August 26, 2024

Ms. Wendy Quackenbush, Director Multifamily Compliance
Texas Department of Housing and Community Affairs
221 E 11th Street
Austin, Texas 78701
Via Email: wendy.quackenbush@tdhca.state.tx.us

Re: Public Comment on Proposed amendments of 10 TAC, Chapter 10, Subchapter 1103, Public Facility Corporation Compliance Monitoring

Dear Ms. Quackenbush,

Thank you for the opportunity to provide comments on the proposed amendments for Public Facility Corporation (PFC) Compliance Monitoring. The Houston Region Business Coalition (HRBC) was actively engaged in the drafting and passage of HB 2071 and has a deep understanding of the bill and its ability to curb the abuses happening prior to its enactment.

The Compliance Monitoring components were a critical part of HB 2071 and were thoroughly discussed by the authors and stakeholders. This portion of the bill was also discussed in both the House and Senate committee hearings to ensure there was oversight and transparency for those operating PFC multifamily properties under Chapter 303 both prior to and after HB 2071 enaction.

HRBC strongly supports the proposed amendments which we believe are in line with the intent of the legislation's authors and the statutory language. Until HB 2071, there was not a single state agency that tracked the number of PFC properties utilizing the lucrative tax breaks offered under the previous code for minimal housing requirements.

We believe that HB 2071's compliance monitoring provisions clearly included properties operating under Chapter 303 prior to its enaction. This specific provision will give lawmakers, stakeholders, and taxpayers a clear picture of the number of properties utilizing this lucrative tax break and ensure they are meeting the bare minimum standard for their 100% property tax exemption.

Furthermore, if these properties are not included in the compliance monitoring there is no recourse to return these properties to the tax rolls if they fail to meet the minimal standards that existed prior to HB 2071.

Please don't hesitate to contact me if you have any questions or would like to discuss further. You can contact me at (713) 693-1400.

Sincerely,

Alan Hassenflu

Chair, Houston Region Business Coalition

the NRP group

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Suite 450
Irving, Texas 75039
Phone 210.487.7878
www.nrpgroup.com

September 9, 2024

Ms. Wendy Quackenbush
Director of Compliance Monitoring
Texas Department of Housing and Community Affairs
211 East 11th Street
Austin, Texas 78701
[via email: wendy.quackenbush@tdhca.texas.gov]

Re: Public Comment on Proposed Rule Change – 10 TAC, Chapter 10, Subchapter I, Public Facility Corporation Compliance Monitoring

Dear Ms. Quackenbush,

The NRP Group, a developer of affordable and mixed-income housing with extensive experience in PFC-structured developments, respectfully submits comments on the proposed amendment to §10.1103.

While we strongly support transparency and compliance, we believe the Texas Department of Housing and Community Affairs (TDHCA) has misinterpreted House Bill 2071 (88th Legislature, Regular Session, 2023). We appreciate the opportunity to provide feedback and thank you for your consideration.

House Bill 2071 comprehensively reformed the PFC program, introducing extensive new requirements. As you know, TDHCA was tasked with implementing compliance audits under Section 303.0426. The rule adopted earlier this year correctly interpreted HB 2071 by grandfathering PFC projects acquired or approved prior to June 18, 2023. **We request that TDHCA withdraws the proposed changes and maintains the current rule for the following reasons**:

- **Plain Language Interpretation**: The proposed change clearly contradicts the plain language of the legislation. Section 10(d)(1) of HB 2071 reads:

  "Section 303.0426, Local Government Code, as added by this Act, applies to all multifamily residential developments ***to which Section 303.0421 applies*** *and with respect to which an exemption is sought or claimed under Section 303.042(c); and"*

  Section 10(b) clarifies that Section 303.0421, triggering the audit requirement, applies only to projects approved or acquired after the Act's effective date (June 18, 2023):

  "*a multifamily residential development that is* ***approved on or after the effective date of this Act*** *by a public facility corporation or the sponsor of a public facility corporation, in accordance with Chapter 303, Local Government Code."*

  While the drafting may be confusing, a plain language reading demonstrates that the new provisions (Sections 303.0421, 303.0425, and 303.0426) apply solely to new construction approved or acquisitions completed after June 18, 2023.

- **Ambiguous Language:** While the final legislation may be ambiguous due to its drafting history, agencies must prioritize the plain language interpretation in such cases. The legislative history reveals that the original bill underwent significant changes in committee and on the House and Senate floors.

the NRP group

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This process resulted in a law that may sometimes appear contradictory. Despite any ambiguity, TDHCA must rely on the clear meaning of the language used in the legislation.

- **Regulatory Uncertainty:** Retroactively applying the new audit requirements to grandfathered projects creates significant uncertainty. These projects operate under a different regulatory framework. Section 303.0426 lays out clear guidelines for post-June 18, 2023 projects, but offers **no guidance for reviewing existing developments**. TDHCA lacks the statutory authority to review grandfathered projects under the new framework and was given no blueprint to do so. This would lead to confusion for years to come.

In conclusion, the current rule accurately reflects the intent and plain language of HB 2071. **We strongly urge TDHCA to withdraw the proposed amendment.** We are happy to discuss these points further. Please do not hesitate to contact me.

Sincerely,

Nick Walsh
Vice President of Development

TEXAS HOUSERS
TEXAS LOW INCOME HOUSING INFORMATION SERVICE

1800 W 6th Street
Austin, TX 78703

TexasHousers.org

September 6, 2024

Attn: Wendy Quackenbush
Texas Department of Housing and Community Affairs
P.O. Box 13941
Austin, Texas 78711-3941
Email: wendy.quackenbush@tdhca.state.tx.us

RE: Proposed Amendments to 10 Texas Administrative Code, Chapter 10, Subchapter I, Public Facility Corporation Compliance Monitoring

Dear Ms. Quackenbush,

Thank you for the opportunity to comment on the proposed amendments to 10 Texas Administrative Code, Chapter 10, Subchapter I, Public Facility Corporation Compliance Monitoring. Texas Housers offers the following comments.

We support TDHCA's proposed changes to the rule to clarify that Public Facility Corporation properties eligible for continuation of the former law in effect prior to June 18, 2023 must still submit an Audit Report which provides basic information on eligibility under the former law, including rent levels for income restricted units. These changes are in line with the text and intent of HB 2071.

Prior to HB 2071's requirements for monitoring of PFC properties and activity by TDHCA, a centralized resource or database on PFCs in Texas did not exist. It is critical that our state leaders and the public have a clear understanding of basic information on the scale and effectiveness of PFC activity in the state, including regarding properties that were established prior to the June 18, 2023 change in law.

Sincerely,
Ben Martin
Research Director
Texas Housers
Email: ben@texashouing.org

Texas Housers is a 501(c)(3) nonprofit organization founded in 1988 to work for housing justice and fair and equal treatment by government of communities. Our mission is to support low-income Texans' efforts to achieve the American dream of a decent, affordable home in a quality neighborhood of their choosing. We work toward these goals through research, policy, and collaboration with community organizations.

Date: September 6, 2024

To: Ms. Wendy Quackenbush

From: Erick Waller-President of NRP Management LLC

RE: Public Comments related Texas Administrative Code, Chapter 10-Subchapter 1, Public Facility Corporation Compliance Monitoring 1.1103 Reporting Requirements

CC: Dawn Brown-Director of Compliance & Tamika Thomas-PFC Compliance Manager

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First, thank you for giving us the chance to comment on the proposed changes to the Public Facility Corporation Reporting Requirements. While we expected the alteration in requirements for sites dated after 06.18.2023 due to House Bill 2071 from the 88th Texas Legislative Session and are ready to address all necessary requirements, applying these same standards to PFC sites dated before the act poses some concerns that we would like to outline.

Our primary concern is that the proposed rule change contradicts the language of the legislative action it stems from, thus it should be retracted. The Department's original rules to enforce HB 2071 in February ensured existing developments wouldn't be affected, which was drafted in line with the intent of the legislation. The new proposed rule goes against the Texas Legislature's intent and misinterprets the legislation. The topic of grandfathering and the impact on existing developments was addressed multiple times during the initial crafting of HB 2071. Representatives wanted to ensure existing developments would not be impacted and were assured that developments approved prior to the Effective Date would be exempt and the argument behind this is as relevant today as it was when the legislation was originally being crafted. These representatives were likely well aware of the adverse impact such a rule could have on existing affordable housing developments and the industry as a whole. Changes like those being proposed would subject the affordable housing developments to undue scrutiny, increased costs during trying economic times, and a variety of other issues like the current lack of auditing resources for this program today with only a handful of approved auditors and hundreds or properties. It is for these reasons and more we respectfully ask TDHCA to remove the proposed changes and continue with the program requirements they originally set forth in February.

If for some reason the agency is not willing to do so, we would like to offer some additional concerns with the proposed changes. Timing is a major issue if this proposal should continue to move forward. With public comments on the current proposed change open until September 9th and the proposed deadline for Audit report completion/submission set for December 1st, there is a very short window to process these audits using a limited pool of third-party vendors for what is hundreds of properties in the state of Texas that would need to comply. If the final decision isn't

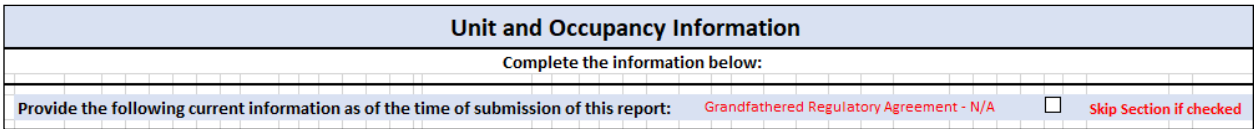
made until the October Board meeting at the site level, this leaves fewer than 60 days for all affected PFC sites to contract with an approved auditor, gather all required data for the audit, and allow auditors time to complete the actual file audit. This tight schedule impacts not only the sites but also the auditing firms, which may face additional stress as they handle other tasks outside the PFC scope. We have explored the feasibility of meeting these deadlines with our portfolio and received feedback from auditing groups about timing concerns as well as the extra fees that would be issued for expediting audits to meet the proposed deadline.

Further complicating matters, adopting the new reporting requirements for sites dated before 06.18.2023 with a December 1st completion date introduces unforeseen costs that were not budgeted for and could result in duplicated expenses for 2024 (not including the fees associated with the expedited completion noted above). For example, our portfolio with The San Antonio Housing Trust undergoes annual PFC audits by Karen A. Graham Consulting LLC, completed earlier this year. Despite covering basic data outlined in the new requirements (10.1103), these previous audits may not satisfy the updated standards, necessitating another audit by a different third-party firm and thus duplicating costs. As a result, if the agency is set on proceeding with the proposed ruling, we would strongly urge that such changes not take effect until the financial year ending 2024 or beyond.

Additionally, the current structure of the audit workbook seems to overlook Regulatory Agreement terms executed prior to 06.18.2023. For instance, in Tab 7 – Unit & Occupancy under "For New Construction," it appears verbiage should be added to account for sites with pre-06.18.2023 Regulatory Agreements lacking requirements such as 10% units rent restricted at 60% and 40% at 80%. Since the final audit report will be public on TDHCA's website, clearly stating each site's compliance with its Regulatory Agreement is essential. For example, many grandfathered projects only need to reserve 50% of units for households at or below 80 AMI ,but might still answer "No" and seem non-compliant. To prevent confusion, we suggest updating the form to include a section for grandfathered deals at a bare minimum and strongly urge the agency to forgo the proposed changes as a whole once again.

This is just one of many possible issues that could arise from imposing the current TDHCA Audit worksheet to grandfathered developments. A few others include:

- The workbook contains questions about rent savings for households in restricted units. This isn't required for grandfathered projects and as a result it would make sense to provide some sort of "N/A" or similar option in the audit that would allow the grandfathered project to avoid completing this section of the audit. An example of such a change is referenced below.

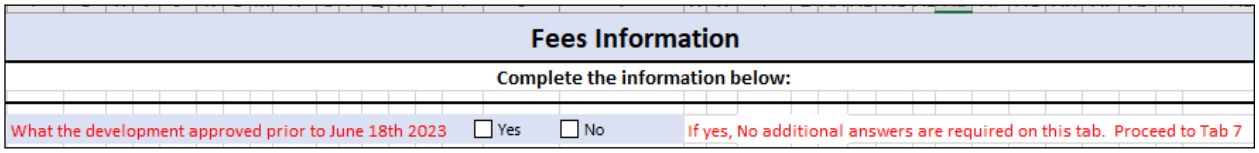


- Tab 9-HH File Check Sheet in the TDHCA Audit workbook currently contains several areas which would not apply directly to many grandfathered deals and could cause a lot of confusion and possible misinterpretation with Auditors, public agenies and the general

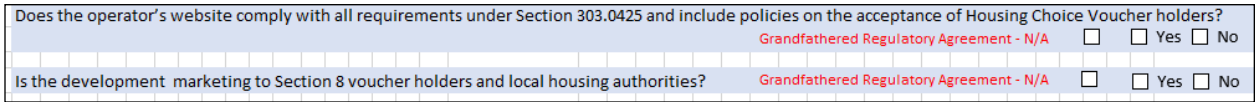
public. Below are two simple examples from the existing workbook that would need adjustment. In red, I have added examples of simple modifications that could start to address the issue.

Income Cert Executed by HH? Yes or No OR N/A	Verifications - Income/Assets? Yes or No or N/A
Yes	Yes

- Tab 5 & 6 seemingly have zero relevance to grandfathered developments, as very few if any have any regulatory requirements related to utilities, deposits, and fees such as application fees, pet fees and beyond. At a minimum, there should be a qualifying question placed in these sections (as illustrated below) that allows them to be exempt to such audit questions.



- The same concept applies to Tab 8-Marketing & LURA as there are several sections that would not apply to grandfathered developments. As a result, there should at the very be an option to select "N/A" or not applicable. See the example below. Please note this applies to far more than this section of the Tab (Rent Limits, Income Limits, etc).



Above are just a few examples of practical reasons why utilizing the current TDHCA Audit workbook for grandfathered developments does not make sense. There are significant variations between regulatory agreements formulated before and after June 18, 2023, which could easily lead to inconsistencies and potential misinterpretations. These interpretations could significantly affect not only property owners and operators, but also auditors, TDHCA, the public and others.

We appreciate this opportunity to give feedback and are willing to participate in further meetings or discussions about PFC monitoring or reporting requirements where we can provide assistance.

TEXAS APARTMENT ASSOCIATION

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September 9, 2024

TDHCA
Wendy Quackenbush
P.O. Box 13941
Austin, Texas 78711-3941

RE: Texas Apartment Association Comments

Dear Ms. Quackenbush:

This public comment letter is issued on behalf of the Texas Apartment Association and is in response to TDHCA's proposed amendments to 10 Texas Administrative Code (TAC), Chapter 10, Subchapter I. The Texas Apartment Association is a statewide trade association whose 12,000 members own and manage multiple rental housing types including multifamily properties operating as Public Facility Corporation (PFC) properties.

Reporting Requirements

- Section 10.1102 (1) defines Audit Report as a report completed "in a matter and format prescribed by the Department." TAA suggests that the term "Audit Report" be defined to allow for other formats in accordance with Texas Local Government Code §303.0426(b). The format the Department has provided includes several tabs of additional data that is not required per §303.0426(b). The Department's proposed rule would require additional data to be collected from Responsible Parties which includes all PFC governing body contact information, PHA board member contact information and elected official's contact information, which changes regularly and adds a significant amount of time to complete the audit. In addition, extensive property information regarding utilities, fees, deposits, unit mix, square footage of each floorplan, occupancy information, number of voucher holders, qualification policies, marketing information, etc. exceeds the governing statute and creates an undue financial and administrative burden for PFC Operators. The additional data collecting requires extensive time to collect and enter all data in all nine tabs of the Department-provided Audit Report and is not required to audit the property and tenant files for compliance with the property regulatory agreement. Due to the increased time required for data collection and data entry, the average cost of a compliance audit can be up to $8,000 or more per year. This is higher than a standard compliance audit and is an unexpected expense for 2024, which increases the cost to operate affordable housing in an already challenging market.
- If TDHCA is unable to accept another format of the Audit Report required, then the additional data that is being collected for informational purposes only should be optional and should be allowed to be provided to TDHCA in the form of a questionnaire directly from the PFC Operator.
- This will reduce the time and expenses incurred to complete the audit and ensure the Auditor is focusing on the compliance requirements and household eligibility.

- Auditor is defined as an "individual" in section 10.1102(2). TAA suggests the term "Auditor" be defined to include an individual, company or firm. This will help broaden the options that PFC Operators can engage to conduct the compliance audit and ensure large portfolios can complete them timely.
- The proposed amendment to the Public Facility Corporation Compliance Monitoring Rule approved by the Department's Governing Board on July 25, 2024. The amendment was sent via email to PFC operators on August 14, 2024. This amendment significantly increases the number of individuals subject to the new rule. Since the Department is revising the Reporting Requirements to include all Developments owned by a PFC after the June 1st deadline, the first compliance audit deadline for existing PFC Developments should be extended to 6/1/2025. This will allow existing PFC Operators time to engage auditors, budget for additional audit expenses and prevent the burden of two Audit Reports being completed within a six-month period. It will also allow the Department and TAA adequate time to disburse information regarding the new requirements and ensure systems are in place to monitor every PFC Development on an ongoing basis.

Thank you for your consideration of our comments. Please feel free to contact me with any questions.

Sincerely,

Sandy Hoy

Sandy Hoy
Vice President & General Counsel
Texas Apartment Association

WestonUrban

September 6, 2024

Via Electronic Mail
wendy.quackenbush@tdhca.texas.gov

Ms. Wendy Quackenbush
Director of Compliance Monitoring
Texas Department of Housing and Community Affairs
211 East 11th Street
Austin, Texas 78701

Re: Public Comment on Proposed Rule Change – 10 Texas Administrative Code, Part 1, Chapter 10, Uniform Multifamily Rules, Subchapter I, Public Facility Corporation Compliance Monitoring Reporting Requirements, §10.1103

Dear Ms. Quackenbush,

I am writing to provide feedback on the proposed revision to §10.1103 of the PFC Rule, which TDHCA has recently put forth. Our company is actively involved in this field with one property under construction in downtown San Antonio, and we have concerns regarding the proposed amendment changes - specifically its contradiction with legislative intent.

The proposed amendments to §10.1103 of the PFC Rule present a significant divergence from the legislative intent outlined in House Bill 2071 (HB 2071). The bill, passed by the 88th Texas Legislature and effective June 18, 2023, was designed to address specific concerns related to public facility corporations (PFCs) managing affordable housing developments.

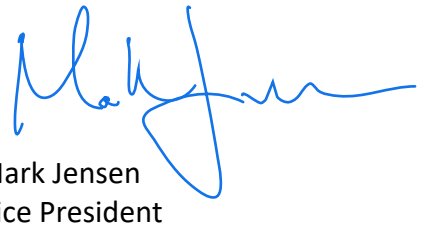
The proposed rule changes to §10.1103, which remove the reference to grandfathering and impose new reporting requirements on all developments regardless of their approval or acquisition date, fundamentally contradict this legislative intent. By applying the new reporting requirements retroactively to developments that should be exempt under the saving and transition provisions, the proposed rule disregards the clear language and purpose of HB 2071. This not only undermines the intent of the legislation

but also creates potential compliance issues and administrative burdens for developments that were explicitly meant to be grandfathered under the old rules.

Given these concerns, we strongly urge TDHCA to withdraw these proposed amendments to align with the legislative language and intent.
The proposed changes should align with the legislative framework established by HB 2071, preserving the exemptions for grandfathered developments as intended by the Legislature. This alignment will ensure that the rulemaking process respects the legislative intent and avoids unnecessary disruptions to existing affordable housing projects.

We appreciate the opportunity to provide these comments and are available to discuss these points further at your convenience.

Sincerely,



Mark Jensen
Vice President
Weston Urban

From: Darren Smith
To: Wendy Quackenbush
Subject: PFC Compliance Comments
Date: Monday, September 9, 2024 11:49:27 AM
Attachments: TDHCA PFC Compliance Comments - final.pdf

Wendy,

Please accept the comments I've attached about PFC public comments.

Darren W. Smith
Managing Member
Office: 214-501-5618
Mobile: 214-735-1430
darren.smith@auxanodevelopment.com

Click the logo for the website.

TDHCA PFC Compliance Comments & Concerns

Regulatory Agreements:
Many of these developments were originated before HB 2071. There needs to be an acknowledgment from TDHCA that the developments that originated before HB 2071 will be reviewed per the current recorded Regulatory Agreement.

Many Regulatory Agreements also allow for the Reservation of Units and certified occupancy of units for acquisitions for compliance calculations.

Income Determination:
Unless defined by a calculator in the Regulatory Agreement. Income should be determined by multiplying the defined AMI by the HUD four-person AMI for the County/MSA.

- For instance, if HUD determines the income for a family of four at $50,000, and the Regulatory Agreement states that the unit is to be reserved or occupied by a family earning less than 80% AMI, the defined max income would be $50,000 multiplied by 80% AMI or $40,0000.

Rent:
Many Regulatory Agreements define "Rent" **without regard to utilities and other charges**, amongst other definitions. TDHCA should confirm that the development will be reviewed per the developments recorded Regulatory Agreement.

TDHCA Income Certification Form:
Many Regulatory Agreements contain a Verification of Income Form as an exhibit. However, the Income Certification form posted on the TDHCA website is not mentioned in the current Regulatory Agreements. Again, many of these developments originated before HB 2071, and the posted Income Certification form is not a requirement of the current Regulatory Agreement.

Sample Regulatory Agreement Language:

> A copy of the most recent Income Certification for Low Income Tenants commencing or continuing occupancy of a Low Income Unit (and not previously filed) shall be attached to the Continuing Program Compliance Certificate which is to be filed with Grantee as provided in Section 3(e). Operator shall make a diligent and good faith effort to determine that the initial Income Certification provided by an applicant is accurate by taking one or more of the following steps for the initial Income Certification, as a part of the verification process: (1) obtain pay stubs for the two most recent pay periods; (2) obtain income tax returns for the most recent tax year; (3) conduct a consumer credit search; (4) obtain an income verification from the applicant's current employer; (5) obtain an income verification from the Social Security Administration; or (6) if the applicant is unemployed, does not have income tax returns or is otherwise unable to

provide other forms of verification as required above, obtain another form of independent verification as would, in Operator's reasonable commercial judgment, be satisfactory and will comply with the terms of this Agreement and Applicable Laws (the items described in (1)-(6) above are collectively referred to as the **"Income Information Evidence").** Notwithstanding the foregoing, Operator shall have the right to submit Income Information Evidence in lieu of an Income Certification for any Low Income Tenant in the event Operator is unable to obtain an Income Certification at any time from such Low Income Tenant.

[redacted]

Daniel L. Smith
Managing Director
Ojala Partners, LP
2501 N. Harwood Street, Suite 2400
Dallas, Texas 75201
dls@ojalaholdings.com

September 6, 2024

Ms. Wendy Quackenbush, Director Multifamily Compliance
Texas Department of Housing and Community Affairs (TDHCA, or the Department)
221 E 11th Street Austin, Texas 78701
wendy.quackenbush@tdhca.state.tx.us

Re: Public Comment on Proposed 10 TAC, Chapter 10, Subchapter I, Public Facility Corporation Compliance Monitoring

Dear Ms. Quackenbush,

Thank you for the opportunity to provide comments on the proposed Public Facility Corporation (PFC) Compliance Monitoring. Ojala Partners is a developer of mixed-income and affordable housing across the state of Texas with deep experience in PFC and similar legal structures. We believe our insights can be of assistance as you develop TDHCA's PFC Compliance Monitoring Program. Ojala has participated with a working group of concerned industry participants across the state that consists of public agencies, legal experts, and housing developers. Our firm is submitting these comments in unison with several other of these concerned parties and we encourage you to take this submission very seriously as it represents the collective comments of a large body of affordable housing advocates, practitioners and experts across the state of Texas

We object to **all proposed changes** to Subchapter I §10.1103 Reporting Requirements. These rules were only first adopted earlier this year, and simply put, we think TDHCA got them right the first time. There will be serious and immediate harm done to the goal of furthering affordable housing in the State of Texas via the proposed rulemaking and we humbly submit that TDHCA must not move forward with the proposed changes.

Why We Are Opposed

With the passage of HB 2071 during the 88th Session in June 2023, Texas created new rules that would affect how the public facility corporation (PFC) legal structure could be employed to create affordable multifamily rental housing across the state. The bill added many new requirements to the rules under which new affordable housing could be approved, as well as including a section "grandfathering" in transactions done prior to the effective date of the law (HB 2071 Section 10). As you are aware, the Department adopted rules to put HB 2071 into effect in February. The proposed rulemaking would amend these recently passed rules, now aiming to undo the grandfathered status of certain affordable housing developments.

Our argument against the proposed course to amend its existing policies to now retroactively apply some new requirements of HB 2071, but not others, to existing multifamily residential affordable housing developments is three-fold:

1. A plain language reading of HB 2071 does not support the proposed interpretation

2. In the face of parts of the bill being ambiguous, this would be choosing the least obvious interpretation
3. Given that TDHCA only first implemented these rules in February, it creates administrative and legal uncertainty for the Department's position on this issue to have a true, 180-degree about-face in such a short time span, particularly when the language at issue is ambiguous at best

Why This Matters

This issue is of extreme importance to affordable housing owners and public agencies, because retroactively applying these new laws to existing affordable housing properties will have three major impacts on developments and in-turn residents of affordable housing state-wide, namely:

1. Publication of these annual reports to county appraisal districts and the public at large when they are **not** required under the law to maintain the property tax exemption, creates undue scrutiny and new attack angles for NIMBYism and affordable housing opponents that hurt the broader mission of providing affordable housing
2. These reports are **not** free to order, and the proposed rulemaking is adding new expenses that will total in the hundreds of thousands of dollars over a development's life, to affordable residential housing at a time when owners and residents are already grappling with higher insurance bills, financing costs, and inflation
3. TDHCA has only identified six auditing groups in the entire state capable of performing such reports, while giving hundreds of owners and housing agencies no prior notice that these reports must now be submitted **by the end of the current year**

Lastly, with the way HB 2071 and Ch. 303 are now constructed, there is the simple question of TDHCA's ability to enforce its own proposed rulemaking. Even if TDHCA passes the proposed rule changes to retroactively re-apply some requirements of HB 2071 **there is no enforceable penalty set out by law at TDHCA's disposal governing 303.0426 reports if an affordable housing development is not subject to 303.0421**. Unfortunately, this could lead to a scenario with very un-even compliance among the industry, as there will be no possible penalty for non-compliance with 303.0426 reporting, as grandfathered properties do rely on 303.0426 or 303.0421 to claim a tax exemption. This only worsens the uncertainty and unfairness over an issue the industry already viewed as solved in February during the original rulemaking. We implore the Department to stick with the rules as they were originally written in February and return to a more fair and equitable approach to 303.0426.

