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Preservation of Affordable Housing: Mitigating Expiring Use Restrictions

By: Warren A. Kirshenbaum, Esq. (November 9, 2006)

I. Overview

People need to be able to live where they work. