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Ohio Affordable Housing 2023 Legislation Updates

On January 6, 2023, Ohio Governor Mike DeWine signed House Bill 45, which contains two provisions that may greatly impact Ohio's affordable housing landscape. The first provision prevents buildings that are part of a housing project receiving federal Low-Income Housing Tax Credits (LIHTCs) from also receiving Ohio Historic Preservation Tax Credits (OHPTCs). The second provision explicitly authorizes county auditors, beginning in tax year 2023, to assess the value of LIHTC projects based on one or more of the existing market-data approach, the income approach, or the cost approach.

Prohibition on Combining LIHTCs with OHPTCs

The Low-Income Housing Tax Credit (LIHTC) program is a federal tax incentive program designed to increase the supply of affordable rental housing. It encourages private investment in affordable housing by providing a dollar-for-dollar reduction in federal taxes. This infusion of equity helps developers reduce the amount of money they need to borrow and pay interest on, making it economically feasible for them to charge reduced rents to serve low-income households. The Ohio Historic Preservation Tax Credit (OHPTC) program is a state tax incentive program that encourages developers to rehabilitate historically significant multifamily rental housing, as well as commercial, industrial or institutional properties, by offering a state tax credit equal to a certain percentage of the qualified rehabilitation expenditures. Developers that renovate historic buildings often combine LIHTCs with OHPTCs to fully maximize private equity and bridge any funding gaps since historic buildings are expensive to renovate and preserve. This combination is not an uncommon strategy because historic buildings are often adapted for housing and located in areas where the demand for affordable housing is strong.

Developers may need to rethink stacking LIHTCs and OHPTCs and restructure their projects' capital stacks because the relevant provisions of House Bill 45 that take effect on April 6, 2023, will ban

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the twining of LIHTCs and OHPTCs. House Bill 45 amends Ohio Revised Code (O.R.C) Section 149.311 to prevent current developments that have been awarded OHPTCs and are still being rehabilitated and future developments from twining LIHTCs and OHPTCs. Amended Section 149.311 will now provide that historic buildings are not eligible for OHPTCs if, upon the completion of the rehabilitation of the historic building, they are part of a LIHTC project.[1] Amended Section 149.311 also requires the director of the Ohio Department of Development to rescind the approval of any OHPTC application if the building will be part of a LIHTC project after its rehabilitation is complete.[2]

These amendments may require developers that are still rehabilitating historic properties for multifamily affordable housing to find new funding sources because these projects may no longer be eligible for OHPTCs, leaving a funding gap. It is critical that these developers discuss these amendments with their equity partners. These amendments may also make it more challenging for developers to fund the rehabilitation of historic properties for use in affordable housing projects in the future.

Although OHPTCs can no longer be used in conjunction with LIHTCs, Governor DeWine supported creating a state low-income housing tax credit in his State of the State address delivered January 31, 2023. House Bill 560, introduced February 7, 2022, may serve as a model for the state low-income housing credit. Finally, given that the next round of OHPTC applications is due on March 31, 2023, before the amendments to Section 149.311 take effect, developers should reach out to counsel and the Ohio Department of Development for further guidance.

Valuation of Low-Income Housing Tax Credit Projects for Property Tax Purposes

Accurately projecting the amount of property taxes that will be levied plays a crucial role in the financial viability of LIHTC projects. LIHTC project owners are required to enter into certain land use restriction agreements limiting to whom rental units may be rented and the maximum amount of rent that may be charged as a condition of receiving LIHTCs. Additionally, LIHTC properties often

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incur higher operating expenses than market-rate housing projects due to additional compliance costs. These factors, combined, can leave project owners with limited cash flow to meet debt service, pay taxes and maintain operations.

In addition to the prohibition on combining LIHTCs with OHPTCs, House Bill 45 amended O.R.C. 5713.03 to explicitly permit county auditors to use the market-data approach, the income approach, the cost approach, or a combination of those approaches to determine the value of LIHTC properties for assessment purposes. Previously, county auditors relied on the sometimes-unclear Ohio case law.

A property's assessed value for Ohio real property tax purposes is required to be based on the property's "true value in money." O.R.C 5713.01(B). How to value LIHTC properties' true value presents unique challenges and has been a topic of hot debate and court cases for decades. One issue is that the common approach to value property on the basis of recent sales of comparable properties in the market area is not a reliable indicator for LIHTC properties since they are rarely sold during their compliance period. Additionally, county auditors have previously been discouraged by Ohio case law and case law from other jurisdictions from using the cost approach to evaluate LIHTC properties.[3] One of the reasons the cost approach is disfavored is that, without government subsidies, ordinary market participants would not have incurred the construction costs in the first place, so this approach tends to result in higher valuation. Since O.R.C. 5713.03 now explicitly allows county auditors to use the cost approach, this might create confusion for county auditors and necessitate valuation appeals by LIHTC property owners.

The income approach focusses on the income the property produces and is more commonly used. However, county auditors grapple with whether to use a LIHTC property's restricted contract rents or its market rents when calculating income. On the one hand, Ohio case law, including recent decisions from the Ohio Supreme Court, permits valuation on the basis of contract rents where those rents do not exceed market rent. On the other hand, since O.R.C. 5713.03 now explicitly allows the county auditor to use the income

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approach, confusion may follow because the Ohio Administrative Code requires that when county auditors use the income approach, "the current economic rent should be given weight" (i.e., market rent).[4]

The impact of this amendment to O.R.C. 5713.03 is uncertain at this time, as county auditors have the flexibility to determine which one or more of the valuation approaches to use. Some affordable housing advocacy groups are concerned that this amendment may lead to higher property taxes for LIHTC properties. It is possible that legal challenges may arise before the impact of O.R.C. 5713.03 is clarified for both county auditors and owners of LIHTC properties. As the potential for greater real property tax liability increases, it is anticipated that developers of affordable housing will identify an increased need for other incentives and sources to offset this operating liability, including real property tax exemptions, community reinvestment areas (CRAs), port authority lease revenue bond transactions, and other tax credit programs such as the transformational mixed-use tax credit.

Conclusion

Frost Brown Todd counsels investors, developers, lenders, and other key stakeholders on low-income housing and historical preservation transactions across the country. We stay at the forefront of all legislative efforts affecting the industry, and we are ready to assist clients with navigating the changing legislative environment. For more information, please contact the authors of this article or any attorney from Frost Brown Todd's Multifamily Housing team.

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[1] O.R.C 149.311 (C)(4): The historic building that is the subject of the application is not, and will not upon completion of the rehabilitation project be, part of a qualified low-income housing project allocated

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a tax credit pursuant to section 42 of the Internal Revenue Code.

[2] O.R.C149.311(D)(9): The director shall rescind the approval of any application if the building that is the subject of the application is part of a qualified low-income housing project allocated a tax credit pursuant to section 42 of the Internal Revenue Code at any time before the building's rehabilitation is complete.

[3] *See Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 151 Ohio St.3d 12, 2017-Ohio-2734, 85 N.E.3d 694; *Notestine Manor, Inc. v. Logan Cnty. Bd. of Revision*, 152 Ohio St. 3d 439, 2018-Ohio-2, 97 N.E.3d 446.

[4] Ohio Administrative Code 5703-25-07.

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