Why We Are Opposed - Plain Reading

In its July 2024 board package, the TDHCA's memo on this topic emphasized one particular phrase of HB 2071.

[Emphasis added] HB 2071 – Section 10(d):

"**Notwithstanding** any other provision of this section [Section 10]:

1) Section 303.0426 [Audit Requirements], Local Government Code, as added by this Act, applies to all multifamily residential developments to which Section 303.0421 applies and with respect to which an exemption is sought or claimed under Section 303.042(c); and

2) the initial audit report required to be submitted under Section 303.0426(b), Local Government Code, as added by this Act, for a multifamily residential development that was approved or acquired by a public facility corporation before the effective date of this Act must be submitted by the later of:

(A) the date established by Section 303.0426(f), Local Government Code, as added by this Act; or

(B) June 1, 2024.

Paragraphs 1 and 2 of 10(d) are both modified by and follow from the "notwithstanding" language, being the key word identified in the memo, however the memo mainly highlighted Paragraph 2. "[T]his section" in the 'notwithstanding' clause refers to Section 10, which governs effective dates and grandfathering for different aspects of the HB 2071 and the new PFC law.

Paragraph 1 makes it clear that 303.0426 only applies to projects which seek an exemption under 303.0421. The "Notwithstanding" language applies equally to Paragraph 1 as it does to Paragraph 2.

Further, per an earlier paragraph in Section 10 (b), 303.0421 "appl[ies] only to a multifamily residential development that is **approved** on or after the effective date of this Act by a public facility corporation or the sponsor of a public facility corporation." [Section 10 (b)]. **Therefore, we find again, an exemption from 303.0421 is an exemption from 303.0426.**

Further, Section 303.0426 itself states:

> "(b) A public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) **and to which Section 303.0421 applies** must annually submit to the department [...] an audit report for a compliance audit".

Section 303.0426 was very clearly written to only apply to those developments to which Section 303.0421 applies. Once again, we find it clear in the text that **an exemption from 303.0421 is an exemption from 303.0426.**

We believe this is the most plain-language reading of 303.0426, Section 10(b), and Section 10(d). Developments which are grandfathered in to the old law are exempt from 303.0421. 303.0426 only applies to developments to which 303.0421 applies, which is developments that come after HB 2071. This is found in three different places in HB 2071. Grandfathering was clearly a key issue for the bill, and we believe these three clear references paint the cumulative picture that developments would only be subject to 303.0426 if they were subject to 303.0421.

Why We Are Opposed - Ambiguous Language

We acknowledge that Section 10(d) Paragraph 2 creates ambiguity as to the grandfathered status of certain developments from 303.0426, having the opposite meaning of 10(d) Paragraph 1, saying:

> "the initial audit report required to be submitted under Section 303.0426(b), Local Government Code, as added by this Act, for a multifamily residential development **that was approved or acquired by a public facility corporation before the effective date of this Act** must be submitted..."

However, this is far from the only ambiguous or poorly drafted portion of the bill, even within Section 10.

For example, Section 10(c) expands on grandfathering, specifically from Section 303.0421(d), saying 303.0421(d) "applies only to an occupied multifamily residential development that is **acquired** by a public facility corporation on or after the effective date of this Act."

Said plainly, any multifamily residential development is **approved** before the date of the Act would already be exempt from 303.0421 under the preceding Section 10(b). Per Section 10(c), any multifamily residential development which was **acquired** before the effective date would also be exempt from 303.0421(d), which is a portion of 303.0421.

The contradictions begin to present themselves. Taking it as fact that a multifamily residential development could not be "acquired" prior to it being "approved," there is no instance in which Section 10(c) is useful or operative. A project approved before the date of the act is exempt from 303.0421, of which 303.0421(d) is clearly a part.

Effective Date ["ED"]: June 18, 2024

		Approved	
		Before ED	On or After ED
Acquired	Before ED	Exempt from 303.0421 and 303.0421(d)	Impossible
	On or After ED	Exempt from 303.0421 ipso facto from 303.0421(d)	Must Comply With 303.0421, and 303.0421(d)

Thus, we are left with a similarly contradictory language as we have on grandfathering from 303.0426. Why is Section 10(c) included at all? The only possible reasoning for its inclusion would be if acquisitions conducted before the effective date of the act were meant to be subject to all parts of 303.0421 **excluding** 303.0421(d), and Section 10(c) was meant to modify Section 10(b) before it (though it contains no such language). We are left with two portions of Section 10 which do not have an immediately obvious meaning. To assume Section 10(c) applies to acquisitions the rules of 303.0421, save .0421(d), including rules about public notices and meetings that must have somehow taken place in the past, is to torture the least obvious meaning out of the bill. While one could somehow read Section 10 and make this case, it is the least obvious interpretation when reading HB 2017 as a whole.

We believe the Department's interpretation of Section 10(d) presents an identical contradiction. Siding with Paragraph 2 over Paragraph 1, when Paragraph 1 is consistent with several other references in the text including 303.0426(b) itself, and Section 10(b), tortures the text of the bill into its less obvious reading.

When uncertainty comes into play, as it clearly does with portions of HB 2071, we believe the agency must defer to the plain language of the statute (see Railroad Commission of Texas v. Texas Citizens for a Safe Future & Clean Water), and thus look to Paragraph 1 and find that 303.0426 does not apply to projects not also subject to 303.0421.

Why We Are Opposed – Regulatory Uncertainty

The TDHCA constructively engaged with public comments submitted at the end of 2023 and beginning of 2024 regarding the implementation of 303.0426, and we believe TDHCA made a good faith effort to propose rulemaking that was consistent with the requirements of HB 2071, and stern but fair to the affordable housing developments they were tasked with regulating. We are unaware of what changed between now and February that suggests TDHCA made a mistake with its initial rule making. We believe TDHCA got this one right initially, and should not abruptly have an about face on implementing 303.0426.

If you have any questions or would like to discuss further, please do not hesitate to contact me at (832) 444-9382 or via email at dls@ojalaholdings.com any time. Thank you for your time and consideration.

Sincerely,

Daniel L. Smith

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September 9, 2024

Via Electronic Mail

Ms. Wendy Quackenbush
Director of Compliance Monitoring
Texas Department of Housing and Community Affairs
211 East 11th Street
Austin, Texas 78701

Re: Public Comment on Proposed Rule Change – 10 Texas Administrative Code, Part 1, Chapter 10, Uniform Multifamily Rules, Subchapter I, Public Facility Corporation Compliance Monitoring Reporting Requirements, §10.1103

Dear Ms. Quackenbush:

Effective February 26, 2024, the Texas Department of Housing and Community Affairs ("**TDHCA**") adopted new rules under 10 Texas Administrative Code, Part 1, Chapter 10, Subchapter I (the "**PFC Rule**"). TDHCA now proposes to revise §10.1103 of the PFC Rule to impose a different requirement than was set forth when the PFC Rule was originally adopted. Our firm is actively engaged in legal representation in this area and submits the following comments to TDHCA's proposed revision of the PFC Rule. Each comment is elaborated upon in the attachments to this letter.

- TDHCA's change to the PFC Rule clearly contradicts the plain language of the legislative action from which it is derived. Therefore, the proposed changes to the PFC Rule should be withdrawn. See **Attachment A**.

- If TDHCA chooses to proceed with revision of the PFC Rule, it should allow the Executive Director to extend the December 1 deadline for good cause shown. See **Attachment B**.

- While we recognize that TDHCA's forms for Income Certification and the Audit Workbook are not open for public comment in conjunction with this rulemaking, a change in the PFC Rule will implicate these forms, and certain changes will need to be made. Therefore, we are taking this opportunity to note concerns about the current versions of the Income Certification and Audit Workbook published on TDHCA's website. See **Attachment C**.

We appreciate the opportunity to present these comments and are happy to address any questions.

Sincerely,

Cynthia L. Bast

Cynthia L. Bast

ATTACHMENT A

TDHCA's change to the PFC Rule clearly contradicts the plain language of the legislative action from which it is derived. Therefore, the proposed changes to the PFC Rule should be withdrawn.

TEXTUAL ANALYSIS OF HB 2071

During its most recent session, the 88th Texas Legislature passed House Bill 2071[1], which took effect on June 18, 2023 (the "**Effective Date**"). HB 2071 substantially revised the requirements for a public facility corporation (a "**PFC**") owning affordable housing under Chapter 303 of the Texas Local Government Code (the "**Act**"). The previous law in Section 303.042 of the Act was provided a tax exemption for affordable housing owned by a PFC, but had limited guidance on the parameters for the housing. Significant provisions added to the Act by HB 2071 included:

- Section 303.0421 to describe the kinds of developments to which the new law would apply, including affordability requirements, public notification and approval requirements, and the term for which a property tax exemption would be available.
- Section 303.0425 to provide additional affordability requirements and tenant protection.
- Section 303.0426 to create a compliance and monitoring function for TDHCA, including authority to establish rules to implement this new function.
- To address public concerns, occupied (existing) developments were treated differently than unoccupied (new construction) developments.

Notably, HB 2071 includes saving and transition provisions. As described in the Texas Legislative Council Drafting Manual dated January 2023:

> Saving and transition provisions help to minimize the disruption and inequities that often attend the taking effect of legislation. A saving provision "saves" from the application of a law certain conduct or legal relationships that occurred before or existed on the effective date of the law. . . . Transition provisions provide for the orderly implementation of legislation, helping to avoid the shock that can result from an abrupt change in the law. *See Section 3.12(a) of the Manual*.

The saving and transition provisions, in Section 10 of the bill, ensured that developments approved and acquired prior to the Effective Date would be "grandfathered," meaning they would continue to be governed by the law in effect prior to HB 2071, and would be exempt from the annual audit requirements.

[1] Tex. HB 2071, 88th Leg., R.S. (2023) (hereafter referred to as "**HB 2071**").

Specifically, Section 10 of HB 2071 states:

> (b) Subject to Subsections (c) and (d) of this section [10], **Sections 303.0421** and 303.0425, Local Government Code, as added by this Act, **apply only to a multifamily residential development that is *approved* on or after the effective date of this Act** by a public facility corporation or the sponsor of a public facility corporation, in accordance with Chapter 303, Local Government Code. A multifamily residential development that was ***approved*** by a public facility corporation . . . **before the effective date of this Act** is **governed by the law in effect on the date the development was approved** . . . and the former law is continued in effect for that purpose. (emphasis added)

Thus, Subsection (b) of Section 10 starts with a broad statement that any development approved by a PFC prior to June 18, 2023 is exempt from the new law and only subject to the law that was in effect at the time of such approval. However, Subsection (b) must be considered in light of Subsections (c) and (d), so the analysis must continue.

Subsection (c) of Section 10 goes on to clarify that:

> (c) Subject to Subsection (d) of this section [10], **Section 303.0421(d)**, Local Government Code, as added by this Act, **applies only to an occupied multifamily residential development that is acquired by a public facility corporation on or after the effective date** of this Act. An ***occupied*** multifamily residential development that is ***acquired*** by a public facility **corporation before the effective date of this Act is governed by the law in effect on the date the development was acquired** by the public facility corporation, and the former law is continued in effect for that purpose. (emphasis added)

Thus, Subsection (c) presents the first carveout from the general exemption in Subsection (b) -- an occupied development (not new construction) that was approved prior to the Effective Date, but acquired by the PFC after the Effective Date. When read together, Subsections (b) and (c) make it clear that Sections 303.0421 and 303.0425 do not apply to any project that was both acquired and approved prior to the Effective Date.

Finally, Subsection (d) of Section 10 of HB 2071 says:

> (d)(1) Section 303.0426, Local Government Code, as added by this Act, applies to all multifamily residential developments **to which Section 303.0421 applies** . . . (emphasis added)

As established in Subsections (b) and (c) of Section 10 of HB 2071, Section 303.0421 does not apply to developments both approved and acquired by a PFC prior to the Effective Date of the Act.

Subsection (d) confirms that Section 303.0426 also does not apply to a development both approved and acquired by a PFC prior to the Effective Date. This conclusion in the saving provision is consistent with the plain language of Section 303.0426 of the Act, which states:

> (b) A public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) **and to which Section 303.0421** applies must annually submit to the department and the chief appraiser of the appraisal district in which the development is located an audit report for a compliance audit . . . (emphasis added)

The above textual analysis is further supported by debate in the Texas House of Representatives. The Texas House of Representatives took its final record vote on May 25, 2023, with the proceedings recorded in writing in the Texas House Journal.[2] The topic of grandfathering and the impact on existing developments was addressed multiple times. Representatives wanted to ensure existing developments would not be impacted and were assured that developments approved and acquired prior to the Effective Date would be exempt. First, Representative Walle expressed his support for HB 2071 and interacted with Representative Gervin-Hawkins:

> REPRESENTATIVE GERVIN-HAWKINS: Representative Walle, you know this is a very, very important issue and the concern is what happens to the existing projects if this bill was to take effect immediately?
>
> WALLE: As I understand it I think—the author could correct me if I'm wrong, but I think one of the issues is some of those folks would get grandfathered in to the existing PFCs.
>
> GERVIN-HAWKINS: They will get grandfathered in.
>
> WALLE: That's my understanding.

Page 5381. Representative Gervin-Hawkins continued on the record to express her concern about existing developments being required to comply with new TDHCA rules:

> GERVIN-HAWKINS: So on the record they will get grandfathered in and those existing projects would not be damaged? It's my understanding, when I talked to the bill author, is that they would have to rework their numbers. Anybody who's ever done these type of projects knows that it's very difficult when you go in with a plan—you've got your performer and all your other numbers, your rent's established, and now to have to change all of that as well as deal with the TDHCA deadlines and timeline. I'm concerned about existing projects.

Page 5382.

[2] Texas House of Representatives Journal, 88th Legislature, Regular Session, May 25, 2023.

Conversation then turned to one of the bill's authors, Representative Jetton. The author also confirmed that grandfathering would apply to all developments approved and acquired by a PFC prior to the Effective Date:

> REPRESENTATIVE COLLIER: Representative Jetton, I said I was going to ask you one question, but another issue came up that was talked about—immediate effect. If this bill goes into immediate effect, is there a grandfather clause for current deals that are in the process of being completed or existing?
>
> REPRESENTATIVE JETTON: The grandfather clause that's in this bill is any deal that is accepted or acquired prior to the enactment date takes on the current requirements for a PFC. I believe it's page 17 and 18.

Page 5383. This led to additional inquiry from Representative Gervin-Hawkins:

> REPRESENTATIVE GERVIN-HAWKINS: Let's be clear. Current projects is the focus. On a current project, if it is in the pipeline, are they grandfathered in or not?
>
> JETTON: If they are approved by the city council, county, or housing authority—whoever is approving those right now—if they are approved before the enactment date, then they are under the previous rules. If they are approved afterwards they would have to comply with the language that, as a body we are agreeing almost with super majority, there needs to be additional transparency and accountability around these programs.

Page 5384. Note that Representative Jetton, an author of HB 2071, specifically states that developments approved prior to the Effective Date "are under the previous rules." But if a development is "approved afterward," it would need to comply "with the language that . . . there needs to be additional transparency and accountability around these programs." This supports the argument that the "additional transparency and accountability" originating from Section 303.0426 is not required for the grandfathered developments. In all of this discussion around grandfathering, there was no indication that there was an exception to the grandfathering for the compliance monitoring requirements.

While the saving and transition provisions of HB 2071 can be difficult to read through, they are absolutely consistent with the legislative intent expressed by the House of Representatives on May 25, 2023. As an additional tool for this analysis, please see a graphical representation attached.

LEGAL ANALYSIS OF TDHCA RULEMAKING

When TDHCA adopted the PFC Rule in February, it correctly reflected the saving and transition provisions in HB 2071, excluding grandfathered developments from the audit reporting requirements under the Act. *See* 10 TAC § 10.1103 ("the following reporting requirements apply

to developments owned by a Public Facility Corporation (PFC), subject to Sections 303.0421 and 303.0425 of the Texas Local Government Code, and not eligible to be grandfathered under previous law pursuant to the criteria established by House Bill 2071, 88th Texas Legislative Session, effective June 18, 2023").

On July 15, 2024, TDHCA proposed amendments to 10 TAC § 10.1103 (the "**Proposed Rule**"), removing its reference to grandfathering. The Proposed Rule applies the reporting requirements to all developments regardless of when they were approved or acquired. Based on the textual analysis above, the Proposed Rule is contrary to the clear intent of the Texas Legislature and constitutes an unreasonable interpretation of the plain language and context in Chapter 303 and HB 2071. While Texas courts will show deference to a state agency's interpretation of a statute if it is a reasonable interpretation of an ambiguous statute, the plain language and context of the Act conflict with TDHCA's interpretation of the statute and contradict the clear intent of the Legislature when enacting HB 2071.

A. Texas Court Review of Agency Rulemaking

Under Texas Law, a state agency is generally entitled to deference for its interpretation of a statute that it is charged with enforcing, if certain conditions exist. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 621 (Tex. 2011). In *Railroad Commission of Texas v. Texas Citizens*, the Texas Supreme Court held that while it will generally uphold a state agency's interpretation if it is "reasonable," such deference is not owed if the agency's interpretation conflicts with the plain language and context of the controlling statute. *Id. at* 625. Where the language of a statute is plain and the intent of the Legislature is clear, courts will not hold up an agency's conflicting interpretation. *See Fiess v. State Farm Lloyds,* 202 S.W.3d 744, 747 (Tex. 2006).

B. The Plain Language of the Statute

As noted above, the Proposed Rule conflicts with the plain language and the unambiguous meaning of the Act and HB 2071. When reviewing the plain language of a statute, Texas courts look to both the text and context to determine the meaning and legislative intent. *See Hegar v. Health Care Serv. Corp.*, 652 S.W.3d 39 (Tex. 2022). It is the objective of the reviewers to "give effect to the Legislature's intent," and "enforce the plain meaning of the statutory text, informed by its context*." Id.* at 41. In *Health Care Service Corporation,* the Texas Supreme Court reviewed whether Chapter 222 of the Texas Insurance Code allowed the State Comptroller to impose taxes on insurance premiums received from sales on certain insurance policies. *Id.* The statute at issue contained specific exclusions and exceptions to the taxes imposed on insurance premiums. *Id.* The court found that the tax unambiguously applied to the premiums at issue, as these premiums were not included in the numerated exceptions to the tax. *See id.* at 44 ("[when] exclusions or exceptions to a statute are stated by the Legislature, the intent is usually clear that no others shall apply").

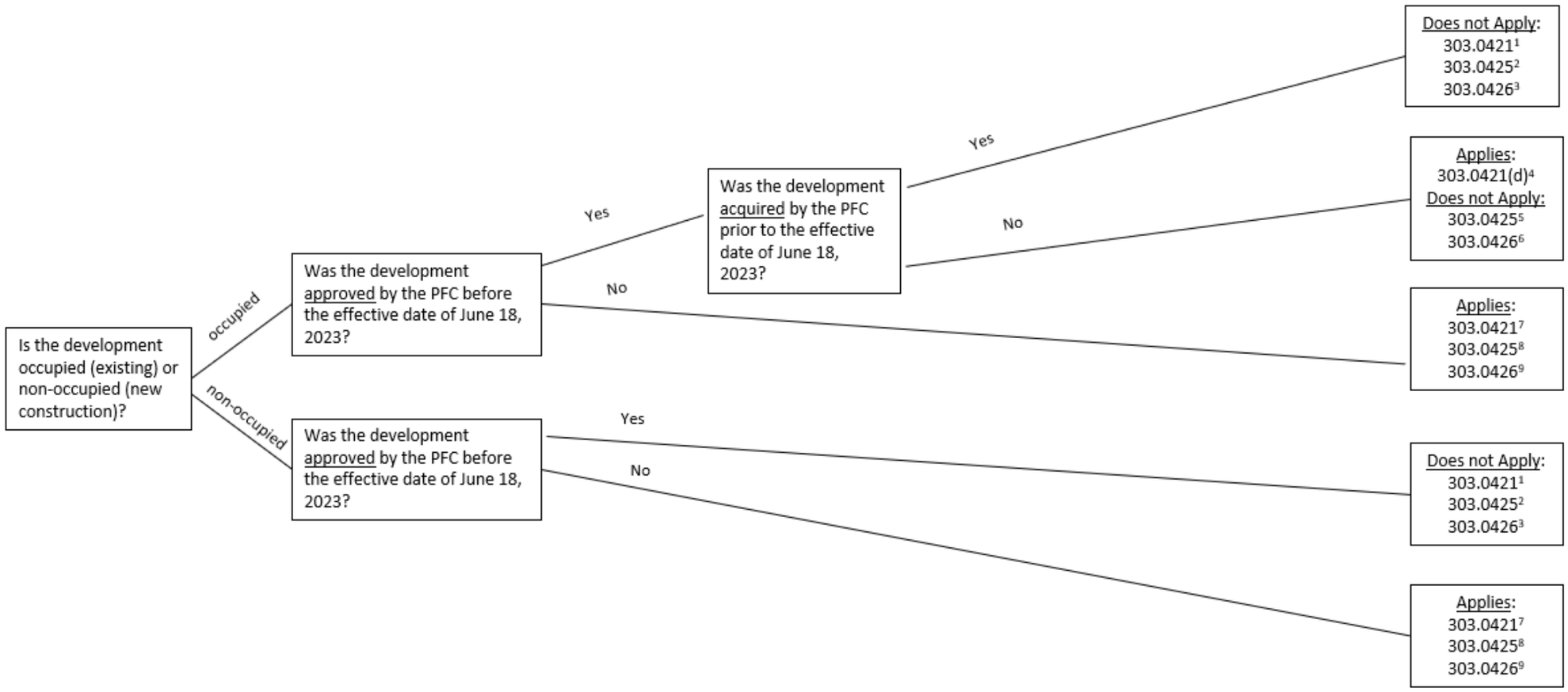
Section 10 of HB 2071 contains saving and transition provisions, excluding certain developments from the effect of Section 303.0421, which excludes them from the compliance and monitoring requirements under Section 303.0426. And similar to the statute in *Health Care Service Corporatio*n, the exemption of certain developments from the audit and reporting requirements is unambiguous. Specifically, Subsection (b) states that Section 303.0421, "appl[ies] only to a multifamily residential development that approved on or after the effective date of this Act by a public facility corporation or the sponsor of a public facility corporation, in accordance with Chapter 303, Local Government Code." And Subsection (d)(1) goes on to state that "notwithstanding any other provision in this section [10], "Section 303.0426, Local Government Code, as added by this Act, applies to all multifamily residential developments to which Section 303.0421 applies." The plain text of Subsection (b) explicitly classifies a group of developments to which Section 303.0421 applies, and Subsection (d) excludes this group from the requirements of Section 303.0426.

Moreover, the plain language of the Act reinforces that not all developments are subject to the requirements under Section 303.0426. Section 303.0426(b) of the Act states that "a public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) and to **which Section 303.0421 applies** must annually submit to the department […] an audit report for a compliance audit." TEX. LOC. GOV'T CODE § 303.0426(b) (emphasis added). Further, the Section goes on to specify that the purpose for the audit report requirement is to "determine whether the public facility user is in compliance with Sections 303.0421…" *Id.* at 303.0426(b)(1). As established in the saving and transition provisions, grandfathered developments are not subject to Section 303.0421, so there would be no reason to ensure compliance with this section by requiring an audit under Section 303.0426.

It is clear from numerous references in the text that the Legislature intended for the audit requirements under Section 303.0426 to apply only to developments to which Section 303.0421 also applies. Both the enacted bill, with its saving and transition provisions, and the Act attempt to exclude certain developments from the audit requirements based on the applicability of Section 303.0421. This was the initial interpretation of TDHCA. In the current version of 10 TAC § 10.1103, the agency references developments that are "eligible to be grandfathered under previous law pursuant to the criteria established by House Bill 2071," to exclude them from the audit requirements, as intended by the Legislature. There is no other portion of the bill that could apply to this consideration, other than Section 10, which includes the exemption of developments approved and acquired prior to the Effective Date. It is unclear why, in the Proposed Rule, TDHCA has decided to reverse its initial understanding of the statute and ignore the plain language of HB 2071.

For all the reasons described above, Texas case law supports a conclusion that the Proposed Rule would exceed TDHCA's authority for rulemaking, and it should be withdrawn.

TEXAS LEGISLATURE, 88TH REGULAR SESSION
HB 2071
ANALYSIS OF SAVING AND TRANSITION PROVISIONS



Endnotes

1. HB2071 Section 10(b) and (c), read together, state Section 303.0421 does not apply to a development approved and acquired before the Effective Date.

2. HB 2071 Section 10(b) and (c), read together, state Section 303.0425 does not apply to a development approved and acquired before the Effective Date. Further, Section 303.0421(b) requires compliance with Section 303.0425. If Section 303.0421 does not apply, per endnote 1 above, then Section 303.0425 does not apply.

3. HB 2071 Section 10(d) states Section 303.0426 does not apply unless Section 303.0421 applies. If Section 303.0421 does not apply, per endnote 1 above, then Section 303.0426 does not apply.

4. HB 2071 Section 10(c) states that an occupied development approved before the Effective Date but acquired after the Effective Date must comply with Section 303.0421(d), which establishes a deadline for an occupied development to achieve the affordability restrictions. None of the other provisions of Section 303.0421 apply. This is a natural transition provision to exempt a deal "in progress" from the new law, while requiring compliance with the affordability deadline.

5. While Section 303.0421(d) applies, Section 303.0421(b) does not apply. Therefore, Section 303.0425 does not apply, as described in endnotes 1 and 2 above. This is a natural transition provision to exempt a deal that is "in progress" from the affects of the new law.

