Ohio Tax Talk: Building On Federal Affordable Housing Credit

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The Ohio Senate issued its version of the proposed R.C. 175.16, originally introduced in the 2022-23 legislative session as Ohio H.B. 560 and included this year as part of the Ohio appropriations bill for 2024-25, H.B. 33. The bill establishes a state-specific low-income housing tax credit, or LIHTC, dedicated to the construction or rehabilitation of affordable rental housing.

With a statewide annual ceiling of $100 million — down from $500 million in the prior version of the bill — these provisions aim to address the critical shortage of reasonably priced rental homes throughout the state and create a credit up to the federal LIHTC award amounts.[1] Qualified properties placed in service after July 1 can access the credit, with no credits being allocated after June 30, 2027.

State Rep. Gail K. Pavliga, R-Portage County, one of the original co-sponsors of the law creating the Ohio tax credits, indicated that they would encourage the development of 2,300 additional rental housing units every year during the tax credit's lifespan and that, overall, the bill would create 34,000 new construction jobs.[2]

H.B. 33 has been approved by the House and Senate and will require the signature by Gov. Mike DeWine before becoming law.

Federal LIHTC Program

Ohio's LIHTC program builds on the existing federal tax credit for affordable housing projects to bolster affordable housing initiatives. The federal tax credit is a credit on income taxes that offsets a portion of a developer's construction costs in exchange for reserving a certain number of rent-restricted units for lower-income households in new or rehabilitated facilities.

As indicated throughout this article, the Ohio bill piggybacks much of the federal LIHTC, and applies it to the Ohio commercial activity

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tax, individual income tax, financial institutions tax, or the state's taxes on foreign and domestic insurance companies.[3]

At the federal level, developers have access to two types of LIHTCs: a larger 9% housing tax credit and a smaller 4% credit. The 9% credit primarily supports new construction projects, providing a subsidy of up to 70% of the developer's qualified basis in the project — as determined based on the developer's nonland investments in the project and the percentage of the building reserved for affordable housing.

On the other hand, the 4% credit is utilized for rehabilitation projects that rely on at least 50% federal tax-exempt bond financing, offering a subsidy of up to 30% of a developer's qualified basis.[4]

In Ohio, awards of the federal LIHTC were administered by the Ohio Housing Finance Agency, an apolitical state agency that helps first-time homebuyers, renters, senior citizens and others find affordable housing, and works with the developers and property managers thereof.[5]

However, under the Ohio Senate's version of the bill, the authority, duty, assets and liabilities of the housing finance agency would be transferred to a newly created Governor's Office of Housing Transformation beginning Jan. 1, 2024.

The updated version of the bill also allows the governor to designate the Office of Housing Transformation's director, and retains and moves all current employees of the agency to the new housing office.[6]

State LIHTC Program

Under the bill, the director may reserve a total of $100 million per fiscal year in state tax credits to be allocated among any affordable housing projects located in Ohio that receive a federal LIHTC allocation and that begin renting between July 1 and June 30, 2027.

The bill also permits any unreserved, recaptured or disallowed credits from one fiscal year to be added to the credit cap for the next. It also limits the amount of the state credit that can be

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allocated to a qualifying project to no more than the amount the director decides is necessary to ensure its financial feasibility.[7]

According to the bill, once a housing development project begins renting units, the director may issue an eligibility certificate to project owners, including direct or indirect investors — e.g., equity owners of a pass-through entity that invested in the project.[8] These owners can then claim the Ohio credit over a 10-year period, commencing in the year when the project starts renting housing units.[9]

The eligibility certificate should specify the credit amount eligible for each year of the 10-year credit period. This amount is the lesser of (1) the federal credit amount that would be awarded for the first year of the credit period absent a first-year reduction required by federal law, or (2) one-tenth of the reserved credit amount stated in the notice reserving the state LIHTC. This effectively sets the state credit cap at the corresponding federal credit amount.

As indicated above, the state-specific LIHTC credit can be claimed by multiple eligible investors and applied against various taxes, including the commercial activity tax, individual income tax, financial institutions tax, or the state's tax on domestic and foreign insurance companies.

While the bill does not contemplate how to allocate the credit amount among eligible investors, it does restrict the total amount of credits for a specific project's period to the amount stated on the eligibility certificate. This flexibility makes the credit effectively transferrable, allowing an equity owner in the project to claim all or a portion of the annual credit amount specified on the eligibility certificate.

To ensure consistency, the bill mandates that if any federal LIHTC is clawed back or disallowed for a specific project, a proportionate amount of the Ohio credit must also be clawed back or disallowed. The bill provides for the Ohio tax commissioner and the superintendent of insurance to carry this out.

Claiming the Credit

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To streamline the application process, developers are not required to submit a separate application for the Ohio credit in addition to the federal regime. This is because the director has the authority to allocate state credit for any qualified project when distributing the federal LIHTC.

Notably, eligibility for the federal credit is not a prerequisite for claiming the state LIHTC program. This means that even if an investor does not meet the requirements for the federal LIHTC, they can still pursue the Ohio credit. The key condition for eligibility is that the person claiming the state credit must be considered an equity owner of the project under state law and must have acquired the ownership interest prior to claiming the credit.

This provision widens the scope of potential investors who can benefit from the Ohio credit. It offers an opportunity for individuals or entities who may not qualify for the federal LIHTC due to specific eligibility criteria, such as income restrictions or other requirements.

Additionally, the bill creates a requirement that, for each calendar year, a designated reporter for each project shall provide the tax commissioner and the superintendent of insurance detailed information on the project and the amount of the credit claimed.

Reductions and Limitations in the New Program

The Senate's version of the bill no longer allows for the claiming of the state LIHTC across multiple calendar years, tax years, taxable years or tax periods, even if it covers a year that includes part or all of the credit-period year or any of the subsequent five years.

Moreover, revised language in R.C. 175.16(B) now requires the director to reserve credits in a manner that ensures qualified projects are generating additional housing units that would not have otherwise been created with other state, federal or private financing. This change reflects an emphasis on creating new housing units rather than merely subsidizing existing projects.

Another significant modification introduced by the state Senate's version of the bill pertains to R.C. 149.311. Under this revision, properties that receive the federal LIHTC, classified as "federally subsidized residential rental property" according to the Senate's

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revised definition in R.C. 57.13.03, are now excluded from qualifying for the Ohio historic building rehabilitation tax credit.[10]

This change has raised concerns within the affordable housing community, with critics characterizing the Senate's approach as an assault on rental housing.[11]

Furthermore, it is important to note that the Senate's version of the bill has notably reduced the total reserved amount for the state LIHTC to $100 million, a substantial decrease from the House's proposed half a billion dollars. These combined changes significantly curtail the potential application and impact of the Ohio LIHTC, leading to a narrower scope of affordable housing initiatives that can be supported by the credit.

Fiscal and Economic Impact

While the tax credit has the potential to reduce state tax receipts, projections for the 2022 version of the bill indicated that it was unlikely to reach the maximum reservation amount of $500 million per fiscal year without significant changes in federal legislation or a substantial increase in rehabilitation projects utilizing the 4% credit.

Moreover, the Ohio legislative budget office predicted that the tax credit proposed by the bill could reduce state tax receipts by $22.3 million in 2023, growing to roughly $146 million in 2028.[12]

Nevertheless, proponents of the bill asserted an $11.4 billion total economic impact, including $1.7 billion in tax revenue generated over the lifetime of the affordable units, highlighting the potential benefits of this initiative.[13]

The new provisions represent a slight step toward addressing the critical issue of affordable rental housing scarcity in the state. By establishing a state-specific LIHTC program, the bill aims to provide a much-needed boost to the construction and rehabilitation of reasonably priced rental properties.

However, it is also important to thoroughly evaluate the modifications made by the Senate's version of H.B. 33 on the affordable housing tax credit program. The reduced availability and limited scope of the state LIHTC, as well as the exclusion of

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properties receiving federal LIHTC from other tax credits, still pose significant challenges to the creation and preservation of affordable housing in Ohio.

Conclusion

As H.B. 33 arrives at the governor's desk for approval, it is highly likely that the LIHTC program will be implemented. This credit holds the potential to significantly affect the affordable housing landscape in Ohio, as well as influence the financing of tax credit deals for these projects.

However, the Senate's version of the provisions implementing the state LIHTC may have dampened down its full immense potential. Stay tuned for further developments on this crucial legislation that promises to shape the future of affordable housing in the state.

For more information, contact any attorney with Frost Brown Todd's Tax practice group.

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[1] "Ohio Legislature Mulls Bill to Fight Affordable Housing Shortage, Tax Credits," Record-Courier, June 12, 2022, available at: https://www.record-courier.com/story/news/2022/06/12/ohio-legislature-mulls-bill-fight-affordable-housing-shortage-tax-credits/9893689002/.
[2] Coalition on Homelessness and Housing in Ohio (COHHIO), "Report Underscores Need to Invest in Affordable Housing Recovery," COHHIO, available at: https://cohhio.org/report-underscores-need-to-invest-in-affordable-housing-recovery/.
[3] R.C. 175.16(F)(1).
[4] The Internal Revenue Code requires that developments awarded 4% Housing Tax Credits must utilize multifamily bonds financing for more than 50% of the total project cost.
[5] Due to high demand, OHFA typically funds only 25% to 30% of all applications for the 9% credit.
[6] "Ohio Senate's budget kills DeWine's proposed affordable housing tax credit program," Ohio Capital Journal, June 12, 2023, available at: https://ohiocapitaljournal.com/2023/06/12/ohio-senates-budget-kills-dewines-proposed-affordable-housing-tax-

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credit-program/.

[7] H.B. 33, in its current form, leaves the term "financial feasibility" undefined.

[8] An eligible investor is the owner of a qualified project or any other person that owns or owned a direct interest, or an indirect interest though one or more pass-through entities, in the qualified project at any time prior to claiming the tax credit.

[9] Importantly, eligible investors can claim advance credit once the project begins renting dwelling units, even before receiving the eligibility certificate from the Director. However, any difference between the advance credit amount and the actual credit amount must be rectified through an amended tax return or report.

[10] Proposed R.C. 149.311(C)(4).

[11] "Ohio Senate's budget kills DeWine's proposed affordable housing tax credit program," Ohio Capital Journal, June 12, 2023, available at: https://ohiocapitaljournal.com/2023/06/12/ohio-senates-budget-kills-dewines-proposed-affordable-housing-tax-credit-program/.

[12] Ohio General Assembly, "Legislative Document: Bill Analysis for H.B. 560," Ohio General Assembly, accessed on June 13, 2023, available at: https://www.legislature.ohio.gov/download?key=19474&format=pdf.

[13] Id.

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