6. HB 2071 Section 10(d) states Section 303.0426 does not apply unless Section 303.0421 applies. Section 303.0421 does not apply in full and it would be inappropriate to perform compliance monitoring simply for the one-time occurrence associated with Section 303.0421(d). This is a natural transition provision to exempt a deal that is "in progress" from the effects of the new law.

7. HB 2071 Section 10(b) clearly indicates that a development approved after the Effective Date is subject to Section 303.0421.

8. HB 2071 Section 10(b) clearly indicates that a development approved after the Effective Date is subject to Section 303.0425. Further, Section 303.0421(b) requires compliance with Section 303.0425. If Section 303.0421(b) applies, per endnote 7 above, then Section 303.0425 applies.

9. Section 303.0426(b) states that all developments subject to Section 303.0421 must comply with the compliance and monitoring provisions of Section 303.0426. If Section 303.0421 applies, per endnote 7 above, then Section 303.0426 applies.

ATTACHMENT B

If TDHCA chooses to proceed with revision of the PFC Rule, it should revise the language to allow the Executive Director to extend the December 1 deadline for good cause shown.

If TDHCA decides to proceed with the Proposed Rule, by the time it is approved and published in the Texas Register, it will be effective merely weeks before the December 1 deadline it is trying to impose. Implementation of the Proposed Rule would require hundreds of developments to obtain and pay for an audit report on a very short timeframe. TDHCA must keep in mind that these developments, closed and operational over the last 7 years or so, will have little to no uniformity in their documentation. Some may have Regulatory Agreements; some may not. They will have different affordability requirements, different lease-up requirements, and different enforcement provisions. Many participants will not have prior experience with affordable housing. This is a large undertaking with a significant learning curve for all involved. Currently, TDHCA has only seven (7) approved auditors listed on its website. Other auditors may be available, but there is a legitimate concern that these auditors may not have the capacity to take on hundreds of audit reports. Moreover, it should be considered that, if the December 1, 2024 deadline is retained, the information submitted will be for the calendar year 2023 and will be stale for any meaningful evaluative purposes. We recommend one of two alternatives for § 10.1103(1):

- Allow the Executive Director to administratively extend the December 1, 2024 deadline for good cause shown.

- Given all of the above, it is reasonable for TDHCA to implement the audit reporting for grandfathered properties for the 2024 calendar year, making reports for these projects due June 1, 2025. This would provide more current data and would allow the participants to work through implementation issues without imposing undue burden or risk on TDHCA, the PFCs, or the other participants.

ATTACHMENT C

The current Income Certification and Audit Workbook are structured in a way that solely pertains to developments approved post-HB 2071. Both documents should clarify that grandfathered developments (existing and new construction) remain subject only to their development-specific Regulatory Agreements and therefore certain fields will be 'N/A'.

Income Certification

- **Part III**:
    - This section is used to calculate a household's income, including "Public Assistance" and "Other Income". We note that Section 303.0425(b) relies on the definition of annual income set forth in 24 CFR 5.609. Section 24 CFR 5.609(b) excludes a number of forms of income from the definition of annual income, many of which could be considered to fall under the "Public Assistance" or "Other Income" categories. To avoid confusion when this form is being completed, we request that a note be added to this worksheet listing the items under 24 CFR 5.609(b) that should not be included in the annual income worksheet. Additionally, the certification form should be updated to note that income for grandfathered projects is not required to be calculated in accordance with 24 CFR 5.609(b). Such projects may be calculated in accordance with applicable regulatory agreements or other documents governing their operation.
- **Part V**:

    The gross rent calculation in this form includes non-optional and mandatory fees. This should be removed from the calculation as it is not a component of the rent limit set forth in Section 303.0425(c).

Public Facilities Corporation (PFC) Monitoring Workbook

- **Tab 6**:
    - We are not requesting any changes to this section. However, we do request a note that fees outlined in this section are not counted as part of a unit's rent unless specifically agreed to by the project's operator, given that Section 303.0425(c) does not require that fees be included in the calculation.
- **Tab 7**:
    - The workbook includes a question that asks for "Highest Restricted Rent Amount" and the "Highest Market Rent Amount" for each unit type. We note that Section 303.0426(b)(2) requires the actual rent charged, rather than a maximum possible rent. We request that this question be corrected to reflect the information required under Section 303.0426(b)(2).

- The workbook asks whether (i) in the case of new construction developments, at least 10% of units are reserved for households at or below 60% area median income (AMI) and at least 40% of units are reserved for households at or below 80% AMI and (ii) in the case of occupied developments, at least 25% of units are reserved for households at or below 60% area median income (AMI) and at least 40% of units are reserved for households at or below 80% AMI. Owners of grandfathered projects are only required to reserve 50% of units for households at or below 80 AMI, but may nonetheless have to answer "No" to this question, which could lead to TDHCA staff mistakenly believing that a property is out of compliance. To avoid this potential confusion, we request that the form is updated to include a section for grandfathered deals asking whether at least 50% of units are reserved for households at or below 80% AMI.
- The workbook includes a question as to whether the operator of a project has spent at least 15% of the gross cost of the project by the first anniversary of the acquisition. We note that this is not a requirement for grandfathered projects and request that this question be included in a separate section for non-grandfathered projects or include a notation that this requirement does not apply to grandfathered projects.
- The workbook includes several questions regarding rent savings for households living in restricted units. We note that this is not a requirement for grandfathered projects and request that this question be included in a separate section for non-grandfathered projects or include a notation that this requirement does not apply to grandfathered projects.

- **Tab 8**:
  - The workbook asks whether the operator's website complies with Section 303.0425 requirements and includes policies on Housing Choice Voucher requirements. This requirement does not apply to grandfathered projects and we therefore request that a note be added reflecting that this is the case.

PROVIDENT
REALTY ADVISORS

September 9, 2024

Via Electronic Mail
wendy.quackenbush@tdhca.texas.gov

Ms. Wendy Quackenbush
Director of Compliance Monitoring
Texas Department of Housing and Community Affairs
211 East 11th Street
Austin, Texas 78701

Re: Public Comment on Proposed Rule Change – 10 Texas Administrative Code, Part 1, Chapter 10, Uniform Multifamily Rules, Subchapter I, Public Facility Corporation Compliance Monitoring Reporting Requirements, §10.1103

Dear Ms. Quackenbush,

I am writing to provide feedback on the proposed revision to §10.1103 of the PFC Rule, which TDHCA has recently put forth. Our company is actively involved in this field, and we have concerns regarding the proposed amendment changes - specifically its contradiction with legislative intent.

The proposed amendments to §10.1103 of the PFC Rule present a significant divergence from the legislative intent outlined in House Bill 2071 (HB 2071). The bill, passed by the 88th Texas Legislature and effective June 18, 2023, was designed to address specific concerns related to public facility corporations (PFCs) managing affordable housing developments.

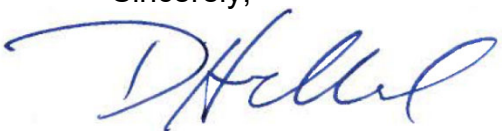
The proposed rule changes to §10.1103, which remove the reference to grandfathering and impose new reporting requirements on all developments regardless of their approval or acquisition date, fundamentally contradict this legislative intent. By applying the new reporting requirements retroactively to developments that should be exempt under the saving and transition provisions, the proposed rule disregards the clear language and purpose of HB 2071. This not only undermines the intent of the legislation but also creates potential compliance issues and administrative burdens for developments that were explicitly meant to be grandfathered under the old rules.

Given these concerns, we strongly urge TDHCA to withdraw these proposed amendments to align with the legislative language and intent.

The proposed changes should align with the legislative framework established by HB 2071, preserving the exemptions for grandfathered developments as intended by the Legislature. This alignment will ensure that the rulemaking process respects the legislative intent and avoids unnecessary disruptions to existing affordable housing projects.

We appreciate the opportunity to provide these comments and are available to discuss these points further at your convenience.

Sincerely,



Dave Holland
Executive Director

TEXANS FOR
WORKFORCE HOUSING
604 WEST 14TH STREET, AUSTIN TX 78701

September 9, 2024

Via Electronic Mail

Ms. Wendy Quackenbush
Director of Compliance Monitoring
Texas Department of Housing and Community Affairs
211 East 11th Street
Austin, Texas 78701

Re: Public Comment on Proposed Rule Change – 10 Texas Administrative Code, Part 1, Chapter 10, Uniform Multifamily Rules, Subchapter I, Public Facility Corporation Compliance Monitoring Reporting Requirements, §10.1103

Dear Ms. Quackenbush:

Effective February 26, 2024, the Texas Department of Housing and Community Affairs ("**TDHCA**") adopted new rules under 10 Texas Administrative Code, Part 1, Chapter 10, Subchapter I (the "**PFC Rule**"). TDHCA now proposes to revise §10.1103 of the PFC Rule to impose a different requirement than was set forth when the PFC Rule was originally adopted. Texans for Workforce Housing, a coalition of stakeholders working to expand affordable multi-family housing opportunities in Texas, submits the following comments to TDHCA's proposed revision of the PFC Rule. Each comment is elaborated upon in the attachments to this letter.

- TDHCA's change to the PFC Rule clearly contradicts the plain language of the legislative action from which it is derived. Therefore, the proposed changes to the PFC Rule should be withdrawn. See **Attachment A**.

- If TDHCA chooses to proceed with revision of the PFC Rule, it should allow the Executive Director to extend the December 1 deadline for good cause shown. See **Attachment B**.

- While we recognize that TDHCA's forms for Income Certification and the Audit Workbook are not open for public comment in conjunction with this rulemaking, a change in the PFC Rule will implicate these forms, and certain changes will need to be made. Therefore, we are taking this opportunity to note concerns about the current versions of the Income Certification and Audit Workbook published on TDHCA's website. See **Attachment C**.

Thank you for the opportunity to share our comments and concerns. If you have any questions, please don't hesitate to reach out to me at 512-496-6295.

Sincerely,

Shera Eichler - Director

ATTACHMENT A

TDHCA's change to the PFC Rule clearly contradicts the plain language of the legislative action from which it is derived. Therefore, the proposed changes to the PFC Rule should be withdrawn.

TEXTUAL ANALYSIS OF HB 2071

During its most recent session, the 88th Texas Legislature passed House Bill 2071[1], which took effect on June 18, 2023 (the "**Effective Date**"). HB 2071 substantially revised the requirements for a public facility corporation (a "**PFC**") owning affordable housing under Chapter 303 of the Texas Local Government Code (the "**Act**"). The previous law in Section 303.042 of the Act was provided a tax exemption for affordable housing owned by a PFC, but had limited guidance on the parameters for the housing. Significant provisions added to the Act by HB 2071 included:

- Section 303.0421 to describe the kinds of developments to which the new law would apply, including affordability requirements, public notification and approval requirements, and the term for which a property tax exemption would be available.
- Section 303.0425 to provide additional affordability requirements and tenant protection.
- Section 303.0426 to create a compliance and monitoring function for TDHCA, including authority to establish rules to implement this new function.
- To address public concerns, occupied (existing) developments were treated differently than unoccupied (new construction) developments.

Notably, HB 2071 includes saving and transition provisions. As described in the Texas Legislative Council Drafting Manual dated January 2023:

> Saving and transition provisions help to minimize the disruption and inequities that often attend the taking effect of legislation. A saving provision "saves" from the application of a law certain conduct or legal relationships that occurred before or existed on the effective date of the law. . . . Transition provisions provide for the orderly implementation of legislation, helping to avoid the shock that can result from an abrupt change in the law. *See Section 3.12(a) of the Manual*.

The saving and transition provisions, in Section 10 of the bill, ensured that developments approved and acquired prior to the Effective Date would be "grandfathered," meaning they would continue to be governed by the law in effect prior to HB 2071, and would be exempt from the annual audit requirements.

[1] Tex. HB 2071, 88th Leg., R.S. (2023) (hereafter referred to as "**HB 2071**").

Specifically, Section 10 of HB 2071 states:

> (b) Subject to Subsections (c) and (d) of this section [10], **Sections 303.0421** and 303.0425, Local Government Code, as added by this Act, **apply only to a multifamily residential development that is *approved* on or after the effective date of this Act** by a public facility corporation or the sponsor of a public facility corporation, in accordance with Chapter 303, Local Government Code. A multifamily residential development that was ***approved*** by a public facility corporation . . . **before the effective date of this Act** is **governed by the law in effect on the date the development was approved** . . . and the former law is continued in effect for that purpose. (emphasis added)

Thus, Subsection (b) of Section 10 starts with a broad statement that any development approved by a PFC prior to June 18, 2023 is exempt from the new law and only subject to the law that was in effect at the time of such approval. However, Subsection (b) must be considered in light of Subsections (c) and (d), so the analysis must continue.

Subsection (c) of Section 10 goes on to clarify that:

> (c) Subject to Subsection (d) of this section [10], **Section 303.0421(d)**, Local Government Code, as added by this Act, **applies only to an occupied multifamily residential development that is acquired by a public facility corporation on or after the effective date** of this Act. An ***occupied*** multifamily residential development that is ***acquired*** by a public facility **corporation before the effective date of this Act is governed by the law in effect on the date the development was acquired** by the public facility corporation, and the former law is continued in effect for that purpose. (emphasis added)

Thus, Subsection (c) presents the first carveout from the general exemption in Subsection (b) -- an occupied development (not new construction) that was approved prior to the Effective Date, but acquired by the PFC after the Effective Date. When read together, Subsections (b) and (c) make it clear that Sections 303.0421 and 303.0425 do not apply to any project that was both acquired and approved prior to the Effective Date.

Finally, Subsection (d) of Section 10 of HB 2071 says:

> (d)(1) Section 303.0426, Local Government Code, as added by this Act, applies to all multifamily residential developments **to which Section 303.0421 applies** . . . (emphasis added)

As established in Subsections (b) and (c) of Section 10 of HB 2071, Section 303.0421 does not apply to developments both approved and acquired by a PFC prior to the Effective Date of the Act.

Subsection (d) confirms that Section 303.0426 also does not apply to a development both approved and acquired by a PFC prior to the Effective Date. This conclusion in the saving provision is consistent with the plain language of Section 303.0426 of the Act, which states:

> (b) A public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) **and to which Section 303.0421** applies must annually submit to the department and the chief appraiser of the appraisal district in which the development is located an audit report for a compliance audit . . . (emphasis added)

The above textual analysis is further supported by debate in the Texas House of Representatives. The Texas House of Representatives took its final record vote on May 25, 2023, with the proceedings recorded in writing in the Texas House Journal.[2] The topic of grandfathering and the impact on existing developments was addressed multiple times. Representatives wanted to ensure existing developments would not be impacted and were assured that developments approved and acquired prior to the Effective Date would be exempt. First, Representative Walle expressed his support for HB 2071 and interacted with Representative Gervin-Hawkins:

> REPRESENTATIVE GERVIN-HAWKINS: Representative Walle, you know this is a very, very important issue and the concern is what happens to the existing projects if this bill was to take effect immediately?
>
> WALLE: As I understand it I think—the author could correct me if I'm wrong, but I think one of the issues is some of those folks would get grandfathered in to the existing PFCs.
>
> GERVIN-HAWKINS: They will get grandfathered in.
>
> WALLE: That's my understanding.

Page 5381. Representative Gervin-Hawkins continued on the record to express her concern about existing developments being required to comply with new TDHCA rules:

> GERVIN-HAWKINS: So on the record they will get grandfathered in and those existing projects would not be damaged? It's my understanding, when I talked to the bill author, is that they would have to rework their numbers. Anybody who's ever done these type of projects knows that it's very difficult when you go in with a plan—you've got your performer and all your other numbers, your rent's established, and now to have to change all of that as well as deal with the TDHCA deadlines and timeline. I'm concerned about existing projects.

Page 5382.

[2] Texas House of Representatives Journal, 88th Legislature, Regular Session, May 25, 2023.

Conversation then turned to one of the bill's authors, Representative Jetton. The author also confirmed that grandfathering would apply to all developments approved and acquired by a PFC prior to the Effective Date:

> REPRESENTATIVE COLLIER: Representative Jetton, I said I was going to ask you one question, but another issue came up that was talked about—immediate effect. If this bill goes into immediate effect, is there a grandfather clause for current deals that are in the process of being completed or existing?
>
> REPRESENTATIVE JETTON: The grandfather clause that's in this bill is any deal that is accepted or acquired prior to the enactment date takes on the current requirements for a PFC. I believe it's page 17 and 18.

Page 5383. This led to additional inquiry from Representative Gervin-Hawkins:

> REPRESENTATIVE GERVIN-HAWKINS: Let's be clear. Current projects is the focus. On a current project, if it is in the pipeline, are they grandfathered in or not?
>
> JETTON: If they are approved by the city council, county, or housing authority—whoever is approving those right now—if they are approved before the enactment date, then they are under the previous rules. If they are approved afterwards they would have to comply with the language that, as a body we are agreeing almost with super majority, there needs to be additional transparency and accountability around these programs.

Page 5384. Note that Representative Jetton, an author of HB 2071, specifically states that developments approved prior to the Effective Date "are under the previous rules." But if a development is "approved afterward," it would need to comply "with the language that . . . there needs to be additional transparency and accountability around these programs." This supports the argument that the "additional transparency and accountability" originating from Section 303.0426 is not required for the grandfathered developments. In all of this discussion around grandfathering, there was no indication that there was an exception to the grandfathering for the compliance monitoring requirements.

While the saving and transition provisions of HB 2071 can be difficult to read through, they are absolutely consistent with the legislative intent expressed by the House of Representatives on May 25, 2023. As an additional tool for this analysis, please see a graphical representation attached.

LEGAL ANALYSIS OF TDHCA RULEMAKING

When TDHCA adopted the PFC Rule in February, it correctly reflected the saving and transition provisions in HB 2071, excluding grandfathered developments from the audit reporting requirements under the Act. *See* 10 TAC § 10.1103 ("the following reporting requirements apply

to developments owned by a Public Facility Corporation (PFC), subject to Sections 303.0421 and 303.0425 of the Texas Local Government Code, and not eligible to be grandfathered under previous law pursuant to the criteria established by House Bill 2071, 88th Texas Legislative Session, effective June 18, 2023").

On July 15, 2024, TDHCA proposed amendments to 10 TAC § 10.1103 (the "**Proposed Rule**"), removing its reference to grandfathering. The Proposed Rule applies the reporting requirements to all developments regardless of when they were approved or acquired. Based on the textual analysis above, the Proposed Rule is contrary to the clear intent of the Texas Legislature and constitutes an unreasonable interpretation of the plain language and context in Chapter 303 and HB 2071. While Texas courts will show deference to a state agency's interpretation of a statute if it is a reasonable interpretation of an ambiguous statute, the plain language and context of the Act conflict with TDHCA's interpretation of the statute and contradict the clear intent of the Legislature when enacting HB 2071.

A. Texas Court Review of Agency Rulemaking

Under Texas Law, a state agency is generally entitled to deference for its interpretation of a statute that it is charged with enforcing, if certain conditions exist. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 621 (Tex. 2011). In *Railroad Commission of Texas v. Texas Citizens*, the Texas Supreme Court held that while it will generally uphold a state agency's interpretation if it is "reasonable," such deference is not owed if the agency's interpretation conflicts with the plain language and context of the controlling statute. *Id. at* 625. Where the language of a statute is plain and the intent of the Legislature is clear, courts will not hold up an agency's conflicting interpretation. *See Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006).

B. The Plain Language of the Statute

As noted above, the Proposed Rule conflicts with the plain language and the unambiguous meaning of the Act and HB 2071. When reviewing the plain language of a statute, Texas courts look to both the text and context to determine the meaning and legislative intent. *See Hegar v. Health Care Serv. Corp.*, 652 S.W.3d 39 (Tex. 2022). It is the objective of the reviewers to "give effect to the Legislature's intent," and "enforce the plain meaning of the statutory text, informed by its context*." Id.* at 41. In *Health Care Service Corporation*, the Texas Supreme Court reviewed whether Chapter 222 of the Texas Insurance Code allowed the State Comptroller to impose taxes on insurance premiums received from sales on certain insurance policies. *Id.* The statute at issue contained specific exclusions and exceptions to the taxes imposed on insurance premiums. *Id.* The court found that the tax unambiguously applied to the premiums at issue, as these premiums were not included in the numerated exceptions to the tax. *See id.* at 44 ("[when] exclusions or exceptions to a statute are stated by the Legislature, the intent is usually clear that no others shall apply").

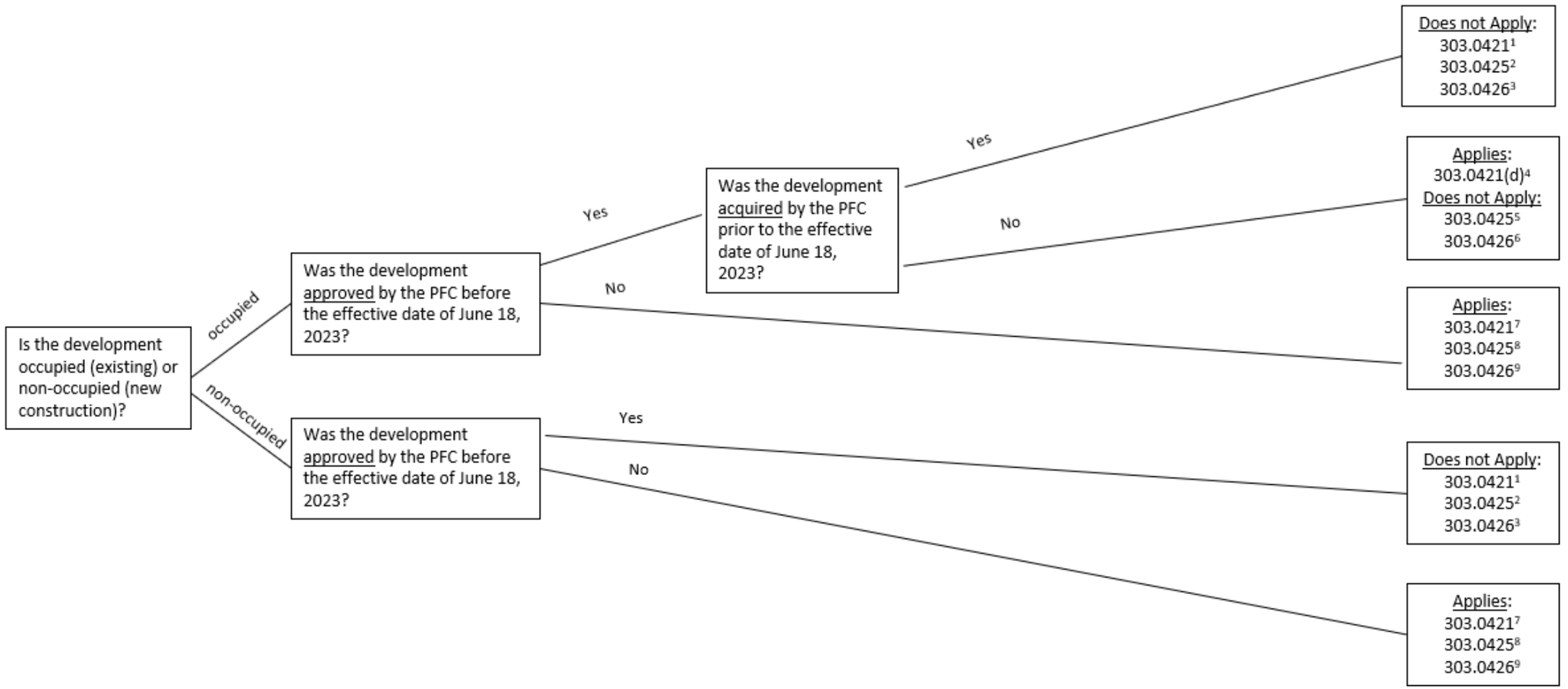
Section 10 of HB 2071 contains saving and transition provisions, excluding certain developments from the effect of Section 303.0421, which excludes them from the compliance and monitoring requirements under Section 303.0426. And similar to the statute in *Health Care Service Corporatio*n, the exemption of certain developments from the audit and reporting requirements is unambiguous. Specifically, Subsection (b) states that Section 303.0421, "appl[ies] only to a multifamily residential development that approved on or after the effective date of this Act by a public facility corporation or the sponsor of a public facility corporation, in accordance with Chapter 303, Local Government Code." And Subsection (d)(1) goes on to state that "notwithstanding any other provision in this section [10], "Section 303.0426, Local Government Code, as added by this Act, applies to all multifamily residential developments to which Section 303.0421 applies." The plain text of Subsection (b) explicitly classifies a group of developments to which Section 303.0421 applies, and Subsection (d) excludes this group from the requirements of Section 303.0426.

Moreover, the plain language of the Act reinforces that not all developments are subject to the requirements under Section 303.0426. Section 303.0426(b) of the Act states that "a public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) and to **which Section 303.0421 applies** must annually submit to the department […] an audit report for a compliance audit." TEX. LOC. GOV'T CODE § 303.0426(b) (emphasis added). Further, the Section goes on to specify that the purpose for the audit report requirement is to "determine whether the public facility user is in compliance with Sections 303.0421…" *Id.* at 303.0426(b)(1). As established in the saving and transition provisions, grandfathered developments are not subject to Section 303.0421, so there would be no reason to ensure compliance with this section by requiring an audit under Section 303.0426.

It is clear from numerous references in the text that the Legislature intended for the audit requirements under Section 303.0426 to apply only to developments to which Section 303.0421 also applies. Both the enacted bill, with its saving and transition provisions, and the Act attempt to exclude certain developments from the audit requirements based on the applicability of Section 303.0421. This was the initial interpretation of TDHCA. In the current version of 10 TAC § 10.1103, the agency references developments that are "eligible to be grandfathered under previous law pursuant to the criteria established by House Bill 2071," to exclude them from the audit requirements, as intended by the Legislature. There is no other portion of the bill that could apply to this consideration, other than Section 10, which includes the exemption of developments approved and acquired prior to the Effective Date. It is unclear why, in the Proposed Rule, TDHCA has decided to reverse its initial understanding of the statute and ignore the plain language of HB 2071.

For all the reasons described above, Texas case law supports a conclusion that the Proposed Rule would exceed TDHCA's authority for rulemaking, and it should be withdrawn.

TEXAS LEGISLATURE, 88TH REGULAR SESSION
HB 2071
ANALYSIS OF SAVING AND TRANSITION PROVISIONS



Endnotes

1. HB2071 Section 10(b) and (c), read together, state Section 303.0421 does not apply to a development approved and acquired before the Effective Date.

2. HB 2071 Section 10(b) and (c), read together, state Section 303.0425 does not apply to a development approved and acquired before the Effective Date. Further, Section 303.0421(b) requires compliance with Section 303.0425. If Section 303.0421 does not apply, per endnote 1 above, then Section 303.0425 does not apply.

3. HB 2071 Section 10(d) states Section 303.0426 does not apply unless Section 303.0421 applies. If Section 303.0421 does not apply, per endnote 1 above, then Section 303.0426 does not apply.

4. HB 2071 Section 10(c) states that an occupied development approved before the Effective Date but acquired after the Effective Date must comply with Section 303.0421(d), which establishes a deadline for an occupied development to achieve the affordability restrictions. None of the other provisions of Section 303.0421 apply. This is a natural transition provision to exempt a deal "in progress" from the new law, while requiring compliance with the affordability deadline.

5. While Section 303.0421(d) applies, Section 303.0421(b) does not apply. Therefore, Section 303.0425 does not apply, as described in endnotes 1 and 2 above. This is a natural transition provision to exempt a deal that is "in progress" from the affects of the new law.

6. HB 2071 Section 10(d) states Section 303.0426 does not apply unless Section 303.0421 applies. Section 303.0421 does not apply in full and it would be inappropriate to perform compliance monitoring simply for the one-time occurrence associated with Section 303.0421(d). This is a natural transition provision to exempt a deal that is "in progress" from the effects of the new law.

7. HB 2071 Section 10(b) clearly indicates that a development approved after the Effective Date is subject to Section 303.0421.

8. HB 2071 Section 10(b) clearly indicates that a development approved after the Effective Date is subject to Section 303.0425. Further, Section 303.0421(b) requires compliance with Section 303.0425. If Section 303.0421(b) applies, per endnote 7 above, then Section 303.0425 applies.

9. Section 303.0426(b) states that all developments subject to Section 303.0421 must comply with the compliance and monitoring provisions of Section 303.0426. If Section 303.0421 applies, per endnote 7 above, then Section 303.0426 applies.

ATTACHMENT B

If TDHCA chooses to proceed with revision of the PFC Rule, it should revise the language to allow the Executive Director to extend the December 1 deadline for good cause shown.

If TDHCA decides to proceed with the Proposed Rule, by the time it is approved and published in the Texas Register, it will be effective merely weeks before the December 1 deadline it is trying to impose. Implementation of the Proposed Rule would require hundreds of developments to obtain and pay for an audit report on a very short timeframe. TDHCA must keep in mind that these developments, closed and operational over the last 7 years or so, will have little to no uniformity in their documentation. Some may have Regulatory Agreements; some may not. They will have different affordability requirements, different lease-up requirements, and different enforcement provisions. Many participants will not have prior experience with affordable housing. This is a large undertaking with a significant learning curve for all involved. Currently, TDHCA has only seven (7) approved auditors listed on its website. Other auditors may be available, but there is a legitimate concern that these auditors may not have the capacity to take on hundreds of audit reports. Moreover, it should be considered that, if the December 1, 2024 deadline is retained, the information submitted will be for the calendar year 2023 and will be stale for any meaningful evaluative purposes. We recommend one of two alternatives for § 10.1103(1):

- Allow the Executive Director to administratively extend the December 1, 2024 deadline for good cause shown.

- Given all of the above, it is reasonable for TDHCA to implement the audit reporting for grandfathered properties for the 2024 calendar year, making reports for these projects due June 1, 2025. This would provide more current data and would allow the participants to work through implementation issues without imposing undue burden or risk on TDHCA, the PFCs, or the other participants.

ATTACHMENT C

The current Income Certification and Audit Workbook are structured in a way that solely pertains to developments approved post-HB 2071. Both documents should clarify that grandfathered developments (existing and new construction) remain subject only to their development-specific Regulatory Agreements and therefore certain fields will be 'N/A'.

Income Certification

- **Part III**:
    - This section is used to calculate a household's income, including "Public Assistance" and "Other Income". We note that Section 303.0425(b) relies on the definition of annual income set forth in 24 CFR 5.609. Section 24 CFR 5.609(b) excludes a number of forms of income from the definition of annual income, many of which could be considered to fall under the "Public Assistance" or "Other Income" categories. To avoid confusion when this form is being completed, we request that a note be added to this worksheet listing the items under 24 CFR 5.609(b) that should not be included in the annual income worksheet. Additionally, the certification form should be updated to note that income for grandfathered projects is not required to be calculated in accordance with 24 CFR 5.609(b). Such projects may be calculated in accordance with applicable regulatory agreements or other documents governing their operation.
- **Part V**:

    The gross rent calculation in this form includes non-optional and mandatory fees. This should be removed from the calculation as it is not a component of the rent limit set forth in Section 303.0425(c).

Public Facilities Corporation (PFC) Monitoring Workbook

- **Tab 6**:
    - We are not requesting any changes to this section. However, we do request a note that fees outlined in this section are not counted as part of a unit's rent unless specifically agreed to by the project's operator, given that Section 303.0425(c) does not require that fees be included in the calculation.
- **Tab 7**:
    - The workbook includes a question that asks for "Highest Restricted Rent Amount" and the "Highest Market Rent Amount" for each unit type. We note that Section 303.0426(b)(2) requires the actual rent charged, rather than a maximum possible rent. We request that this question be corrected to reflect the information required under Section 303.0426(b)(2).

- The workbook asks whether (i) in the case of new construction developments, at least 10% of units are reserved for households at or below 60% area median income (AMI) and at least 40% of units are reserved for households at or below 80% AMI and (ii) in the case of occupied developments, at least 25% of units are reserved for households at or below 60% area median income (AMI) and at least 40% of units are reserved for households at or below 80% AMI. Owners of grandfathered projects are only required to reserve 50% of units for households at or below 80 AMI, but may nonetheless have to answer "No" to this question, which could lead to TDHCA staff mistakenly believing that a property is out of compliance. To avoid this potential confusion, we request that the form is updated to include a section for grandfathered deals asking whether at least 50% of units are reserved for households at or below 80% AMI.
- The workbook includes a question as to whether the operator of a project has spent at least 15% of the gross cost of the project by the first anniversary of the acquisition. We note that this is not a requirement for grandfathered projects and request that this question be included in a separate section for non-grandfathered projects or include a notation that this requirement does not apply to grandfathered projects.
- The workbook includes several questions regarding rent savings for households living in restricted units. We note that this is not a requirement for grandfathered projects and request that this question be included in a separate section for non-grandfathered projects or include a notation that this requirement does not apply to grandfathered projects.

- **Tab 8**:
  - The workbook asks whether the operator's website complies with Section 303.0425 requirements and includes policies on Housing Choice Voucher requirements. This requirement does not apply to grandfathered projects and we therefore request that a note be added reflecting that this is the case.

Brian Alef
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September 6, 2024

Ms. Wendy Quackenbush, Director Multifamily Compliance
Texas Department of Housing and Community Affairs (TDHCA, or the Department)
221 E 11th Street Austin, Texas 78701
wendy.quackenbush@tdhca.state.tx.us

Re: Public Comment on Proposed 10 TAC, Chapter 10, Subchapter I, Public Facility Corporation Compliance Monitoring

Dear Ms. Quackenbush,

Thank you for the opportunity to provide comments on the proposed Public Facility Corporation (PFC) Compliance Monitoring. Town Companies is a developer of mixed-income and affordable housing across Dallas-Fort Worth with deep experience in PFC and similar legal structures. We believe our insights can be of assistance as you develop TDHCA's PFC Compliance Monitoring Program. Additionally, Town has participated with a working group of concerned industry participants across the state that consists of public agencies, legal experts, and housing developers. Our firm is submitting these comments in unison with several other of these concerned parties and we encourage you to take this submission very seriously as it represents the collective comments of a large body of affordable housing advocates, practitioners and experts across the state of Texas

We object to **all proposed changes** to Subchapter I §10.1103 Reporting Requirements. These rules were only first adopted earlier this year, and simply put, we think TDHCA got them right the first time. There will be serious and immediate harm done to the goal of furthering affordable housing in the State of Texas via the proposed rulemaking and we humbly submit that TDHCA must not move forward with the proposed changes.

Why We Are Opposed

With the passage of HB 2071 during the 88th Session in June 2023, Texas created new rules that would affect how the public facility corporation (PFC) legal structure could be employed to create affordable multifamily rental housing across the state. The bill added many new requirements to the rules under which new affordable housing could be approved, as well as including a section "grandfathering" in transactions done prior to the effective date of the law (HB 2071 Section 10). As you are aware, the Department adopted rules to put HB 2071 into effect in February. The proposed rulemaking would amend these recently passed rules, now aiming to undo the grandfathered status of certain affordable housing developments.

Our argument against the proposed course to amend its existing policies to now retroactively apply some new requirements of HB 2071, but not others, to existing multifamily residential affordable housing developments is three-fold:

1. A plain language reading of HB 2071 does not support the proposed interpretation
2. In the face of parts of the bill being ambiguous, this would be choosing the least obvious interpretation

3. Given that TDHCA only first implemented these rules in February, it creates administrative and legal uncertainty for the Department's position on this issue to have a true, 180-degree about-face in such a short time span, particularly when the language at issue is ambiguous at best

Why This Matters

This issue is of extreme importance to affordable housing owners and public agencies, because retroactively applying these new laws to existing affordable housing properties will have three major impacts on developments and in-turn residents of affordable housing state-wide, namely:

1. Publication of these annual reports to county appraisal districts and the public at large when they are **not** required under the law to maintain the property tax exemption, creates undue scrutiny and new attack angles for NIMBYism and affordable housing opponents that hurt the broader mission of providing affordable housing

2. These reports are **not** free to order, and the proposed rulemaking is adding new expenses that will total in the hundreds of thousands of dollars over a development's life, to affordable residential housing at a time when owners and residents are already grappling with higher insurance bills, financing costs, and inflation

3. TDHCA has only identified six auditing groups in the entire state capable of performing such reports, while giving hundreds of owners and housing agencies no prior notice that these reports must now be submitted **by the end of the current year**

Lastly, with the way HB 2071 and Ch. 303 are now constructed, there is the simple question of TDHCA's ability to enforce its own proposed rulemaking. Even if TDHCA passes the proposed rule changes to retroactively re-apply some requirements of HB 2071 **there is no enforceable penalty set out by law at TDHCA's disposal governing 303.0426 reports if an affordable housing development is not subject to 303.0421**. Unfortunately, this could lead to a scenario with very un-even compliance among the industry, as there will be no possible penalty for non-compliance with 303.0426 reporting, as grandfathered properties do rely on 303.0426 or 303.0421 to claim a tax exemption. This only worsens the uncertainty and unfairness over an issue the industry already viewed as solved in February during the original rulemaking. We implore the Department to stick with the rules as they were originally written in February and return to a more fair and equitable approach to 303.0426.

Why We Are Opposed - Plain Reading

In its July 2024 board package, the TDHCA's memo on this topic emphasized one particular phrase of HB 2071.

[Emphasis added] HB 2071 – Section 10(d):

"**Notwithstanding** any other provision of this section [Section 10]:

1) Section 303.0426 [Audit Requirements], Local Government Code, as added by this Act, applies to all multifamily residential developments to which Section 303.0421 applies and with respect to which an exemption is sought or claimed under Section 303.042(c); and

2) the initial audit report required to be submitted under Section 303.0426(b), Local Government Code, as added by this Act, for a multifamily residential development that was approved or acquired by a public facility corporation before the effective date of this Act must be submitted by the later of:

(A) the date established by Section 303.0426(f), Local Government Code, as added by this Act; or

(B) June 1, 2024.

Paragraphs 1 and 2 of 10(d) are both modified by and follow from the "notwithstanding" language, being the key word identified in the memo, however the memo mainly highlighted Paragraph 2. "[T]his section" in the 'notwithstanding' clause refers to Section 10, which governs effective dates and grandfathering for different aspects of the HB 2071 and the new PFC law.

Paragraph 1 makes it clear that 303.0426 only applies to projects which seek an exemption under 303.0421. The "Notwithstanding" language applies equally to Paragraph 1 as it does to Paragraph 2.

Further, per an earlier paragraph in Section 10 (b), 303.0421 "appl[ies] only to a multifamily residential development that is **approved** on or after the effective date of this Act by a public facility corporation or the sponsor of a public facility corporation." [Section 10 (b)]. **Therefore, we find again, an exemption from 303.0421 is an exemption from 303.0426.**

Further, Section 303.0426 itself states:

> "(b) A public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) **and to which Section 303.0421 applies** must annually submit to the department […] an audit report for a compliance audit".

Section 303.0426 was very clearly written to only apply to those developments to which Section 303.0421 applies. Once again, we find it clear in the text that **an exemption from 303.0421 is an exemption from 303.0426.**

We believe this is the most plain-language reading of 303.0426, Section 10(b), and Section 10(d). Developments which are grandfathered in to the old law are exempt from 303.0421. 303.0426 only applies to developments to which 303.0421 applies, which is developments that come after HB 2071. This is found in three different places in HB 2071. Grandfathering was clearly a key issue for the bill, and we believe these three clear references paint the cumulative picture that developments would only be subject to 303.0426 if they were subject to 303.0421.

Why We Are Opposed - Ambiguous Language

We acknowledge that Section 10(d) Paragraph 2 creates ambiguity as to the grandfathered status of certain developments from 303.0426, having the opposite meaning of 10(d) Paragraph 1, saying:

> "the initial audit report required to be submitted under Section 303.0426(b), Local Government Code, as added by this Act, for a multifamily residential development **that was approved or acquired by a public facility corporation before the effective date of this Act** must be submitted…"

However, this is far from the only ambiguous or poorly drafted portion of the bill, even within Section 10.

For example, Section 10(c) expands on grandfathering, specifically from Section 303.0421(d), saying 303.0421(d) "applies only to an occupied multifamily residential development that is **acquired** by a public facility corporation on or after the effective date of this Act."

Said plainly, any multifamily residential development is **approved** before the date of the Act would already be exempt from 303.0421 under the preceding Section 10(b)**.** Per Section 10(c)**,** any multifamily residential development which was **acquired** before the effective date would also be exempt from 303.0421(d), which is a portion of 303.0421**.**

The contradictions begin to present themselves. Taking it as fact that a multifamily residential development could not be "acquired" prior to it being "approved," there is no instance in which Section 10(c) is useful or operative. A project approved before the date of the act is exempt from 303.0421, of which 303.0421(d) is clearly a part.

Effective Date ["ED"]: June 18, 2024

		Approved	
		Before ED	On or After ED
Acquired	Before ED	Exempt from 303.0421 and 303.0421(d)	Impossible
	On or After ED	Exempt from 303.0421 ipso facto from 303.0421(d)	Must Comply With 303.0421, and 303.0421(d)

Thus, we are left with a similarly contradictory language as we have on grandfathering from 303.0426. Why is Section 10(c) included at all? The only possible reasoning for its inclusion would be if acquisitions conducted before the effective date of the act were meant to be subject to all parts of 303.0421 **excluding** 303.0421(d), and Section 10(c) was meant to modify Section 10(b) before it (though it contains no such language). We are left with two portions of Section 10 which do not have an immediately obvious meaning. To assume Section 10(c) applies to acquisitions the rules of 303.0421, save .0421(d), including rules about public notices and meetings that must have somehow taken place in the past, is to torture the least obvious meaning out of the bill. While one could somehow read Section 10 and make this case, it is the least obvious interpretation when reading HB 2017 as a whole.

We believe the Department's interpretation of Section 10(d) presents an identical contradiction. Siding with Paragraph 2 over Paragraph 1, when Paragraph 1 is consistent with several other references in the text including 303.0426(b) itself, and Section 10(b), tortures the text of the bill into its less obvious reading.

When uncertainty comes into play, as it clearly does with portions of HB 2071, we believe the agency must defer to the plain language of the statute (see Railroad Commission of Texas v. Texas Citizens for a Safe Future & Clean Water), and thus look to Paragraph 1 and find that 303.0426 does not apply to projects not also subject to 303.0421.

Why We Are Opposed – Regulatory Uncertainty

The TDHCA constructively engaged with public comments submitted at the end of 2023 and beginning of 2024 regarding the implementation of 303.0426, and we believe TDHCA made a good faith effort to propose rulemaking that was consistent with the requirements of HB 2071, and stern but fair to the affordable housing developments they were tasked with regulating. We are unaware of what changed between now and February that suggests TDHCA made a mistake with its initial rule making. We believe TDHCA got this one right initially, and should not abruptly have an about face on implementing 303.0426.

If you have any questions or would like to discuss further, please do not hesitate to contact me at (248) 670-1365 or via email at ba@towncompanies.com any time. Thank you for your time and consideration.

Sincerely,

Brian Alef

Founder & CEO

EMBREY

7600 BROADWAY SUITE 300
SAN ANTONIO TEXAS 78209
210.824.6044
embrey.com

September 6, 2024

Via Electronic Mail
wendy.quackenbush@tdhca.texas.gov

Ms. Wendy Quackenbush
Director of Compliance Monitoring
Texas Department of Housing and Community Affairs
211 East 11th Street
Austin, Texas 78701

Re: Public Comment on Proposed Rule Change – 10 Texas Administrative Code, Part 1, Chapter 10, Uniform Multifamily Rules, Subchapter I, Public Facility Corporation Compliance Monitoring Reporting Requirements, §10.1103

Dear Ms. Quackenbush,

I am writing to provide feedback on the proposed revision to §10.1103 of the PFC Rule, which TDHCA has recently put forth. Our company is actively involved in this field, and we have concerns regarding the proposed amendment changes - specifically its contradiction with legislative intent.

The proposed amendments to §10.1103 of the PFC Rule present a significant divergence from the legislative intent outlined in House Bill 2071 (HB 2071). The bill, passed by the 88th Texas Legislature and effective June 18, 2023, was designed to address specific concerns related to public facility corporations (PFCs) managing affordable housing developments.

The proposed rule changes to §10.1103, which remove the reference to grandfathering and impose new reporting requirements on all developments regardless of their approval or acquisition date, fundamentally contradict this legislative intent. By applying the new reporting requirements retroactively to developments that should be exempt under the saving and transition provisions, the proposed rule disregards the clear language and purpose of HB 2071. This not only undermines the intent of the legislation but also creates potential compliance issues and administrative burdens for developments that were explicitly meant to be grandfathered under the old rules.

Given these concerns, we strongly urge TDHCA to withdraw these proposed amendments to align with the legislative language and intent.

The proposed changes should align with the legislative framework established by HB 2071, preserving the exemptions for grandfathered developments as intended by the Legislature. This alignment will ensure that the rulemaking process respects the legislative intent and avoids unnecessary disruptions to existing affordable housing projects.

We appreciate the opportunity to provide these comments and are available to discuss these points further at your convenience.

Sincerely,

Trey Embrey
President & Chief Executive Officer

CHERRY
PETERSEN
ALBERT

September 9, 2024

Via Electronic Mail

Ms. Wendy Quackenbush
Director of Compliance Monitoring
Texas Department of Housing and Community Affairs
211 East 11th Street
Austin, Texas 78701

Re: Public Comment on Proposed Rule Change – 10 Texas Administrative Code, Part 1, Chapter 10, Uniform Multifamily Rules, Subchapter I, Public Facility Corporation Compliance Monitoring Reporting Requirements, §10.1103

Dear Ms. Quackenbush:

Effective February 26, 2024, the Texas Department of Housing and Community Affairs ("**TDHCA**") adopted new rules under 10 Texas Administrative Code, Part 1, Chapter 10, Subchapter I (the "**PFC Rule**"). TDHCA now proposes to revise §10.1103 of the PFC Rule to impose a different requirement than was set forth in the original PFC Rule. Our firm is engaged in legal representation in this area and submits the following comments to TDHCA's proposed revision of the PFC Rule. Each comment is elaborated upon in the attachments to this letter.

- TDHCA's change to the PFC Rule contradicts the plain language of the legislative action from which it is derived. Therefore, the proposed changes to the PFC Rule should be withdrawn. See **Attachment A**.
- If TDHCA chooses to proceed with revision of the PFC Rule, it should allow the Executive Director to extend the December 1 deadline for good cause shown. See **Attachment B**.
- While we recognize that TDHCA's forms for Income Certification and the Audit Workbook are not open for public comment in conjunction with this rulemaking, a change in the PFC Rule will implicate these forms, and certain changes will need to be made. Therefore, we are taking this opportunity to note concerns about the

current versions of the Income Certification and Audit Workbook published on TDHCA's website. See **Attachment C**.

We appreciate the opportunity to present these comments.

Sincerely,

Kevin Cherry

ATTACHMENT A

TDHCA's change to the PFC Rule clearly contradicts the plain language of the legislative action from which it is derived. Therefore, the proposed changes to the PFC Rule should be withdrawn.

TEXTUAL ANALYSIS OF HB 2071

During its most recent session, the 88th Texas Legislature passed House Bill 2071[1], which took effect on June 18, 2023 (the "**Effective Date**"). HB 2071 substantially revised the requirements for a public facility corporation (a "**PFC**") owning affordable housing under Chapter 303 of the Texas Local Government Code (the "**Act**"). The previous law in Section 303.042 of the Act was provided a tax exemption for affordable housing owned by a PFC, but had limited guidance on the parameters for the housing. Significant provisions added to the Act by HB 2071 included:

- Section 303.0421 to describe the kinds of developments to which the new law would apply, including affordability requirements, public notification and approval requirements, and the term for which a property tax exemption would be available.
- Section 303.0425 to provide additional affordability requirements and tenant protection.
- Section 303.0426 to create a compliance and monitoring function for TDHCA, including authority to establish rules to implement this new function.
- To address public concerns, occupied (existing) developments were treated differently than unoccupied (new construction) developments.

Notably, HB 2071 includes saving and transition provisions. As described in the Texas Legislative Council Drafting Manual dated January 2023:

> Saving and transition provisions help to minimize the disruption and inequities that often attend the taking effect of legislation. A saving provision "saves" from the application of a law certain conduct or legal relationships that occurred before or existed on the effective date of the law. . . . Transition provisions provide for the orderly implementation of legislation, helping to avoid the shock that can result from an abrupt change in the law. *See Section 3.12(a) of the Manual.*

The saving and transition provisions, in Section 10 of the bill, ensured that developments approved and acquired prior to the Effective Date would be "grandfathered," meaning they would continue to be governed by the law in effect prior to HB 2071, and would be exempt from the annual audit requirements.

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[1] Tex. HB 2071, 88th Leg., R.S. (2023) (hereafter referred to as "**HB 2071**").

Specifically, Section 10 of HB 2071 states:

> (b) Subject to Subsections (c) and (d) of this section [10], **Sections 303.0421** and 303.0425, Local Government Code, as added by this Act, **apply only to a multifamily residential development that is *approved* on or after the effective date of this Act** by a public facility corporation or the sponsor of a public facility corporation, in accordance with Chapter 303, Local Government Code. A multifamily residential development that was ***approved*** by a public facility corporation . . . **before the effective date of this Act** is **governed by the law in effect on the date the development was approved** . . . and the former law is continued in effect for that purpose. (emphasis added)

Thus, Subsection (b) of Section 10 starts with a broad statement that any development approved by a PFC prior to June 18, 2023 is exempt from the new law and only subject to the law that was in effect at the time of such approval. However, Subsection (b) must be considered in light of Subsections (c) and (d), so the analysis must continue.

Subsection (c) of Section 10 goes on to clarify that:

> (c) Subject to Subsection (d) of this section [10], **Section 303.0421(d)**, Local Government Code, as added by this Act, **applies only to an occupied multifamily residential development that is acquired by a public facility corporation on or after the effective date** of this Act. An ***occupied*** multifamily residential development that is ***acquired*** by a public facility **corporation before the effective date of this Act is governed by the law in effect on the date the development was acquired** by the public facility corporation, and the former law is continued in effect for that purpose. (emphasis added)

Thus, Subsection (c) presents the first carveout from the general exemption in Subsection (b) -- an occupied development (not new construction) that was approved prior to the Effective Date, but acquired by the PFC after the Effective Date. When read together, Subsections (b) and (c) make it clear that Sections 303.0421 and 303.0425 do not apply to any project that was both acquired and approved prior to the Effective Date.

Finally, Subsection (d) of Section 10 of HB 2071 says:

> (d)(1) Section 303.0426, Local Government Code, as added by this Act, applies to all multifamily residential developments **to which Section 303.0421 applies** . . . (emphasis added)

As established in Subsections (b) and (c) of Section 10 of HB 2071, Section 303.0421 does not apply to developments both approved and acquired by a PFC prior to the Effective Date of the Act.

Subsection (d) confirms that Section 303.0426 also does not apply to a development both approved and acquired by a PFC prior to the Effective Date. This conclusion in the saving provision is consistent with the plain language of Section 303.0426 of the Act, which states:

> (b) A public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) **and to which Section 303.0421** applies must annually submit to the department and the chief appraiser of the appraisal district in which the development is located an audit report for a compliance audit . . . (emphasis added)

The above textual analysis is further supported by debate in the Texas House of Representatives. The Texas House of Representatives took its final record vote on May 25, 2023, with the proceedings recorded in writing in the Texas House Journal.[2] The topic of grandfathering and the impact on existing developments was addressed multiple times. Representatives wanted to ensure existing developments would not be impacted and were assured that developments approved and acquired prior to the Effective Date would be exempt. First, Representative Walle expressed his support for HB 2071 and interacted with Representative Gervin-Hawkins:

> REPRESENTATIVE GERVIN-HAWKINS: Representative Walle, you know this is a very, very important issue and the concern is what happens to the existing projects if this bill was to take effect immediately?
>
> WALLE: As I understand it I think—the author could correct me if I'm wrong, but I think one of the issues is some of those folks would get grandfathered in to the existing PFCs.
>
> GERVIN-HAWKINS: They will get grandfathered in.
>
> WALLE: That's my understanding.

Page 5381. Representative Gervin-Hawkins continued on the record to express her concern about existing developments being required to comply with new TDHCA rules:

> GERVIN-HAWKINS: So on the record they will get grandfathered in and those existing projects would not be damaged? It's my understanding, when I talked to the bill author, is that they would have to rework their numbers. Anybody who's ever done these type of projects knows that it's very difficult when you go in with a plan—you've got your performer and all your other numbers, your rent's established, and now to have to change all of that as well as deal with the TDHCA deadlines and timeline. I'm concerned about existing projects.

Page 5382.

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[2] Texas House of Representatives Journal, 88th Legislature, Regular Session, May 25, 2023.

Conversation then turned to one of the bill's authors, Representative Jetton. The author also confirmed that grandfathering would apply to all developments approved and acquired by a PFC prior to the Effective Date:

> REPRESENTATIVE COLLIER: Representative Jetton, I said I was going to ask you one question, but another issue came up that was talked about—immediate effect. If this bill goes into immediate effect, is there a grandfather clause for current deals that are in the process of being completed or existing?
>
> REPRESENTATIVE JETTON: The grandfather clause that's in this bill is any deal that is accepted or acquired prior to the enactment date takes on the current requirements for a PFC. I believe it's page 17 and 18.

Page 5383. This led to additional inquiry from Representative Gervin-Hawkins:

> REPRESENTATIVE GERVIN-HAWKINS: Let's be clear. Current projects is the focus. On a current project, if it is in the pipeline, are they grandfathered in or not?
>
> JETTON: If they are approved by the city council, county, or housing authority—whoever is approving those right now—if they are approved before the enactment date, then they are under the previous rules. If they are approved afterwards they would have to comply with the language that, as a body we are agreeing almost with super majority, there needs to be additional transparency and accountability around these programs.

Page 5384. Note that Representative Jetton, an author of HB 2071, specifically states that developments approved prior to the Effective Date "are under the previous rules." But if a development is "approved afterward," it would need to comply "with the language that . . . there needs to be additional transparency and accountability around these programs." This supports the argument that the "additional transparency and accountability" originating from Section 303.0426 is not required for the grandfathered developments. In all of this discussion around grandfathering, there was no indication that there was an exception to the grandfathering for the compliance monitoring requirements.

While the saving and transition provisions of HB 2071 can be difficult to read through, they are absolutely consistent with the legislative intent expressed by the House of Representatives on May 25, 2023. As an additional tool for this analysis, please see a graphical representation attached.

LEGAL ANALYSIS OF TDHCA RULEMAKING

When TDHCA adopted the PFC Rule in February, it correctly reflected the saving and transition provisions in HB 2071, excluding grandfathered developments from the audit reporting requirements under the Act. *See* 10 TAC § 10.1103 ("the following reporting requirements apply

to developments owned by a Public Facility Corporation (PFC), subject to Sections 303.0421 and 303.0425 of the Texas Local Government Code, and not eligible to be grandfathered under previous law pursuant to the criteria established by House Bill 2071, 88th Texas Legislative Session, effective June 18, 2023").

On July 15, 2024, TDHCA proposed amendments to 10 TAC § 10.1103 (the "**Proposed Rule**"), removing its reference to grandfathering. The Proposed Rule applies the reporting requirements to all developments regardless of when they were approved or acquired. Based on the textual analysis above, the Proposed Rule is contrary to the clear intent of the Texas Legislature and constitutes an unreasonable interpretation of the plain language and context in Chapter 303 and HB 2071. While Texas courts will show deference to a state agency's interpretation of a statute if it is a reasonable interpretation of an ambiguous statute, the plain language and context of the Act conflict with TDHCA's interpretation of the statute and contradict the clear intent of the Legislature when enacting HB 2071.

A. Texas Court Review of Agency Rulemaking

Under Texas Law, a state agency is generally entitled to deference for its interpretation of a statute that it is charged with enforcing, if certain conditions exist. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 621 (Tex. 2011). In *Railroad Commission of Texas v. Texas Citizens*, the Texas Supreme Court held that while it will generally uphold a state agency's interpretation if it is "reasonable," such deference is not owed if the agency's interpretation conflicts with the plain language and context of the controlling statute. *Id. at* 625. Where the language of a statute is plain and the intent of the Legislature is clear, courts will not hold up an agency's conflicting interpretation. *See Fiess v. State Farm Lloyds,* 202 S.W.3d 744, 747 (Tex. 2006).

B. The Plain Language of the Statute

As noted above, the Proposed Rule conflicts with the plain language and the unambiguous meaning of the Act and HB 2071. When reviewing the plain language of a statute, Texas courts look to both the text and context to determine the meaning and legislative intent. *See Hegar v. Health Care Serv. Corp.*, 652 S.W.3d 39 (Tex. 2022). It is the objective of the reviewers to "give effect to the Legislature's intent," and "enforce the plain meaning of the statutory text, informed by its context." *Id.* at 41. In *Health Care Service Corporation,* the Texas Supreme Court reviewed whether Chapter 222 of the Texas Insurance Code allowed the State Comptroller to impose taxes on insurance premiums received from sales on certain insurance policies. *Id.* The statute at issue contained specific exclusions and exceptions to the taxes imposed on insurance premiums. *Id.* The court found that the tax unambiguously applied to the premiums at issue, as these premiums were not included in the numerated exceptions to the tax. *See id.* at 44 ("[when] exclusions or exceptions to a statute are stated by the Legislature, the intent is usually clear that no others shall apply").

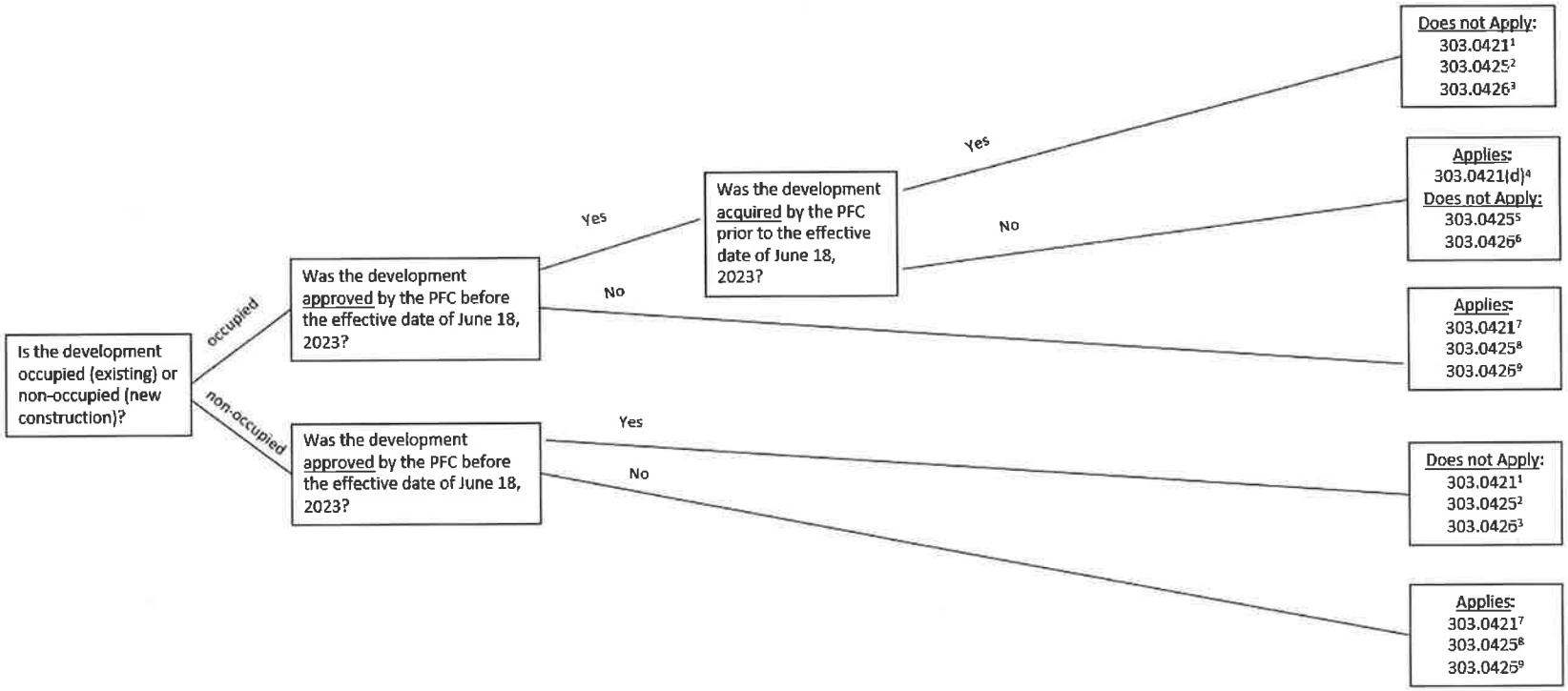
Section 10 of HB 2071 contains saving and transition provisions, excluding certain developments from the effect of Section 303.0421, which excludes them from the compliance and monitoring requirements under Section 303.0426. And similar to the statute in *Health Care Service Corporation*, the exemption of certain developments from the audit and reporting requirements is unambiguous. Specifically, Subsection (b) states that Section 303.0421, "appl[ies] only to a multifamily residential development that approved on or after the effective date of this Act by a public facility corporation or the sponsor of a public facility corporation, in accordance with Chapter 303, Local Government Code." And Subsection (d)(1) goes on to state that "notwithstanding any other provision in this section [10], "Section 303.0426, Local Government Code, as added by this Act, applies to all multifamily residential developments to which Section 303.0421 applies." The plain text of Subsection (b) explicitly classifies a group of developments to which Section 303.0421 applies, and Subsection (d) excludes this group from the requirements of Section 303.0426.

Moreover, the plain language of the Act reinforces that not all developments are subject to the requirements under Section 303.0426. Section 303.0426(b) of the Act states that "a public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) and to **which Section 303.0421 applies** must annually submit to the department [...] an audit report for a compliance audit." TEX. LOC. GOV'T CODE § 303.0426(b) (emphasis added). Further, the Section goes on to specify that the purpose for the audit report requirement is to "determine whether the public facility user is in compliance with Sections 303.0421..." *Id.* at 303.0426(b)(1). As established in the saving and transition provisions, grandfathered developments are not subject to Section 303.0421, so there would be no reason to ensure compliance with this section by requiring an audit under Section 303.0426.

It is clear from numerous references in the text that the Legislature intended for the audit requirements under Section 303.0426 to apply only to developments to which Section 303.0421 also applies. Both the enacted bill, with its saving and transition provisions, and the Act attempt to exclude certain developments from the audit requirements based on the applicability of Section 303.0421. This was the initial interpretation of TDHCA. In the current version of 10 TAC § 10.1103, the agency references developments that are "eligible to be grandfathered under previous law pursuant to the criteria established by House Bill 2071," to exclude them from the audit requirements, as intended by the Legislature. There is no other portion of the bill that could apply to this consideration, other than Section 10, which includes the exemption of developments approved and acquired prior to the Effective Date. It is unclear why, in the Proposed Rule, TDHCA has decided to reverse its initial understanding of the statute and ignore the plain language of HB 2071.

For all the reasons described above, Texas case law supports a conclusion that the Proposed Rule would exceed TDHCA's authority for rulemaking, and it should be withdrawn.

TEXAS LEGISLATURE, 88TH REGULAR SESSION
HB 2071
ANALYSIS OF SAVING AND TRANSITION PROVISIONS



Endnotes

1. HB2071 Section 10(b) and (c), read together, state Section 303.0421 does not apply to a development approved and acquired before the Effective Date.
2. HB 2071 Section 10(b) and (c), read together, state Section 303.0425 does not apply to a development approved and acquired before the Effective Date. Further, Section 303.0421(b) requires compliance with Section 303.0425. If Section 303.0421 does not apply, per endnote 1 above, then Section 303.0425 does not apply.
3. HB 2071 Section 10(d) states Section 303.0426 does not apply unless Section 303.0421 applies. If Section 303.0421 does not apply, per endnote 1 above, then Section 303.0426 does not apply.
4. HB 2071 Section 10(c) states that an occupied development approved before the Effective Date but acquired after the Effective Date must comply with Section 303.0421(d), which establishes a deadline for an occupied development to achieve the affordability restrictions. None of the other provisions of Section 303.0421 apply. This is a natural transition provision to exempt a deal "in progress" from the new law, while requiring compliance with the affordability deadline.
5. While Section 303.0421(d) applies, Section 303.0421(b) does not apply. Therefore, Section 303.0425 does not apply, as described in endnotes 1 and 2 above. This is a natural transition provision to exempt a deal that is "in progress" from the affects of the new law.
6. HB 2071 Section 10(d) states Section 303.0426 does not apply unless Section 303.0421 applies. Section 303.0421 does not apply in full and it would be inappropriate to perform compliance monitoring simply for the one-time occurrence associated with Section 303.0421(d). This is a natural transition provision to exempt a deal that is "in progress" from the effects of the new law.

7. HB 2071 Section 10(b) clearly indicates that a development approved after the Effective Date is subject to Section 303.0421.

8. HB 2071 Section 10(b) clearly indicates that a development approved after the Effective Date is subject to Section 303.0425. Further, Section 303.0421(b) requires compliance with Section 303.0425. If Section 303.0421(b) applies, per endnote 7 above, then Section 303.0425 applies.

9. Section 303.0426(b) states that all developments subject to Section 303.0421 must comply with the compliance and monitoring provisions of Section 303.0426. If Section 303.0421 applies, per endnote 7 above, then Section 303.0426 applies.

ATTACHMENT B

If TDHCA chooses to proceed with revision of the PFC Rule, it should revise the language to allow the Executive Director to extend the December 1 deadline for good cause shown.

If TDHCA decides to proceed with the Proposed Rule, by the time it is approved and published in the Texas Register, it will be effective merely weeks before the December 1 deadline it is trying to impose. Implementation of the Proposed Rule would require hundreds of developments to obtain and pay for an audit report on a very short timeframe. TDHCA must keep in mind that these developments, closed and operational over the last 7 years or so, will have little to no uniformity in their documentation. Some may have Regulatory Agreements; some may not. They will have different affordability requirements, different lease-up requirements, and different enforcement provisions. Many participants will not have prior experience with affordable housing. This is a large undertaking with a significant learning curve for all involved. Currently, TDHCA has only seven (7) approved auditors listed on its website. Other auditors may be available, but there is a legitimate concern that these auditors may not have the capacity to take on hundreds of audit reports. Moreover, it should be considered that, if the December 1, 2024 deadline is retained, the information submitted will be for the calendar year 2023 and will be stale for any meaningful evaluative purposes. We recommend one of two alternatives for § 10.1103(1):

- Allow the Executive Director to administratively extend the December 1, 2024 deadline for good cause shown.

- Given all of the above, it is reasonable for TDHCA to implement the audit reporting for grandfathered properties for the 2024 calendar year, making reports for these projects due June 1, 2025. This would provide more current data and would allow the participants to work through implementation issues without imposing undue burden or risk on TDHCA, the PFCs, or the other participants.

ATTACHMENT C

If the grandfathered projects are not excluded from the audit report requirements, please consider the following concerns regarding the Income Certification and the Audit Workbook.

Income Certification

- **Part III**:
  - This section is used to calculate a household's income, including "Public Assistance" and "Other Income". We note that Section 303.0425(b) relies on the definition of annual income set forth in 24 CFR 5.609. Section 24 CFR 5.609(b) excludes a number of forms of income from the definition of annual income, many of which could be considered to fall under the "Public Assistance" or "Other Income" categories. To avoid confusion when this form is being completed, we request that a note be added to this worksheet listing the items under 24 CFR 5.609(b) that should not be included in the annual income worksheet.

Public Facilities Corporation (PFC) Monitoring Workbook

- **Tab 7**:
  - The workbook includes a question that asks for "Highest Restricted Rent Amount" and the "Highest Market Rent Amount" for each unit type. We note that Section 303.0426(b)(2) requires the actual rent charged, rather than a maximum possible rent. We request that this question be corrected to reflect the information required under Section 303.0426(b)(2).
  - The workbook asks whether (i) in the case of new construction developments, at least 10% of units are reserved for households at or below 60% area median income (AMI) and at least 40% of units are reserved for households at or below 80% AMI and (ii) in the case of occupied developments, at least 25% of units are reserved for households at or below 60% area median income (AMI) and at least 40% of units are reserved for households at or below 80% AMI. Owners of grandfathered projects are only required to reserve 50% of units for households at or below 80 AMI, but may nonetheless have to answer "No" to this question, which could lead to TDHCA staff mistakenly believing that a property is out of compliance. To avoid this potential confusion, we request that the form is updated to include a section for grandfathered deals asking whether at least 50% of units are reserved for households at or below 80% AMI.
  - The workbook includes a question as to whether the operator of a project has spent at least 15% of the gross cost of the project by the first anniversary of the acquisition. We note that this is not a requirement for grandfathered projects and request that this question be included in a separate section for non-grandfathered

projects or include a notation that this requirement does not apply to grandfathered projects.

- The workbook includes several questions regarding rent savings for households living in restricted units. We note that this is not a requirement for grandfathered projects and request that this question be included in a separate section for non-grandfathered projects or include a notation that this requirement does not apply to grandfathered projects.

From: S Black
To: Wendy Quackenbush
Subject: Comments: 10 TAC Chapter 10, Public Facility Corporation Compliance
Date: Monday, September 9, 2024 3:47:54 PM

Dear TDHCA,

Since there appears to be zero to low oversight by City of Austin or Travis county officials for the sub-recipient nonprofit of massive federal funds which owns the property where I live, I approve of oversight.

I agree with the compliance monitoring rule. Audit Reports should be due annually starting December 1, 2024 and thereafter by June1.

Sara Black
Oppressed renter
Austin/Travis County

Via Electronic Mail
wendy.quackenbush@tdhca.texas.gov

September 6, 2024

Ms. Wendy Quackenbush
Director of Compliance Monitoring
Texas Department of Housing and Community Affairs
211 East 11th Street
Austin, Texas 78701

Re: Public Comment on Proposed Rule Change – 10 Texas Administrative Code, Part 1, Chapter 10, Uniform Multifamily Rules, Subchapter I, Public Facility Corporation Compliance Monitoring Reporting Requirements, §10.1103

Dear Ms. Quackenbush,

I am writing to provide feedback on the proposed revision to §10.1103 of the PFC Rule, which TDHCA has recently put forth. Our company is actively involved in this field, and we have concerns regarding the proposed amendment changes - specifically its contradiction with legislative intent.

The proposed amendments to §10.1103 of the PFC Rule present a significant divergence from the legislative intent outlined in House Bill 2071 (HB 2071). The bill, passed by the 88th Texas Legislature and effective June 18, 2023, was designed to address specific concerns related to public facility corporations (PFCs) managing affordable housing developments.

The proposed rule changes to §10.1103, which remove the reference to grandfathering and impose new reporting requirements on all developments regardless of their approval or acquisition date, fundamentally contradict this legislative intent. By applying the new reporting requirements retroactively to developments that should be exempt under the saving and transition provisions, the proposed rule disregards the clear language and purpose of HB 2071. This not only undermines the intent of the legislation but also creates potential compliance issues and administrative burdens for developments that were explicitly meant to be grandfathered under the old rules.

Given these concerns, we strongly urge TDHCA to withdraw these proposed amendments to align with the legislative language and intent.

The proposed changes should align with the legislative framework established by HB 2071, preserving the exemptions for grandfathered developments as intended by the Legislature. This alignment will ensure that the rulemaking process respects the legislative intent and avoids unnecessary disruptions to existing affordable housing projects.

We appreciate the opportunity to provide these comments and are available to discuss these points further at your convenience.

Sincerely,

David M. Adelman, Principal of AREA Real Estate LLC

September 6, 2024

Via Electronic Mail
wendy.quackenbush@tdhca.texas.gov

Ms. Wendy Quackenbush
Director of Compliance Monitoring
Texas Department of Housing and Community Affairs
211 East 11th Street
Austin, Texas 78701

Re: Public Comment on Proposed Rule Change – 10 Texas Administrative Code, Part 1, Chapter 10, Uniform Multifamily Rules, Subchapter I, Public Facility Corporation Compliance Monitoring Reporting Requirements, §10.1103

Dear Ms. Quackenbush,

I am writing to provide feedback on the proposed revision to §10.1103 of the PFC Rule, which TDHCA has recently put forth. Our company is actively involved in this field, and we have concerns regarding the proposed amendment changes - specifically its contradiction with legislative intent.

The proposed amendments to §10.1103 of the PFC Rule present a significant divergence from the legislative intent outlined in House Bill 2071 (HB 2071). The bill, passed by the 88th Texas Legislature and effective June 18, 2023, was designed to address specific concerns related to public facility corporations (PFCs) managing affordable housing developments.

The proposed rule changes to §10.1103, which remove the reference to grandfathering and impose new reporting requirements on all developments regardless of their approval or acquisition date, fundamentally contradict this legislative intent. By applying the new reporting requirements retroactively to developments that should be exempt under the saving and transition provisions, the proposed rule disregards the clear language and purpose of HB 2071. This not only undermines the intent of the legislation but also creates potential compliance issues and administrative burdens for developments that were explicitly meant to be grandfathered under the old rules.

Given these concerns, we strongly urge TDHCA to withdraw these proposed amendments to align with the legislative language and intent.

The proposed changes should align with the legislative framework established by HB 2071, preserving the exemptions for grandfathered developments as intended by the Legislature. This alignment will ensure that the rulemaking process respects the legislative intent and avoids unnecessary disruptions to existing affordable housing projects.

We appreciate the opportunity to provide these comments and are available to discuss these points further at your convenience.

Sincerely,

Paul Ahls

Senior Vice President

Starwood Capital Group

September 9, 2024

From: John Jeter

Post Real Estate Group

To: Wendy Quackenbush

Director of Compliance

Texes Department of Housing and Community Affairs

Re: Public Comment – Proposed Changes to 10 TAC 10.1103

Comments and Concerns

Concerns pertaining to the treatment of properties subject to a regulatory agreement executed prior to the June 18, 2023 effective date of HB 2071. While only 10 TAC 10.1103 is being changed, the audit requirements reflected in 10 TAC 10.1104 should also be modified to reflect the different audit requirements for properties with regulatory agreements that predate June 18, 2023.

Specific areas of concern are:

- The inclusion of fees and other charges when determining the rent for an income qualified occupied apartment;
- The blanket requirement for verification of assets when determining income qualified households. Unless the specific regulatory agreement calls for such verification, this should not be a standard that is being audited.
- Review of one-time fee and deposit amounts.
- The percentage of units set aside in each unit type matching the percentage of units of each type for the property as a whole
- The requirement that rent savings for the property must be equal to or exceed 60% of the tax savings.

Some of the regulatory agreements in place prior to June 18, 2023 allow for the reservation of units to be occupied by income qualified tenants to count towards the compliance threshold. The reservation threshold should be allowed for properties with that standard in the controlling regulatory agreement in determining program compliance.

Some regulatory agreements contain a “reletting” period that gives the owner time to gain compliance with the income requirements for qualified residents. This reletting period should be taken into account in determining program compliance for the property.

Many regulatory agreements in place prior to June 18, 2023 call for a specific income verification document to be utilized by the property. This document should continue to be the prevailing form for income verifications. Use of a form created for LIHTC properties or other programs creates an additional burden for the sites that isn’t required by the statute. This would also result in confusion regarding the requirements in place for the property as called for in the prevailing regulatory agreement.

FAIRFIELD.

September 9, 2024

Via Electronic Mail
wendy.quackenbush@tdhca.texas.gov

Ms. Wendy Quackenbush
Director of Compliance Monitoring
Texas Department of Housing and Community Affairs
211 East 11th Street
Austin, Texas 78701

Re: Public Comment on Proposed Rule Change – 10 Texas Administrative Code, Part 1, Chapter 10, Uniform Multifamily Rules, Subchapter I, Public Facility Corporation Compliance Monitoring Reporting Requirements, §10.1103

Dear Ms. Quackenbush,

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The proposed amendments to §10.1103 of the PFC Rule present a significant divergence from the legislative intent outlined in House Bill 2071 (HB 2071). The bill, passed by the 88th Texas Legislature and effective June 18, 2023, was designed to address specific concerns related to public facility corporations (PFCs) managing affordable housing developments.

The proposed rule changes to §10.1103, which remove the reference to grandfathering and impose new reporting requirements on all developments regardless of their approval or acquisition date, fundamentally contradict this legislative intent. By applying the new reporting requirements retroactively to developments that should be exempt under the saving and transition provisions, the proposed rule disregards the clear language and purpose of HB 2071. This not only undermines the intent of the legislation but also creates potential compliance issues and administrative burdens for developments that were explicitly meant to be grandfathered under the old rules. Additionally, the proposed rule does not provide clear consequences or penalties for noncompliance, and the proposed publication of annual compliance reports would likely result in negative public perception of affordable housing.

Given these concerns, we strongly urge TDHCA to withdraw these proposed amendments to align with the legislative language and intent.

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5355 Mira Sorrento Place
Suite 100
San Diego, CA 92121

fairfieldresidential.com

The proposed changes should align with the legislative framework established by HB 2071, preserving the exemptions for grandfathered developments as intended by the Legislature. This alignment will ensure that the rulemaking process respects the legislative intent and avoids unnecessary disruptions to existing affordable housing projects.

We appreciate the opportunity to provide these comments and are available to discuss these points further at your convenience.

Sincerely,

Jessica Antoniades
Vice President & Assistant Secretary

From: Pedro Alanis
To: Wendy Quackenbush
Subject: FW: Public Comment on Proposed Rule Change
Date: Monday, September 9, 2024 5:05:09 PM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
image006.png
image007.png
SAHT PFC monitor Public Comment.xlsx

Sorry, went to the wrong email address.

pete

From: Pedro Alanis
Sent: Monday, September 9, 2024 5:00 PM
To: wendy.quakenbush@tdhca.texas.gov
Subject: Public Comment on Proposed Rule Change

Dear Ms. Quackenbush:

Effective February 26, 2024, the Texas Department of Housing and Community Affairs ("TDHCA") adopted new rules under 10 Texas Administrative Code, Part 1, Chapter 10, Subchapter I (the "PFC Rule"). TDHCA now proposes to revise §10.1103 of the PFC Rule to impose a different requirement than was set forth when the PFC Rule was originally adopted. We have participated in numerous projects that will be affected by these provisions and submit the following comments to TDHCA's proposed revision of the PFC Rule.

TDHCA's change to the PFC Rule clearly contradicts the plain language of the legislative action from which it is derived. Therefore, the proposed changes to the PFC Rule should be withdrawn. **See below Text labeled Attachment A.**

If TDHCA chooses to proceed with revision of the PFC Rule, it should allow the Executive Director to extend the December 1 deadline to June 1, 2025. **See below text labeled Attachment B.**

We have also **attached** an **excel sheet** describing our additional comments.

ATTACHMENT A
TDHCA's change to the PFC Rule clearly contradicts the plain language of the legislative action from which it is derived. Therefore, the proposed changes to the PFC Rule should be withdrawn.

Textual Analysis of HB 2071

During its most recent session, the 88th Texas Legislature passed House Bill 2071 [1], which took effect on June 18, 2023 (the "**Effective Date**"). HB 2071 substantially revised the requirements for a public facility corporation (a "**PFC**") owning affordable housing under Chapter 303 of the Texas Local Government Code (the "**Act**"). The previous law in Section 303.042 of the Act was provided a tax exemption for affordable housing owned by a PFC, but had limited guidance on the parameters for the housing. Significant provisions added to the Act by HB 2071 included:

- Section 303.0421 to describe the kinds of developments to which the new law would apply, including affordability requirements, public notification and approval requirements, and the term for which a property tax exemption would be available.
- Section 303.0425 to provide additional affordability requirements and tenant protection.
- Section 303.0426 to create a compliance and monitoring function for TDHCA, including authority to establish rules to implement this new function.
- To address public concerns, occupied (existing) developments were treated differently than unoccupied (new construction) developments.

Notably, HB 2071 includes saving and transition provisions. As described in the Texas Legislative Council Drafting Manual dated January 2023:
Saving and transition provisions help to minimize the disruption and inequities that often attend the taking effect of legislation. A saving provision "saves" from the application of a law certain conduct or legal relationships that occurred before or existed on the effective date of the law. . . . Transition provisions provide for the orderly implementation of legislation, helping to avoid the shock that can result from an abrupt change in the law. *See Section 3.12(a) of the Manual.*

The saving and transition provisions, in Section 10 of the bill, ensured that developments approved and acquired prior to the Effective Date would be "grandfathered," meaning they would continue to be governed by the law in effect prior to HB 2071, and would be exempt from the annual audit requirements.

Specifically, Section 10 of HB 2071 states:
(b) Subject to Subsections (c) and (d) of this section [10], **Sections 303.0421** and 303.0425, Local Government Code, as added by this Act, **apply only to a multifamily residential development that is *approved* on or after the effective date of this Act** by a public facility corporation or the sponsor of a public facility corporation, in accordance with Chapter 303, Local Government Code. A multifamily residential development that was ***approved*** by a public facility corporation . . . **before the effective date of this Act** is **governed by the law in effect on the date the development was approved** . . . and the former law is continued in effect for that purpose. (emphasis added)
Thus, Subsection (b) of Section 10 starts with a broad statement that any development approved by a PFC prior to June 18, 2023 is exempt from the new law and only subject to the law that was in effect at the time of such approval. However, Subsection (b) must be considered in light of Subsections (c) and (d), so the analysis must continue.
Subsection (c) of Section 10 goes on to clarify that:

(c) Subject to Subsection (d) of this section [10], **Section 303.0421(d)**, Local Government Code, as added by this Act, **applies only to an occupied multifamily residential development that is acquired by a public facility corporation on or after the effective date** of this Act. An ***occupied*** multifamily residential development that is ***acquired*** by a public facility **corporation before the effective date of this Act is governed by the law in effect on the date the development was acquired** by the public facility corporation, and the former law is continued in effect for that purpose. (emphasis added)

Thus, Subsection (c) presents the first carveout from the general exemption in Subsection (b) -- an occupied development (not new construction) that was approved prior to the Effective Date, but acquired by the PFC after the Effective Date. When read together, Subsections (b) and (c) make it clear that Sections 303.0421 and 303.0425 do not apply to any project that was both acquired and approved prior to the Effective Date.

Finally, Subsection (d) of Section 10 of HB 2071 says:
(d)(1) Section 303.0426, Local Government Code, as added by this Act, applies to all multifamily residential developments **to which Section 303.0421 applies** . . . (emphasis added)

As established in Subsections (b) and (c) of Section 10 of HB 2071, Section 303.0421 does not apply to developments both approved and acquired by a PFC prior to the Effective Date of the Act. Subsection (d) confirms that Section 303.0426 also does not apply to a development both approved and acquired by a PFC prior to the Effective Date. This conclusion in the saving provision is consistent with the plain language of Section 303.0426 of the Act, which states:

(b) A public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) **and to which Section 303.0421** applies must annually submit to the department and the chief appraiser of the appraisal district in which the development is located an audit report for a compliance audit . . . (emphasis added)
The above textual analysis is further supported by debate in the Texas House of Representatives. The Texas House of Representatives took its final record vote on May 25, 2023, with the proceedings recorded in writing in the Texas House Journal.[2] The topic of grandfathering and the impact on existing developments was addressed multiple times. Representatives wanted to ensure existing developments would not be impacted and were assured that developments approved and acquired prior to the Effective Date would be exempt.

First, Representative Walle expressed his support for HB 2071 and interacted with Representative Gervin-Hawkins:

REPRESENTATIVE GERVIN-HAWKINS: Representative Walle, you know this is a very, very important issue and the concern is what happens to the existing projects if this bill was to take effect immediately?

WALLE: As I understand it I think—the author could correct me if I'm wrong, but I think one of the issues is some of those folks would get grandfathered in to the existing PFCs.

GERVIN-HAWKINS: They will get grandfathered in.

WALLE: That's my understanding.

Page 5381. Representative Gervin-Hawkins continued on the record to express her concern about existing developments being required to comply with new TDHCA rules:

GERVIN-HAWKINS: So on the record they will get grandfathered in and those existing projects would not be damaged? It's my understanding, when I talked to the bill author, is that they would have to rework their numbers. Anybody who's ever done these type of projects knows that it's very difficult when you go in with a plan—you've got your performer and all your other numbers, your rent's established, and now to have to change all of that as well as deal with the TDHCA deadlines and timeline. I'm concerned about existing projects.

Page 5382.

Conversation then turned to one of the bill's authors, Representative Jetton. The author also confirmed that grandfathering would apply to all developments approved and acquired by a PFC prior to the Effective Date:

REPRESENTATIVE COLLIER: Representative Jetton, I said I was going to ask you one question, but another issue came up that was talked about—immediate effect. If this bill goes into immediate effect, is there a grandfather clause for current deals that are in the process of being completed or existing?

REPRESENTATIVE JETTON: The grandfather clause that's in this bill is any deal that is accepted or acquired prior to the enactment date takes on the current requirements for a PFC. I believe it's page 17 and 18.

Page 5383. This led to additional inquiry from Representative Gervin-Hawkins:

REPRESENTATIVE GERVIN-HAWKINS: Let's be clear. Current projects is the focus. On a current project, if it is in the pipeline, are they grandfathered in or not?

JETTON: If they are approved by the city council, county, or housing authority—whoever is approving those right now—if they are approved before the enactment date, then they are under the previous rules. If they are approved afterwards they would have to comply with the language that, as a body we are agreeing almost with super majority, there needs to be additional transparency and accountability around these programs.

Page 5384. Note that Representative Jetton, an author of HB 2071, specifically states that developments approved prior to the Effective Date "are under the previous rules." But if a development is "approved afterward," it would need to comply "with the language that . . . there needs to be additional transparency and accountability around these programs." This supports the argument that the "additional transparency and accountability" originating from Section 303.0426 is not required for the grandfathered developments. In all of this discussion around grandfathering, there was no indication that there was an exception to the grandfathering for the compliance monitoring requirements.

While the saving and transition provisions of HB 2071 can be difficult to read through, they are absolutely consistent with the legislative intent expressed by the House of Representatives on May 25, 2023. As an additional tool for this analysis, please see a graphical representation attached.

Legal Analysis of TDHCA Rulemaking

When TDHCA adopted the PFC Rule in February, it correctly reflected the saving and transition provisions in HB 2071, excluding grandfathered developments from the audit reporting requirements under the Act. *See* 10 TAC § 10.1103 ("the following reporting requirements apply to developments owned by a Public Facility Corporation (PFC), subject to Sections 303.0421 and 303.0425 of the Texas Local Government Code, and not eligible to be grandfathered under previous law pursuant to the criteria established by House Bill 2071, 88th Texas Legislative Session, effective June 18, 2023").

On July 15, 2024, TDHCA proposed amendments to 10 TAC § 10.1103 (the "**Proposed Rule**"), removing its reference to grandfathering. The Proposed Rule applies the reporting requirements to all developments regardless of when they were approved or acquired. Based on the textual analysis above, the Proposed Rule is contrary to the clear intent of the Texas Legislature and constitutes an unreasonable interpretation of the plain language and context in Chapter 303 and HB 2071. While Texas courts will show deference to a state agency's interpretation of a statute if it is a reasonable interpretation of an ambiguous statute, the plain language and context of the Act conflict with TDHCA's interpretation of the statute and contradict the clear intent of the Legislature when enacting HB 2071.

A. *Texas Court Review of Agency Rulemaking*

Under Texas Law, a state agency is generally entitled to deference for its interpretation of a statute that it is charged with enforcing, if certain conditions exist. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 621 (Tex. 2011). In *Railroad Commission of Texas v. Texas Citizens*, the Texas Supreme Court held that while it will generally uphold a state agency's interpretation if it is "reasonable," such deference is not owed if the agency's interpretation conflicts with the plain language and context of the controlling statute. *Id. at* 625. Where the language of a statute is plain and the intent of the Legislature is clear, courts will not hold up an agency's conflicting interpretation. *See Fiess v. State Farm Lloyds,* 202 S.W.3d 744, 747 (Tex. 2006).

B. The Plain Language of the Statute

As noted above, the Proposed Rule conflicts with the plain language and the unambiguous meaning of the Act and HB 2071. When reviewing the plain language of a statute, Texas courts look to both the text and context to determine the meaning and legislative intent. *See Hegar v. Health Care Serv. Corp.*, 652 S.W.3d 39 (Tex. 2022). It is the objective of the reviewers to "give effect to the Legislature's intent," and "enforce the plain meaning of the statutory text, informed by its context." *Id.* at 41. In *Health Care Service Corporation,* the Texas Supreme Court reviewed whether Chapter 222 of the Texas Insurance Code allowed the State Comptroller to impose taxes on insurance premiums received from sales on certain insurance policies. *Id.* The statute at issue contained specific exclusions and exceptions to the taxes imposed on insurance premiums. *Id.* The court found that the tax unambiguously applied to the premiums at issue, as these premiums were not included in the numerated exceptions to the tax. *See id.* at 44 ("[when] exclusions or exceptions to a statute are stated by the Legislature, the intent is usually clear that no others shall apply").

Section 10 of HB 2071 contains saving and transition provisions, excluding certain developments from the effect of Section 303.0421, which excludes them from the compliance and monitoring requirements under Section 303.0426. And similar to the statute in *Health Care Service Corporatio*n, the exemption of certain developments from the audit and reporting requirements is unambiguous. Specifically, Subsection (b) states that Section 303.0421, "appl[ies] only to a multifamily residential development that approved on or after the effective date of this Act by a public facility corporation or the sponsor of a public facility corporation, in accordance with Chapter 303, Local Government Code." And Subsection (d)(1) goes on to state that "notwithstanding any other provision in this section [10], "Section 303.0426, Local Government Code, as added by this Act, applies to all multifamily residential developments to which Section 303.0421 applies." The plain text of Subsection (b) explicitly classifies a group of developments to which Section 303.0421 applies, and Subsection (d) excludes this group from the requirements of Section 303.0426.

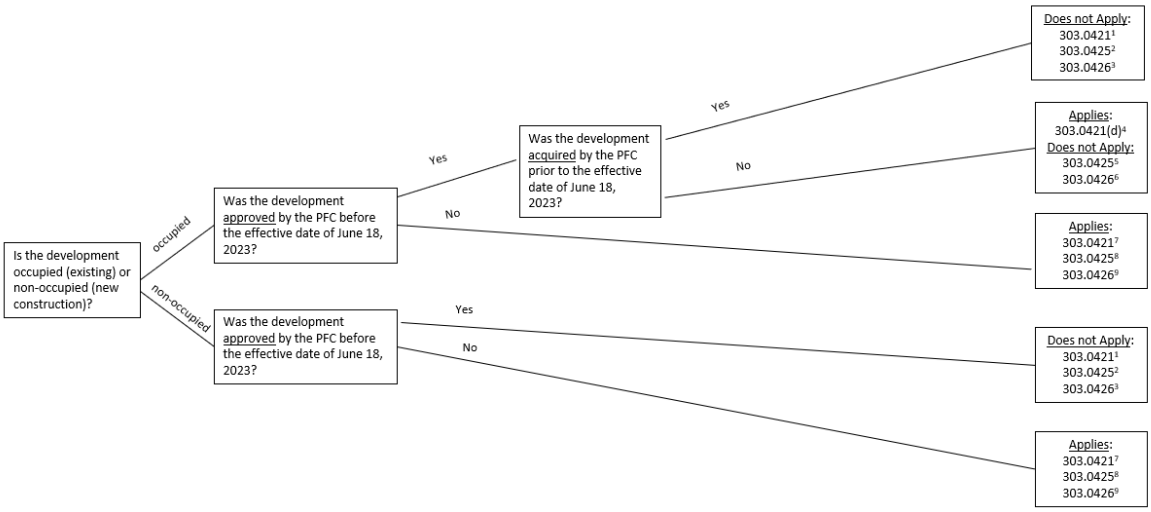
Moreover, the plain language of the Act reinforces that not all developments are subject to the requirements under Section 303.0426. Section 303.0426(b) of the Act states that "a public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) and to **which Section 303.0421 applies** must annually submit to the department […] an audit report for a compliance audit." Tex. Loc. Gov't Code § 303.0426(b) (emphasis added). Further, the Section goes on to specify that the purpose for the audit report requirement is to "determine whether the public facility user is in compliance with Sections 303.0421…" *Id.* at 303.0426(b)(1). As established in the saving and transition provisions, grandfathered developments are not subject to Section 303.0421, so there would be no reason to ensure compliance with this section by requiring an audit under Section 303.0426.

It is clear from numerous references in the text that the Legislature intended for the audit requirements under Section 303.0426 to apply only to developments to which Section 303.0421 also applies. Both the enacted bill, with its saving and transition provisions, and the Act attempt to exclude certain developments from the audit requirements based on the applicability of Section 303.0421. This was the initial interpretation of TDHCA. In the current version of 10 TAC § 10.1103, the agency references developments that are "eligible to be grandfathered

under previous law pursuant to the criteria established by House Bill 2071," to exclude them from the audit requirements, as intended by the Legislature. There is no other portion of the bill that could apply to this consideration, other than Section 10, which includes the exemption of developments approved and acquired prior to the Effective Date. It is unclear why, in the Proposed Rule, TDHCA has decided to reverse its initial understanding of the statute and ignore the plain language of HB 2071.

For all the reasons described above, Texas case law supports a conclusion that the Proposed Rule would exceed TDHCA's authority for rulemaking, and it should be withdrawn.

TEXAS LEGISLATURE, 88TH REGULAR SESSION
HB 2071
ANALYSIS OF SAVING AND TRANSITION PROVISIONS



Endnotes

1. HB2071 Section 10(b) and (c), read together, state Section 303.0421 does not apply to a development approved and acquired before the Effective Date.
2. HB 2071 Section 10(b) and (c), read together, state Section 303.0425 does not apply to a development approved and acquired before the Effective Date. Further, Section 303.0421(b) requires compliance with Section 303.0425. If Section 303.0421 does not apply, per endnote 1 above, then Section 303.0425 does not apply.
3. HB 2071 Section 10(d) states Section 303.0426 does not apply unless Section 303.0421 applies. If Section 303.0421 does not apply, per endnote 1 above, then Section 303.0426 does not apply.
4. HB 2071 Section 10(c) states that an occupied development approved before the Effective Date but acquired after the Effective Date must comply with Section 303.0421(d), which establishes a deadline for an occupied development to achieve the affordability restrictions. None of the other provisions of Section 303.0421 apply. This is a natural transition provision to exempt a deal "in progress" from the new law, while requiring compliance with the affordability deadline.
5. While Section 303.0421(d) applies, Section 303.0421(b) does not apply. Therefore, Section 303.0425 does not apply, as described in endnotes 1 and 2 above. This is a natural transition provision to exempt a deal that is "in progress" from the affects of the new law.
6. HB 2071 Section 10(d) states Section 303.0426 does not apply unless Section 303.0421 applies. Section 303.0421 does not apply in full and it would be inappropriate to perform compliance monitoring simply for the one-time occurrence associated with Section 303.0421(d). This is a natural transition provision to exempt a deal that is "in progress" from the effects of the new law.

7. HB 2071 Section 10(b) clearly indicates that a development approved after the Effective Date is subject to Section 303.0421.
8. HB 2071 Section 10(b) clearly indicates that a development approved after the Effective Date is subject to Section 303.0425. Further, Section 303.0421(b) requires compliance with Section 303.0425. If Section 303.0421(b) applies, per endnote 7 above, then Section 303.0425 applies.
9. Section 303.0426(b) states that all developments subject to Section 303.0421 must comply with the compliance and monitoring provisions of Section 303.0426. If Section 303.0421 applies, per endnote 7 above, then Section 303.0426 applies.

If TDHCA chooses to proceed with revision of the PFC Rule, it should revise the language to allow the Executive Director to extend the December 1 deadline for good cause shown.

If TDHCA decides to proceed with the Proposed Rule, by the time it is approved and published in the Texas Register, it will be effective merely weeks before the December 1 deadline it is trying to impose. Implementation of the Proposed Rule would require hundreds of developments to obtain and pay for an audit report on a very short timeframe. TDHCA must keep in mind that these developments, closed and operational over the last 7 years or so, will have little to no uniformity in their documentation. Some may have Regulatory Agreements; some may not. They will have different affordability requirements, different lease-up requirements, and different enforcement provisions. Many participants will not have prior experience with affordable housing. This is a large undertaking with a significant learning curve for all involved. Currently, TDHCA has only seven (7) approved auditors listed on its website. Other auditors may be available, but there is a legitimate concern that these auditors may not have the capacity to take on hundreds of audit reports. Moreover, it should be considered that, if the December 1, 2024 deadline is retained, the information submitted will be for the calendar year 2023 and will be stale for any meaningful evaluative purposes. We recommend one of two alternatives for § 10.1103(1):

- Allow the Executive Director to administratively extend the December 1, 2024 deadline for good cause shown.
- Given all of the above, it is reasonable for TDHCA to implement the audit reporting for grandfathered properties for the 2024 calendar year, making reports for these projects due June 1, 2025. This would provide more current data and would allow the participants to work through implementation issues without imposing undue burden or risk on TDHCA, the PFCs, or the other participants.

Thank you,

Pete Alanis
Executive Director
San Antonio Housing Trust
8200 W IH-10 Frontage Rd
San Antonio, TX 78230
210-735-2772 ***x402***

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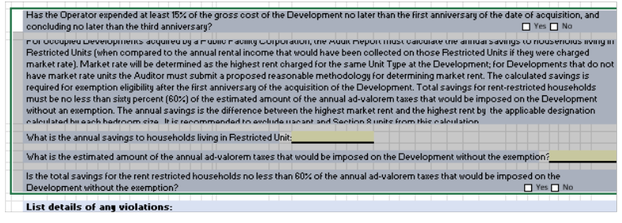
[1] Tex. HB 2071, 88th Leg., R.S. (2023) (hereafter referred to as "**HB 2071**").

[2] Texas House of Representatives Journal, 88th Legislature, Regular Session, May 25, 2023.

Public Facility Corporation Compliance Monitoring

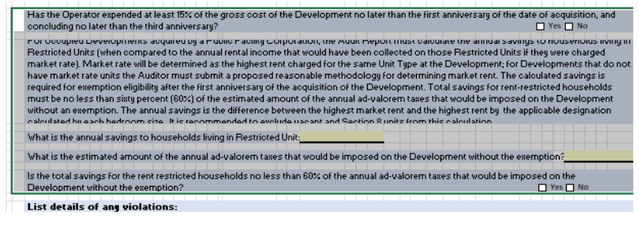
		Public Comment Submission
Purpose 10.1101	Clarification	Owned -
		Owned is a broad term when % are involved.
		Sponsored - (SAHT Sponsor?)
		Also difficult due to layered funding
Definitions 10.1102		
	Clarification	
	(2)	COS or Equivalent - What is equivalent BOS Blended Occupancy Specialist TCS - Tax Credit Specialist?
		Do third party Auditor's need proof of certain business credentials?
	(6)	Operated by an Operator
		Clarification of Operator
	(10)	Ownership Interest is a broad term need clarification
Reporting Requirements 10.1103		
	(1)	Public Facility User (is who) submits Audit to pfc.moniotring / TDHCA - Just the audit sheet or attach IC as well. What Tabs would this include
		Operator (is who) to complete contact form? What Tabs would this include?
		What if communities do not utilized IC. Rather they have some other forms such as Exhibit D's
	(10)	IN DEFINITIONS 10.1102 States "PF User" & "Operator" are interchangeable, However under Reporting Requirements 10.1103 they are threated as separate. "User" to submit audits "Operator" to submit contact information?
	Just a Thought	Mabey a two part process would be more feasible for all
		Step #1 - Identify the entity to submit Development & Contact information & Identify Tabs. (Ex: Tab 1-Tab 4)
		Step #2 - Identify of who will submit file audit documentation identify Tabs. (Ex: Tab 5-Tab 9, to include back-up Income Certification docs)
Audit Requirements 10.1104		
Income & Rent Requirements 10.1105	(b)	Why limited to HUD Income & Rent limits
	(c)	Regulatory Agreements may be based on HUD or TDHCA and /or Novogradac Rent & Income tools. Depends on what was utilized to create MOU/Proforma
Penalties 10.1106		
Options For Review 10.1107	(a), (b) & (c)	Is there a certain process, email or coordinator to initiate any of these options
		What is the process to request these options?
TABS		
Tab 1	Development Information	Who is operator (clarification)
Tab 2	Responsible Parties	Sponsor (Clarification) Governing body (Org Chart?)
Tab 3	Auditor Information	1. What also qualifies / clarification of credentials 2. (suggest) Affidavit of Ownership and no affiliation statement.
Tab 4	Development Information	
Tab 5	Utilities	What utilities does the Operator pay? Potential alternate description - Property, owner, management
Tab 6	Fees	
Tab 7	Unit & Occupancy	Confusing - where do you list Designation? 30% , 50% etc…. management may see unit type as A1 or 1x1. Would it be listed under # of restricted units? Need clarification or instructions on section below - how to calculate per TDHCA.
	Unit & Occupancy	 Has the Operator expended at least 15% of the gross cost of the Development no later than the first anniversary of the date of acquisition, and concluding no later than the third anniversarg? ☐ Yes ☐ No For Occupied Developments acquired by a Public Facility Corporation, the Audit Report must calculate the annual savings to households living in Restricted Units (when compared to the annual rental income that would have been collected on those Restricted Units if they were charged market rate). Market rate will be determined as the highest rent charged for the same Unit Type at the Development; for Developments that do not have market rate units the Auditor must submit a proposed reasonable methodology for determining market rent. The calculated savings is required for exemption eligibility after the first anniversary of the acquisition of the Development. Total savings for rent-restricted households must be no less than sixty percent (60%) of the estimated amount of the annual ad-valorem taxes that would be imposed on the Development without an exemption. The annual savings is the difference between the highest market rent and the highest rent by the applicable designation calculated by each bedroom size. It is recommended to exclude vacant and Section 8 units from this calculation. What is the annual savings to households living in Restricted Unit: _____ What is the estimated amount of the annual ad-valorem taxes that would be imposed on the Development without the exemption? _____ Is the total savings for the rent restricted households no less than 60% of the annual ad-valorem taxes that would be imposed on the Development without the exemption? ☐ Yes ☐ No List details of ang violations:
		This section is problematic, with expectation that on-site staff or management will be able to complete this information without detailed instruction or guidance. Or where to pull information from past approval period / initial evaluation reports.
Tab 8	Marketing & LURA	Is there any required proof of Marketing? Similar to AFHM
Tab 9	Household file check sheet	Is the resident (s) Income Certification to be attached with this report? Does not say to include any and all IC listed on the Audit.
Auditors List		How do vendors get on the Auditors List? Is there an approval process and what would that be?

From: Jessica Kuehne
To: Wendy Quackenbush
Subject: FW: Public Comment PFC Monitoring
Date: Monday, September 9, 2024 5:05:30 PM
Attachments: image001.png
Copy of SAHT PFC monitor Public Comment.pdf

> You don't often get email from jessicakuehne@saht.org. Learn why this is important

Jessica Kuehne
Director of Asset Management
San Antonio Housing Trust Foundation
8200 IH 10 West Ste:501
San Antonio, TX. 78230
(210) 735-2772 ext 406
(210) 542-0536 cell
www.sahousingtrust.org

Public Facility Corporation Compliance Monitoring

		Public Comment Submission
Purpose 10.1101	Clarification	Owned -
		Owned is a broad term when % are involved.
		Sponsored - (SAHT Sponsor?)
		Also difficult due to layered funding
Definitions 10.1102		
	Clarification	
	(2)	COS or Equivalent - What is equivalent BOS Blended Occupancy Specialist TCS - Tax Credit Specialist?
		Do third party Auditor's need proof of certain business credentials?
	(6)	Operated by an Operator
		Clarification of Operator
	(10)	Ownership Interest is a broad term need clarification
Reporting Requirements 10.1103		
	(1)	Public Facility User (is who) submits Audit to pfc.moniotring / TDHCA - Just the audit sheet or attach IC as well. What Tabs would this include
		Operator (is who) to complete contact form? What Tabs would this include?
		What if communities do not utilized IC. Rather they have some other forms such as Exhibit D's
	(10)	IN DEFINITIONS 10.1102 States "PF User" & "Operator" are interchangeable, However under Reporting Requirements 10.1103 they are threated as separate. "User" to submit audits "Operator" to submit contact information?
	Just a Thought	Mabey a two part process would be more feasible for all
		Step #1 - Identify the entity to submit Development & Contact information & Identify Tabs. (Ex: Tab 1-Tab 4)
		Step #2 - Identify of who will submit file audit documentation identify Tabs. (Ex: Tab 5-Tab 9, to include back-up Income Certification docs)
Audit Requirements 10.1104		
Income & Rent Requirements 10.1105	(b)	Why limited to HUD Income & Rent limits
	(c)	Regulatory Agreements may be based on HUD or TDHCA and /or Novogradac Rent & Income tools. Depends on what was utilized to create MOU/Proforma
Penalties 10.1106		
Options For Review 10.1107	(a), (b) & (c)	Is there a certain process, email or coordinator to initiate any of these options
		What is the process to request these options?
TABS		
Tab 1	Development Information	Who is operator (clarification)
Tab 2	Responsible Parties	Sponsor (Clarification) Governing body (Org Chart?)
Tab 3	Auditor Information	1. What also qualifies / clarification of credentials 2. (suggest) Affidavit of Ownership and no affiliation statement.
Tab 4	Development Information	
Tab 5	Utilities	What utilities does the Operator pay? Potential alternate description - Property, owner, management
Tab 6	Fees	
Tab 7	Unit & Occupancy	Confusing - where do you list Designation? 30% , 50% etc.... management may see unit type as A1 or 1x1. Would it be listed under # of restricted units? Need clarification or instructions on section below - how to calculate per TDHCA.
	Unit & Occupancy	 Has the Operator expended at least 15% of the gross cost of the Development no later than the first anniversary of the date of acquisition, and concluding no later than the third anniversary? ☐ Yes ☐ No For Occupied Developments acquired by a Public Facility Corporation, the Audit Report must calculate the annual savings to households living in Restricted Units (when compared to the annual rental income that would have been collected on those Restricted Units if they were charged market rate). Market rate will be determined as the highest rent charged for the same Unit Type at the Development; for Developments that do not have market rate units the Auditor must submit a proposed reasonable methodology for determining market rent. The calculated savings is required for exemption eligibility after the first anniversary of the acquisition of the Development. Total savings for rent-restricted households must be no less than sixty percent (60%) of the estimated amount of the annual ad-valorem taxes that would be imposed on the Development without an exemption. The annual savings is the difference between the highest market rent and the highest rent by the applicable designation calculated by each bedroom size. It is recommended to exclude vacant and Section 8 units from this calculation. What is the annual savings to households living in Restricted Unit: _____ What is the estimated amount of the annual ad-valorem taxes that would be imposed on the Development without the exemption? _____ Is the total savings for the rent restricted households no less than 60% of the annual ad-valorem taxes that would be imposed on the Development without the exemption? ☐ Yes ☐ No List details of any violations:
		This section is problematic, with expectation that on-site staff or management will be able to complete this information without detailed instruction or guidance. Or where to pull information from past approval period / initial evaluation reports.
Tab 8	Marketing & LURA	Is there any required proof of Marketing? Similar to AFHM
Tab 9	Household file check sheet	Is the resident (s) Income Certification to be attached with this report? Does not say to include any and all IC listed on the Audit.
Auditors List		How do vendors get on the Auditors List? Is there an approval process and what would that be?

OPPORTUNITY HOME SAN ANTONIO

A COMMUNITY OF POSSIBILITIES

September 13, 2024

Via Electronic Mail

Ms. Wendy Quackenbush
Director of Compliance Monitoring
Texas Department of Housing and Community Affairs
211 East 11th Street
Austin, Texas 78701

Re: Public Comment on Proposed Rule Change – 10 Texas Administrative Code, Part 1, Chapter 10, Uniform Multifamily Rules, Subchapter I, Public Facility Corporation Compliance Monitoring Reporting Requirements, §10.1103

Dear Ms. Quackenbush:

Effective February 26, 2024, the Texas Department of Housing and Community Affairs ("**TDHCA**") adopted new rules under 10 Texas Administrative Code, Part 1, Chapter 10, Subchapter I (the "**PFC Rule**"). TDHCA now proposes to revise §10.1103 of the PFC Rule to impose a different requirement than was set forth when the PFC Rule was originally adopted. We have participated in numerous projects that will be affected by these provisions and submit the following comments to TDHCA's proposed revision of the PFC Rule. Each comment is elaborated upon in the attachments to this letter.

- TDHCA's change to the PFC Rule clearly contradicts the plain language of the legislative action from which it is derived. Therefore, the proposed changes to the PFC Rule should be withdrawn. See **Attachment A**.

- If TDHCA chooses to proceed with revision of the PFC Rule, it should allow the Executive Director to extend the December 1 deadline to June 1, 2025. See **Attachment B**.

- However, I am in agreement that the TDHCA approves the audit and compliance firms to ensure independence. There are currently seven qualified firms. Compliance is very important and they should not be affiliated with for-profit developers or law firms who have very little compliance history or staff. We have noticed at least one law firm writing into the partnership agreements that their 'independent' compliance company will be doing compliance as a new

income stream. Having the TDHCA monitor the qualifications of the audit and compliance firms will be better for the industry.

We appreciate the opportunity to present these comments and are happy to address any questions.

Sincerely,

Timothy Alcott
Executive Vice President
Development and General Counsel

ATTACHMENT A

TDHCA's change to the PFC Rule clearly contradicts the plain language of the legislative action from which it is derived. Therefore, the proposed changes to the PFC Rule should be withdrawn.

TEXTUAL ANALYSIS OF HB 2071

During its most recent session, the 88th Texas Legislature passed House Bill 2071[1], which took effect on June 18, 2023 (the "**Effective Date**"). HB 2071 substantially revised the requirements for a public facility corporation (a "**PFC**") owning affordable housing under Chapter 303 of the Texas Local Government Code (the "**Act**"). The previous law in Section 303.042 of the Act was provided a tax exemption for affordable housing owned by a PFC, but had limited guidance on the parameters for the housing. Significant provisions added to the Act by HB 2071 included:

- Section 303.0421 to describe the kinds of developments to which the new law would apply, including affordability requirements, public notification and approval requirements, and the term for which a property tax exemption would be available.
- Section 303.0425 to provide additional affordability requirements and tenant protection.
- Section 303.0426 to create a compliance and monitoring function for TDHCA, including authority to establish rules to implement this new function.
- To address public concerns, occupied (existing) developments were treated differently than unoccupied (new construction) developments.

Notably, HB 2071 includes saving and transition provisions. As described in the Texas Legislative Council Drafting Manual dated January 2023:

> Saving and transition provisions help to minimize the disruption and inequities that often attend the taking effect of legislation. A saving provision "saves" from the application of a law certain conduct or legal relationships that occurred before or existed on the effective date of the law. . . . Transition provisions provide for the orderly implementation of legislation, helping to avoid the shock that can result from an abrupt change in the law. *See Section 3.12(a) of the Manual.*

The saving and transition provisions, in Section 10 of the bill, ensured that developments approved and acquired prior to the Effective Date would be "grandfathered," meaning they would continue to be governed by the law in effect prior to HB 2071, and would be exempt from the annual audit requirements.

---

[1] Tex. HB 2071, 88th Leg., R.S. (2023) (hereafter referred to as "**HB 2071**").

Specifically, Section 10 of HB 2071 states:

> (b) Subject to Subsections (c) and (d) of this section [10], **Sections 303.0421** and 303.0425, Local Government Code, as added by this Act, **apply only to a multifamily residential development that is *approved* on or after the effective date of this Act** by a public facility corporation or the sponsor of a public facility corporation, in accordance with Chapter 303, Local Government Code. A multifamily residential development that was ***approved*** by a public facility corporation . . . **before the effective date of this Act** is **governed by the law in effect on the date the development was approved** . . . and the former law is continued in effect for that purpose. (emphasis added)

Thus, Subsection (b) of Section 10 starts with a broad statement that any development approved by a PFC prior to June 18, 2023 is exempt from the new law and only subject to the law that was in effect at the time of such approval. However, Subsection (b) must be considered in light of Subsections (c) and (d), so the analysis must continue.

Subsection (c) of Section 10 goes on to clarify that:

> (c) Subject to Subsection (d) of this section [10], **Section 303.0421(d)**, Local Government Code, as added by this Act, **applies only to an occupied multifamily residential development that is acquired by a public facility corporation on or after the effective date** of this Act. An ***occupied*** multifamily residential development that is ***acquired*** by a public facility **corporation before the effective date of this Act is governed by the law in effect on the date the development was acquired** by the public facility corporation, and the former law is continued in effect for that purpose. (emphasis added)

Thus, Subsection (c) presents the first carveout from the general exemption in Subsection (b) -- an occupied development (not new construction) that was approved prior to the Effective Date, but acquired by the PFC after the Effective Date. When read together, Subsections (b) and (c) make it clear that Sections 303.0421 and 303.0425 do not apply to any project that was both acquired and approved prior to the Effective Date.

Finally, Subsection (d) of Section 10 of HB 2071 says:

> (d)(1) Section 303.0426, Local Government Code, as added by this Act, applies to all multifamily residential developments **to which Section 303.0421 applies** . . . (emphasis added)

As established in Subsections (b) and (c) of Section 10 of HB 2071, Section 303.0421 does not apply to developments both approved and acquired by a PFC prior to the Effective Date of the

Act. Subsection (d) confirms that Section 303.0426 also does not apply to a development both approved and acquired by a PFC prior to the Effective Date. This conclusion in the saving provision is consistent with the plain language of Section 303.0426 of the Act, which states:

> (b) A public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) **and to which Section 303.0421** applies must annually submit to the department and the chief appraiser of the appraisal district in which the development is located an audit report for a compliance audit . . . (emphasis added)

The above textual analysis is further supported by debate in the Texas House of Representatives. The Texas House of Representatives took its final record vote on May 25, 2023, with the proceedings recorded in writing in the Texas House Journal.[2] The topic of grandfathering and the impact on existing developments was addressed multiple times. Representatives wanted to ensure existing developments would not be impacted and were assured that developments approved and acquired prior to the Effective Date would be exempt. First, Representative Walle expressed his support for HB 2071 and interacted with Representative Gervin-Hawkins:

> REPRESENTATIVE GERVIN-HAWKINS: Representative Walle, you know this is a very, very important issue and the concern is what happens to the existing projects if this bill was to take effect immediately?
>
> WALLE: As I understand it I think—the author could correct me if I'm wrong, but I think one of the issues is some of those folks would get grandfathered in to the existing PFCs.
>
> GERVIN-HAWKINS: They will get grandfathered in.
>
> WALLE: That's my understanding.

Page 5381. Representative Gervin-Hawkins continued on the record to express her concern about existing developments being required to comply with new TDHCA rules:

> GERVIN-HAWKINS: So on the record they will get grandfathered in and those existing projects would not be damaged? It's my understanding, when I talked to the bill author, is that they would have to rework their numbers. Anybody who's ever done these type of projects knows that it's very difficult when you go in with a plan—you've got your performer and all your other numbers, your rent's established, and now to have to change all of that as well as deal with the TDHCA deadlines and timeline. I'm concerned about existing projects.

Page 5382.

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[2] Texas House of Representatives Journal, 88th Legislature, Regular Session, May 25, 2023.

Conversation then turned to one of the bill's authors, Representative Jetton. The author also confirmed that grandfathering would apply to all developments approved and acquired by a PFC prior to the Effective Date:

> REPRESENTATIVE COLLIER: Representative Jetton, I said I was going to ask you one question, but another issue came up that was talked about—immediate effect. If this bill goes into immediate effect, is there a grandfather clause for current deals that are in the process of being completed or existing?
>
> REPRESENTATIVE JETTON: The grandfather clause that's in this bill is any deal that is accepted or acquired prior to the enactment date takes on the current requirements for a PFC. I believe it's page 17 and 18.

Page 5383. This led to additional inquiry from Representative Gervin-Hawkins:

> REPRESENTATIVE GERVIN-HAWKINS: Let's be clear. Current projects is the focus. On a current project, if it is in the pipeline, are they grandfathered in or not?
>
> JETTON: If they are approved by the city council, county, or housing authority—whoever is approving those right now—if they are approved before the enactment date, then they are under the previous rules. If they are approved afterwards they would have to comply with the language that, as a body we are agreeing almost with super majority, there needs to be additional transparency and accountability around these programs.

Page 5384. Note that Representative Jetton, an author of HB 2071, specifically states that developments approved prior to the Effective Date "are under the previous rules." But if a development is "approved afterward," it would need to comply "with the language that . . . there needs to be additional transparency and accountability around these programs." This supports the argument that the "additional transparency and accountability" originating from Section 303.0426 is not required for the grandfathered developments. In all of this discussion around grandfathering, there was no indication that there was an exception to the grandfathering for the compliance monitoring requirements.

While the saving and transition provisions of HB 2071 can be difficult to read through, they are absolutely consistent with the legislative intent expressed by the House of Representatives on May 25, 2023. As an additional tool for this analysis, please see a graphical representation attached.

LEGAL ANALYSIS OF TDHCA RULEMAKING

When TDHCA adopted the PFC Rule in February, it correctly reflected the saving and transition provisions in HB 2071, excluding grandfathered developments from the audit reporting

requirements under the Act. *See* 10 TAC § 10.1103 ("the following reporting requirements apply to developments owned by a Public Facility Corporation (PFC), subject to Sections 303.0421 and 303.0425 of the Texas Local Government Code, and not eligible to be grandfathered under previous law pursuant to the criteria established by House Bill 2071, 88th Texas Legislative Session, effective June 18, 2023").

On July 15, 2024, TDHCA proposed amendments to 10 TAC § 10.1103 (the "**Proposed Rule**"), removing its reference to grandfathering. The Proposed Rule applies the reporting requirements to all developments regardless of when they were approved or acquired. Based on the textual analysis above, the Proposed Rule is contrary to the clear intent of the Texas Legislature and constitutes an unreasonable interpretation of the plain language and context in Chapter 303 and HB 2071. While Texas courts will show deference to a state agency's interpretation of a statute if it is a reasonable interpretation of an ambiguous statute, the plain language and context of the Act conflict with TDHCA's interpretation of the statute and contradict the clear intent of the Legislature when enacting HB 2071.

A. Texas Court Review of Agency Rulemaking

Under Texas Law, a state agency is generally entitled to deference for its interpretation of a statute that it is charged with enforcing, if certain conditions exist. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 621 (Tex. 2011). In *Railroad Commission of Texas v. Texas Citizens*, the Texas Supreme Court held that while it will generally uphold a state agency's interpretation if it is "reasonable," such deference is not owed if the agency's interpretation conflicts with the plain language and context of the controlling statute. *Id. at* 625. Where the language of a statute is plain and the intent of the Legislature is clear, courts will not hold up an agency's conflicting interpretation. *See Fiess v. State Farm Lloyds,* 202 S.W.3d 744, 747 (Tex. 2006).

B. The Plain Language of the Statute

As noted above, the Proposed Rule conflicts with the plain language and the unambiguous meaning of the Act and HB 2071. When reviewing the plain language of a statute, Texas courts look to both the text and context to determine the meaning and legislative intent. *See Hegar v. Health Care Serv. Corp.*, 652 S.W.3d 39 (Tex. 2022). It is the objective of the reviewers to "give effect to the Legislature's intent," and "enforce the plain meaning of the statutory text, informed by its context." *Id.* at 41. In *Health Care Service Corporation,* the Texas Supreme Court reviewed whether Chapter 222 of the Texas Insurance Code allowed the State Comptroller to impose taxes on insurance premiums received from sales on certain insurance policies. *Id.* The statute at issue contained specific exclusions and exceptions to the taxes imposed on insurance premiums. *Id.* The court found that the tax unambiguously applied to the premiums at issue, as these premiums were not included in the numerated exceptions to the tax.

See id. at 44 ("[when] exclusions or exceptions to a statute are stated by the Legislature, the intent is usually clear that no others shall apply").

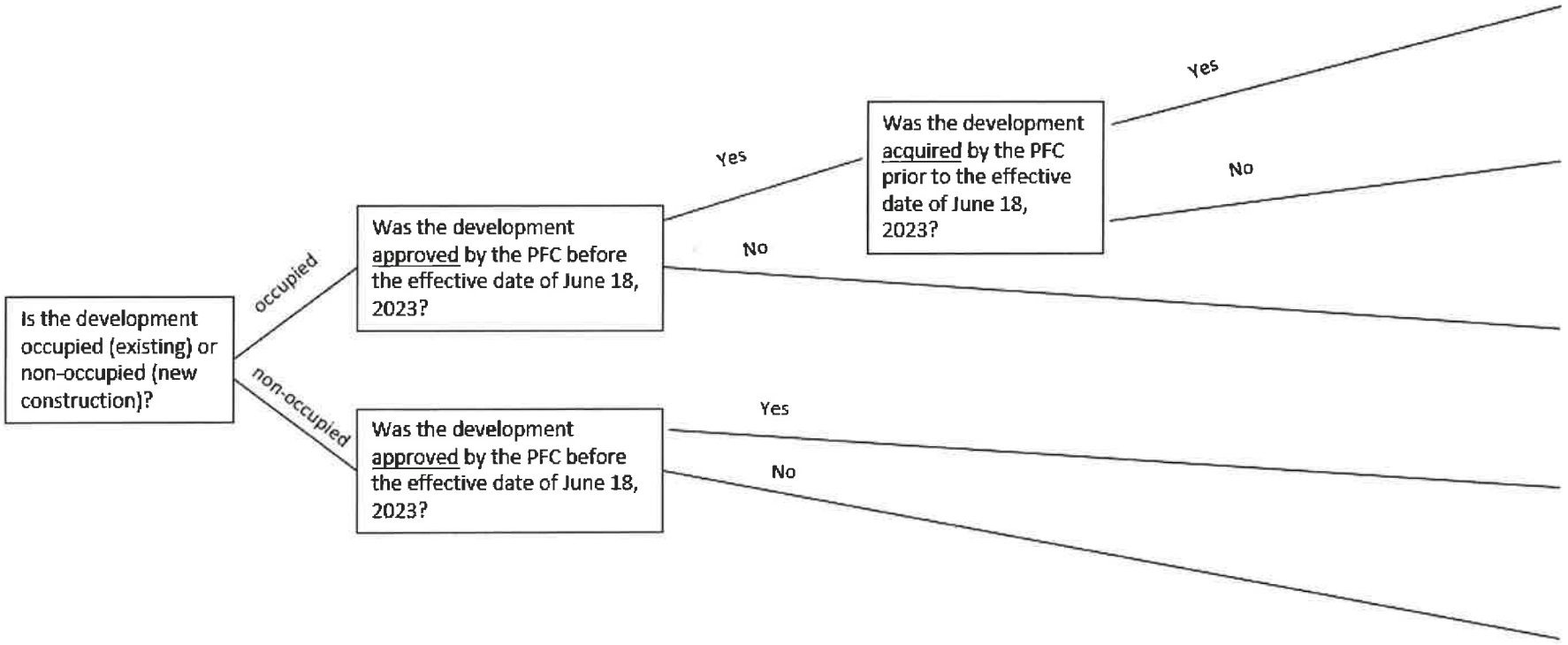
Section 10 of HB 2071 contains saving and transition provisions, excluding certain developments from the effect of Section 303.0421, which excludes them from the compliance and monitoring requirements under Section 303.0426. And similar to the statute in *Health Care Service Corporation*, the exemption of certain developments from the audit and reporting requirements is unambiguous. Specifically, Subsection (b) states that Section 303.0421, "appl[ies] only to a multifamily residential development that approved on or after the effective date of this Act by a public facility corporation or the sponsor of a public facility corporation, in accordance with Chapter 303, Local Government Code." And Subsection (d)(1) goes on to state that "notwithstanding any other provision in this section [10], "Section 303.0426, Local Government Code, as added by this Act, applies to all multifamily residential developments to which Section 303.0421 applies." The plain text of Subsection (b) explicitly classifies a group of developments to which Section 303.0421 applies, and Subsection (d) excludes this group from the requirements of Section 303.0426.

Moreover, the plain language of the Act reinforces that not all developments are subject to the requirements under Section 303.0426. Section 303.0426(b) of the Act states that "a public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) and to **which Section 303.0421 applies** must annually submit to the department [...] an audit report for a compliance audit." TEX. LOC. GOV'T CODE § 303.0426(b) (emphasis added). Further, the Section goes on to specify that the purpose for the audit report requirement is to "determine whether the public facility user is in compliance with Sections 303.0421..." *Id.* at 303.0426(b)(1). As established in the saving and transition provisions, grandfathered developments are not subject to Section 303.0421, so there would be no reason to ensure compliance with this section by requiring an audit under Section 303.0426.

It is clear from numerous references in the text that the Legislature intended for the audit requirements under Section 303.0426 to apply only to developments to which Section 303.0421 also applies. Both the enacted bill, with its saving and transition provisions, and the Act attempt to exclude certain developments from the audit requirements based on the applicability of Section 303.0421. This was the initial interpretation of TDHCA. In the current version of 10 TAC § 10.1103, the agency references developments that are "eligible to be grandfathered under previous law pursuant to the criteria established by House Bill 2071," to exclude them from the audit requirements, as intended by the Legislature. There is no other portion of the bill that could apply to this consideration, other than Section 10, which includes the exemption of developments approved and acquired prior to the Effective Date. It is unclear why, in the Proposed Rule, TDHCA has decided to reverse its initial understanding of the statute and ignore the plain language of HB 2071.

For all the reasons described above, Texas case law supports a conclusion that the Proposed Rule would exceed TDHCA's authority for rulemaking, and it should be withdrawn.

TEXAS LEGISLATURE, 88TH REGULAR SESSION
HB 2071
ANALYSIS OF SAVING AND TRANSITION PROVISIONS



Endnotes

1. HB2071 Section 10(b) and (c), read together, state Section 303.0421 does not apply to a deve approved and acquired before the Effective Date.

2. HB 2071 Section 10(b) and (c), read together, state Section 303.0425 does not apply to a dev approved and acquired before the Effective Date. Further, Section 303.0421(b) requires com Section 303.0425. If Section 303.0421 does not apply, per endnote 1 above, then Section 303 not apply.

3. HB 2071 Section 10(d) states Section 303.0426 does not apply unless Section 303.0421 applie 303.0421 does not apply, per endnote 1 above, then Section 303.0426 does not apply.

4. HB 2071 Section 10(c) states that an occupied development approved before the Effective Da acquired after the Effective Date must comply with Section 303.0421(d), which establishes a an occupied development to achieve the affordability restrictions. None of the other provisio 303.0421 apply. This is a natural transition provision to exempt a deal "in progress" from the while requiring compliance with the affordability deadline.

5. While Section 303.0421(d) applies, Section 303.0421(b) does not apply. Therefore, Section 30 not apply, as described in endnotes 1 and 2 above. This is a natural transition provision to exe that is "in progress" from the affects of the new law.

6. HB 2071 Section 10(d) states Section 303.0426 does not apply unless Section 303.0421 applie 303.0421 does not apply in full and it would be inappropriate to perform compliance monito for the one-time occurrence associated with Section 303.0421(d). This is a natural transition exempt a deal that is "in progress" from the effects of the new law.

7. HB 2071 Section 10(b) clearly indicates that a development approved after the Effective Da subject to Section 303.0421.

8. HB 2071 Section 10(b) clearly indicates that a development approved after the Effective Da subject to Section 303.0425. Further, Section 303.0421(b) requires compliance with Sectio 303.0425. If Section 303.0421(b) applies, per endnote 7 above, then Section 303.0425 app

9. Section 303.0426(b) states that all developments subject to Section 303.0421 must comply with the compliance and monitoring provisions of Section 303.0426. If Section 303.0421 applies, per endnote 7 above, then Section 303.0426 applies.

ATTACHMENT B

If TDHCA chooses to proceed with revision of the PFC Rule, it should revise the language to allow the Executive Director to extend the December 1 deadline for good cause shown.

If TDHCA decides to proceed with the Proposed Rule, by the time it is approved and published in the Texas Register, it will be effective merely weeks before the December 1 deadline it is trying to impose. Implementation of the Proposed Rule would require hundreds of developments to obtain and pay for an audit report on a very short timeframe. TDHCA must keep in mind that these developments, closed and operational over the last 7 years or so, will have little to no uniformity in their documentation. Some may have Regulatory Agreements; some may not. They will have different affordability requirements, different lease-up requirements, and different enforcement provisions. Many participants will not have prior experience with affordable housing. This is a large undertaking with a significant learning curve for all involved. Currently, TDHCA has only seven (7) approved auditors listed on its website. Other auditors may be available, but there is a legitimate concern that these auditors may not have the capacity to take on hundreds of audit reports. Moreover, it should be considered that, if the December 1, 2024 deadline is retained, the information submitted will be for the calendar year 2023 and will be stale for any meaningful evaluative purposes. We recommend one of two alternatives for § 10.1103(1):

- Allow the Executive Director to administratively extend the December 1, 2024 deadline for good cause shown.

- Given all of the above, it is reasonable for TDHCA to implement the audit reporting for grandfathered properties for the 2024 calendar year, making reports for these projects due June 1, 2025. This would provide more current data and would allow the participants to work through implementation issues without imposing undue burden or risk on TDHCA, the PFCs, or the other participants.

ATTACHMENT C

COATS | ROSE
A PROFESSIONAL CORPORATION

BARRY J. PALMER

bpalmer@coatsrose.com
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(713) 890-394

September 6, 2024

Texas Department of Housing and Community Affairs
Attn: Wendy Quackenbush
P.O. Box 13941
Austin, Texas 78711-3941
Email: wendy.quackenbush@tdhca.texas.gov

Re: Public Comment on Proposed Rule Change – 10 Texas Administrative Code, Part 1, Chapter 10, Uniform Multifamily Rules, Subchapter I, Public Facility Corporation Compliance Monitoring Reporting Requirements, §10.1103

Dear Ms. Quackenbush:

Effective February 26, 2024, the Texas Department of Housing and Community Affairs ("**TDHCA**") adopted new rules under 10 Texas Administrative Code, Part 1, Chapter 10, Subchapter I (the "**PFC Rule**"). TDHCA now proposes to revise §10.1103 of the PFC Rule to impose a different requirement than was set forth when the PFC Rule was originally adopted. Our firm is actively engaged in legal representation in this area and submits the following comments to TDHCA's proposed revision of the PFC Rule. Each comment is elaborated upon in the attachments to this letter.

- TDHCA's proposed changes to the PFC Rule clearly contradict the plain language of the legislative action from which it is derived. Therefore, the proposed changes to the PFC Rule should be withdrawn. See **Attachment A**.

- If TDHCA chooses to proceed with revision of the PFC Rule, it should allow the Executive Director to extend the December 1 deadline for good cause shown, or alternatively should provide a June 1, 2025 deadline for submitting audits regarding 2023 compliance. See **Attachment B**.

- While we recognize that TDHCA's forms for Income Certification and the Audit Workbook are not open for public comment in conjunction with this rulemaking, a change in the PFC Rule will implicate these forms, and certain changes will need to be made. Therefore, we are taking this opportunity to note concerns about the current versions of the Income Certification and Audit Workbook published on TDHCA's website. See **Attachment C**.

We appreciate the opportunity to present these comments and are happy to address any questions.

Sincerely,

Barry J. Palmer, Director

ATTACHMENT A

TDHCA's change to the PFC Rule clearly contradicts the plain language of the legislative action from which it is derived. Therefore, the proposed changes to the PFC Rule should be withdrawn.

TEXTUAL ANALYSIS OF HB 2071

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- To address public concerns, occupied (existing) developments were treated differently than unoccupied (new construction) developments.

Notably, HB 2071 includes saving and transition provisions. As described in the Texas Legislative Council Drafting Manual dated January 2023:

> Saving and transition provisions help to minimize the disruption and inequities that often attend the taking effect of legislation. A saving provision "saves" from the application of a law certain conduct or legal relationships that occurred before or existed on the effective date of the law. . . . Transition provisions provide for the orderly implementation of legislation, helping to avoid the shock that can result from an abrupt change in the law. *See Section 3.12(a) of the Manual*.

The saving and transition provisions, in Section 10 of the bill, ensured that developments approved and acquired prior to the Effective Date would be "grandfathered," meaning they would continue

[1] Tex. HB 2071, 88th Leg., R.S. (2023) (hereafter referred to as "**HB 2071**").

to be governed by the law in effect prior to HB 2071, and would be exempt from the annual audit requirements.

Specifically, Section 10 of HB 2071 states:

> (b) Subject to Subsections (c) and (d) of this section [10], **Sections 303.0421** and 303.0425, Local Government Code, as added by this Act, **apply only to a multifamily residential development that is *approved* on or after the effective date of this Act** by a public facility corporation or the sponsor of a public facility corporation, in accordance with Chapter 303, Local Government Code. A multifamily residential development that was ***approved*** by a public facility corporation . . . **before the effective date of this Act** is **governed by the law in effect on the date the development was approved** . . . and the former law is continued in effect for that purpose. (emphasis added)

Thus, Subsection (b) of Section 10 starts with a broad statement that any development approved by a PFC prior to June 18, 2023 is exempt from the new law and only subject to the law that was in effect at the time of such approval. However, Subsection (b) must be considered in light of Subsections (c) and (d), so the analysis must continue.

Subsection (c) of Section 10 goes on to clarify that:

> (c) Subject to Subsection (d) of this section [10], **Section 303.0421(d)**, Local Government Code, as added by this Act, **applies only to an occupied multifamily residential development that is acquired by a public facility corporation on or after the effective date** of this Act. An ***occupied*** multifamily residential development that is ***acquired*** by a public facility **corporation before the effective date of this Act is governed by the law in effect on the date the development was acquired** by the public facility corporation, and the former law is continued in effect for that purpose. (emphasis added)

Thus, Subsection (c) presents the first carveout from the general exemption in Subsection (b) -- an occupied development (not new construction) that was <u>approved</u> prior to the Effective Date, but <u>acquired</u> by the PFC after the Effective Date. When read together, Subsections (b) and (c) make it clear that Sections 303.0421 and 303.0425 do not apply to <u>any</u> project that was both acquired and approved prior to the Effective Date.

Finally, Subsection (d) of Section 10 of HB 2071 says:

> (d)(1) Section 303.0426, Local Government Code, as added by this Act, applies to all multifamily residential developments **to which Section 303.0421 applies** . . . (emphasis added)

As established in Subsections (b) and (c) of Section 10 of HB 2071, Section 303.0421 does not apply to developments both approved and acquired by a PFC prior to the Effective Date of the Act. Subsection (d) confirms that Section 303.0426 also does not apply to a development both approved and acquired by a PFC prior to the Effective Date. This conclusion in the saving provision is consistent with the plain language of Section 303.0426 of the Act, which states:

> (b) A public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) **and to which Section 303.0421** applies must annually submit to the department and the chief appraiser of the appraisal district in which the development is located an audit report for a compliance audit . . . (emphasis added)

The above textual analysis is further supported by debate in the Texas House of Representatives. The Texas House of Representatives took its final record vote on May 25, 2023, with the proceedings recorded in writing in the Texas House Journal.[2] The topic of grandfathering and the impact on existing developments was addressed multiple times. Representatives wanted to ensure existing developments would not be impacted and were assured that developments approved and acquired prior to the Effective Date would be exempt. First, Representative Walle expressed his support for HB 2071 and interacted with Representative Gervin-Hawkins:

> REPRESENTATIVE GERVIN-HAWKINS: Representative Walle, you know this is a very, very important issue and the concern is what happens to the existing projects if this bill was to take effect immediately?
>
> WALLE: As I understand it I think—the author could correct me if I'm wrong, but I think one of the issues is some of those folks would get grandfathered in to the existing PFCs.
>
> GERVIN-HAWKINS: They will get grandfathered in.
>
> WALLE: That's my understanding.

Page 5381. Representative Gervin-Hawkins continued on the record to express her concern about existing developments being required to comply with new TDHCA rules:

[2] Texas House of Representatives Journal, 88th Legislature, Regular Session, May 25, 2023.

> GERVIN-HAWKINS: So on the record they will get grandfathered in and those existing projects would not be damaged? It's my understanding, when I talked to the bill author, is that they would have to rework their numbers. Anybody who's ever done these type of projects knows that it's very difficult when you go in with a plan—you've got your performer and all your other numbers, your rent's established, and now to have to change all of that as well as deal with the TDHCA deadlines and timeline. I'm concerned about existing projects.

Page 5382.

Conversation then turned to one of the bill's authors, Representative Jetton. The author also confirmed that grandfathering would apply to all developments approved and acquired by a PFC prior to the Effective Date:

> REPRESENTATIVE COLLIER: Representative Jetton, I said I was going to ask you one question, but another issue came up that was talked about—immediate effect. If this bill goes into immediate effect, is there a grandfather clause for current deals that are in the process of being completed or existing?
>
> REPRESENTATIVE JETTON: The grandfather clause that's in this bill is any deal that is accepted or acquired prior to the enactment date takes on the current requirements for a PFC. I believe it's page 17 and 18.

Page 5383. This led to additional inquiry from Representative Gervin-Hawkins:

> REPRESENTATIVE GERVIN-HAWKINS: Let's be clear. Current projects is the focus. On a current project, if it is in the pipeline, are they grandfathered in or not?
>
> JETTON: If they are approved by the city council, county, or housing authority—whoever is approving those right now—if they are approved before the enactment date, then they are under the previous rules. If they are approved afterwards they would have to comply with the language that, as a body we are agreeing almost with super majority, there needs to be additional transparency and accountability around these programs.

Page 5384. Note that Representative Jetton, an author of HB 2071, specifically states that developments approved prior to the Effective Date "are under the previous rules." But if a development is "approved afterward," it would need to comply "with the language that . . . there needs to be additional transparency and accountability around these programs." This supports the argument that the "additional transparency and accountability" originating from Section 303.0426 is not required for the grandfathered developments. In all of this discussion around grandfathering, there was no indication that there was an exception to the grandfathering for the compliance monitoring requirements.

While the saving and transition provisions of HB 2071 can be difficult to read through, they are absolutely consistent with the legislative intent expressed by the House of Representatives on May 25, 2023. As an additional tool for this analysis, please see a graphical representation attached.

LEGAL ANALYSIS OF TDHCA RULEMAKING

When TDHCA adopted the PFC Rule in February, it correctly reflected the saving and transition provisions in HB 2071, excluding grandfathered developments from the audit reporting requirements under the Act. *See* 10 TAC § 10.1103 ("the following reporting requirements apply to developments owned by a Public Facility Corporation (PFC), subject to Sections 303.0421 and 303.0425 of the Texas Local Government Code, and not eligible to be grandfathered under previous law pursuant to the criteria established by House Bill 2071, 88th Texas Legislative Session, effective June 18, 2023").

On July 15, 2024, TDHCA proposed amendments to 10 TAC § 10.1103 (the "**Proposed Rule**"), removing its reference to grandfathering. The Proposed Rule applies the reporting requirements to all developments regardless of when they were approved or acquired. Based on the textual analysis above, the Proposed Rule is contrary to the clear intent of the Texas Legislature and constitutes an unreasonable interpretation of the plain language and context in Chapter 303 and HB 2071. While Texas courts will show deference to a state agency's interpretation of a statute if it is a reasonable interpretation of an ambiguous statute, the plain language and context of the Act conflict with TDHCA's interpretation of the statute and contradict the clear intent of the Legislature when enacting HB 2071.

A. Texas Court Review of Agency Rulemaking

Under Texas Law, a state agency is generally entitled to deference for its interpretation of a statute that it is charged with enforcing, if certain conditions exist. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 621 (Tex. 2011). In *Railroad Commission of Texas v. Texas Citizens*, the Texas Supreme Court held that while it will generally uphold a state agency's interpretation if it is "reasonable," such deference is not owed if the agency's interpretation conflicts with the plain language and context of the controlling statute. *Id. at* 625. Where the language of a statute is plain and the intent of the Legislature is clear, courts will not hold up an agency's conflicting interpretation. *See Fiess v. State Farm Lloyds,* 202 S.W.3d 744, 747 (Tex. 2006).

B. The Plain Language of the Statute

As noted above, the Proposed Rule conflicts with the plain language and the unambiguous meaning of the Act and HB 2071. When reviewing the plain language of a statute, Texas courts look to both the text and context to determine the meaning and legislative intent. *See Hegar v.*

Health Care Serv. Corp., 652 S.W.3d 39 (Tex. 2022). It is the objective of the reviewers to "give effect to the Legislature's intent," and "enforce the plain meaning of the statutory text, informed by its context*." Id.* at 41. In *Health Care Service Corporation,* the Texas Supreme Court reviewed whether Chapter 222 of the Texas Insurance Code allowed the State Comptroller to impose taxes on insurance premiums received from sales on certain insurance policies. *Id.* The statute at issue contained specific exclusions and exceptions to the taxes imposed on insurance premiums. *Id.* The court found that the tax unambiguously applied to the premiums at issue, as these premiums were not included in the numerated exceptions to the tax. *See id.* at 44 ("[when] exclusions or exceptions to a statute are stated by the Legislature, the intent is usually clear that no others shall apply").

Section 10 of HB 2071 contains saving and transition provisions, excluding certain developments from the effect of Section 303.0421, which excludes them from the compliance and monitoring requirements under Section 303.0426. And similar to the statute in *Health Care Service Corporatio*n, the exemption of certain developments from the audit and reporting requirements is unambiguous. Specifically, Subsection (b) states that Section 303.0421, "appl[ies] only to a multifamily residential development that approved on or after the effective date of this Act by a public facility corporation or the sponsor of a public facility corporation, in accordance with Chapter 303, Local Government Code." And Subsection (d)(1) goes on to state that "notwithstanding any other provision in this section [10], "Section 303.0426, Local Government Code, as added by this Act, applies to all multifamily residential developments to which Section 303.0421 applies." The plain text of Subsection (b) explicitly classifies a group of developments to which Section 303.0421 applies, and Subsection (d) excludes this group from the requirements of Section 303.0426.

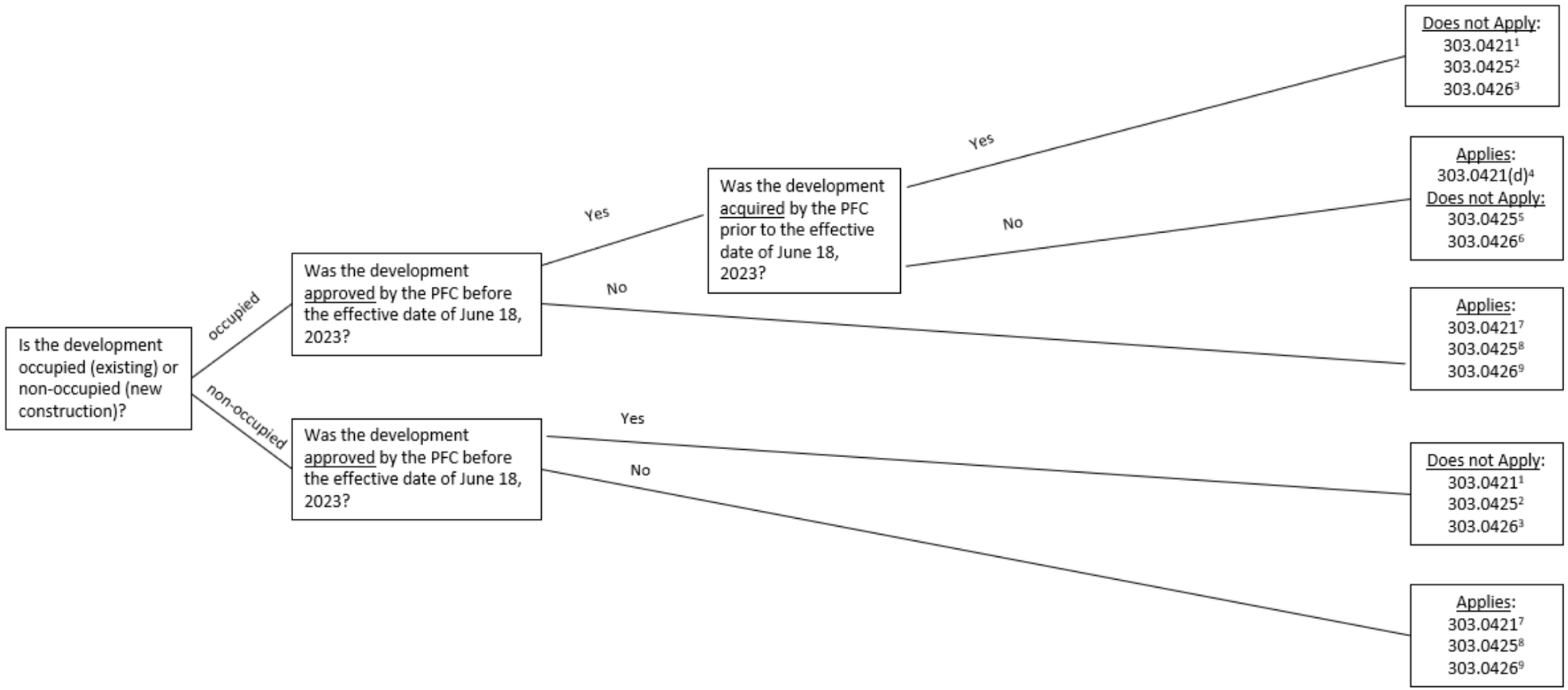
Moreover, the plain language of the Act reinforces that not all developments are subject to the requirements under Section 303.0426. Section 303.0426(b) of the Act states that "a public facility user of a multifamily residential development claiming an exemption under Section 303.042(c) and to **which Section 303.0421 applies** must annually submit to the department […] an audit report for a compliance audit." TEX. LOC. GOV'T CODE § 303.0426(b) (emphasis added). Further, the Section goes on to specify that the purpose for the audit report requirement is to "determine whether the public facility user is in compliance with Sections 303.0421…" *Id.* at 303.0426(b)(1). As established in the saving and transition provisions, grandfathered developments are not subject to Section 303.0421, so there would be no reason to ensure compliance with this section by requiring an audit under Section 303.0426.

It is clear from numerous references in the text that the Legislature intended for the audit requirements under Section 303.0426 to apply only to developments to which Section 303.0421 also applies. Both the enacted bill, with its saving and transition provisions, and the Act attempt to exclude certain developments from the audit requirements based on the applicability of Section 303.0421. This was the initial interpretation of TDHCA. In the current version of 10 TAC § 10.1103, the agency references developments that are "eligible to be grandfathered under

previous law pursuant to the criteria established by House Bill 2071," to exclude them from the audit requirements, as intended by the Legislature. There is no other portion of the bill that could apply to this consideration, other than Section 10, which includes the exemption of developments approved and acquired prior to the Effective Date. It is unclear why, in the Proposed Rule, TDHCA has decided to reverse its initial understanding of the statute and ignore the plain language of HB 2071.

For all the reasons described above, Texas case law supports a conclusion that the Proposed Rule would exceed TDHCA's authority for rulemaking, and it should be withdrawn.

TEXAS LEGISLATURE, 88TH REGULAR SESSION
HB 2071
ANALYSIS OF SAVING AND TRANSITION PROVISIONS



Endnotes

1. HB2071 Section 10(b) and (c), read together, state Section 303.0421 does not apply to a development approved and acquired before the Effective Date.

2. HB 2071 Section 10(b) and (c), read together, state Section 303.0425 does not apply to a development approved and acquired before the Effective Date. Further, Section 303.0421(b) requires compliance with Section 303.0425. If Section 303.0421 does not apply, per endnote 1 above, then Section 303.0425 does not apply.

3. HB 2071 Section 10(d) states Section 303.0426 does not apply unless Section 303.0421 applies. If Section 303.0421 does not apply, per endnote 1 above, then Section 303.0426 does not apply.

4. HB 2071 Section 10(c) states that an occupied development approved before the Effective Date but acquired after the Effective Date must comply with Section 303.0421(d), which establishes a deadline for an occupied development to achieve the affordability restrictions. None of the other provisions of Section 303.0421 apply. This is a natural transition provision to exempt a deal "in progress" from the new law, while requiring compliance with the affordability deadline.

5. While Section 303.0421(d) applies, Section 303.0421(b) does not apply. Therefore, Section 303.0425 does not apply, as described in endnotes 1 and 2 above. This is a natural transition provision to exempt a deal that is "in progress" from the affects of the new law.

6. HB 2071 Section 10(d) states Section 303.0426 does not apply unless Section 303.0421 applies. Section 303.0421 does not apply in full and it would be inappropriate to perform compliance monitoring simply for the one-time occurrence associated with Section 303.0421(d). This is a natural transition provision to exempt a deal that is "in progress" from the effects of the new law.

7. HB 2071 Section 10(b) clearly indicates that a development approved after the Effective Date is subject to Section 303.0421.

8. HB 2071 Section 10(b) clearly indicates that a development approved after the Effective Date is subject to Section 303.0425. Further, Section 303.0421(b) requires compliance with Section 303.0425. If Section 303.0421(b) applies, per endnote 7 above, then Section 303.0425 applies.

9. Section 303.0426(b) states that all developments subject to Section 303.0421 must comply with the compliance and monitoring provisions of Section 303.0426. If Section 303.0421 applies, per endnote 7 above, then Section 303.0426 applies.

ATTACHMENT B

If TDHCA chooses to proceed with revision of the PFC Rule, it should revise the language to allow the Executive Director to extend the December 1 deadline for good cause shown.

If TDHCA decides to proceed with the Proposed Rule, by the time it is approved and published in the Texas Register, it will be effective merely weeks before the December 1 deadline it is trying to impose. Implementation of the Proposed Rule would require hundreds of developments to obtain and pay for an audit report on a very short timeframe. TDHCA must keep in mind that these developments, closed and operational over the last 7 years or so, will have little to no uniformity in their documentation. Some may have Regulatory Agreements; some may not. They will have different affordability requirements, different lease-up requirements, and different enforcement provisions. Many participants will not have prior experience with affordable housing. This is a large undertaking with a significant learning curve for all involved. Currently, TDHCA has only seven (7) approved auditors listed on its website. Other auditors may be available, but there is a legitimate concern that these auditors may not have the capacity to take on hundreds of audit reports. Moreover, it should be considered that, if the December 1, 2024 deadline is retained, the information submitted will be for the calendar year 2023 and will be stale for any meaningful evaluative purposes. We recommend one of two alternatives for § 10.1103(1):

- Allow the Executive Director to administratively extend the December 1, 2024 deadline for good cause shown.

- Given all of the above, it is reasonable for TDHCA to implement the audit reporting for grandfathered properties for the 2024 calendar year, making reports for these projects due June 1, 2025. This would provide more current data and would allow the participants to work through implementation issues without imposing undue burden or risk on TDHCA, the PFCs, or the other participants.

ATTACHMENT C

The current Income Certification and Audit Workbook are structured in a way that solely pertains to developments approved post-HB 2071. Both documents should clarify that grandfathered developments remain subject only to their development-specific Regulatory Agreements and therefore certain fields will be 'N/A'.

Income Certification

- **Part III**:
    - This section is used to calculate a household's income, including "Public Assistance" and "Other Income". We note that Section 303.0425(b) relies on the definition of annual income set forth in 24 CFR 5.609. Section 24 CFR 5.609(b) excludes a number of forms of income from the definition of annual income, many of which could be considered to fall under the "Public Assistance" or "Other Income" categories. To avoid confusion when this form is being completed, we request that a note be added to this worksheet listing the items under 24 CFR 5.609(b) that should not be included in the annual income worksheet. Additionally, the certification form should be updated to note that income for grandfathered projects is not required to be calculated in accordance with 24 CFR 5.609(b). Such projects may be calculated in accordance with applicable regulatory agreements or other documents governing their operation.
- **Part V**

    The gross rent calculation in this form includes non-optional and mandatory fees. This should be removed from the calculation as it is not a component of the rent limit set forth in Section 303.0425(c).

Public Facilities Corporation (PFC) Monitoring Workbook

- **Tab 6**:
    - We are not requesting any changes to this section. However, we do request a note that fees outlined in this section are not counted as part of a unit's rent unless specifically agreed to by the project's operator, given that Section 303.0425(c) does not require that fees be included in the calculation.
- **Tab 7**:
    - The workbook includes a question that asks for "Highest Restricted Rent Amount" and the "Highest Market Rent Amount" for each unit type. We note that Section 303.0426(b)(2) requires the actual rent charged, rather than a maximum possible rent. We request that this question be corrected to reflect the information required under Section 303.0426(b)(2).

- The workbook asks whether (i) in the case of new construction developments, at least 10% of units are reserved for households at or below 60% area median income (AMI) and at least 40% of units are reserved for households at or below 80% AMI and (ii) in the case of occupied developments, at least 25% of units are reserved for households at or below 60% area median income (AMI) and at least 40% of units are reserved for households at or below 80% AMI. Owners of grandfathered projects are only required to reserve 50% of units for households at or below 80 AMI, but may nonetheless have to answer "No" to this question, which could lead to TDHCA staff mistakenly believing that a property is out of compliance. To avoid this potential confusion, we request that the form is updated to include a section for grandfathered deals asking whether at least 50% of units are reserved for households at or below 80% AMI.
- The workbook includes a question as to whether the operator of a project has spent at least 15% of the gross cost of the project by the first anniversary of the acquisition. We note that this is not a requirement for grandfathered projects and request that this question be included in a separate section for non-grandfathered projects or include a notation that this requirement does not apply to grandfathered projects.
- The workbook includes several questions regarding rent savings for households living in restricted units. We note that this is not a requirement for grandfathered projects and request that this question be included in a separate section for non-grandfathered projects or include a notation that this requirement does not apply to grandfathered projects.

- **Tab 8**:
  - The workbook asks whether the operator's website complies with Section 303.0425 requirements and includes policies on Housing Choice Voucher requirements. This requirement does not apply to grandfathered projects and we therefore request that a note be added reflecting that this is the case.

September 9th, 2024

Via Electronic Mail
wendy.quackenbush@tdhca.texas.gov
Ms. Wendy Quackenbush
Director of Compliance Monitoring
Texas Department of Housing and Community Affairs
211 East 11th Street
Austin, Texas 78701

Re: Public Comment on Proposed Rule Change – 10 Texas Administrative Code, Part 1, Chapter 10, Uniform Multifamily Rules, Subchapter I, Public Facility Corporation Compliance Monitoring Reporting Requirements, §10.1103

Dear Ms. Quackenbush,

I am writing to provide feedback on the proposed revision to §10.1103 of the PFC Rule, which TDHCA has recently put forth. Our company is actively involved in this field, and we have concerns regarding the proposed amendment changes - specifically its contradiction with legislative intent.

JPI is a Texas based real estate developer that builds quality multifamily housing. Our developments seek to meet the housing needs of Texans across the affordability spectrum. JPI develops both affordable and mixed-income housing with extensive experience in PFC-structured developments, respectfully submits comments on the proposed amendment to §10.1103.

The proposed amendments to §10.1103 of the PFC Rule present a significant divergence from the legislative intent outlined in House Bill 2071 (HB 2071). The bill, passed by the 88th Texas Legislature and effective June 18, 2023, was designed to address specific concerns related to public facility corporations (PFCs) managing affordable housing developments.

The proposed rule changes to §10.1103, which remove the reference to grandfathering and impose new reporting requirements on all developments regardless of their approval or acquisition date, fundamentally contradict this legislative intent. By applying the new reporting requirements retroactively to developments that should be exempt under the saving and transition provisions, the proposed rule disregards the clear language and purpose of HB 2071. This not only undermines the intent of the legislation but also creates potential compliance issues and administrative burdens for developments that were explicitly meant to be grandfathered under the old rules.

Given these concerns, we strongly urge TDHCA to withdraw these proposed amendments to align with the legislative language and intent.

The proposed changes should align with the legislative framework established by HB 2071, preserving the exemptions for grandfathered developments as intended by the Legislature. This alignment will ensure that the rulemaking process respects the legislative intent and avoids unnecessary disruptions to existing affordable housing projects.

We appreciate the opportunity to provide these comments and are available to discuss these points further at your convenience.

Sincerely,

Miller Sylvan
Senior Vice President
JPI Regional Development Partner
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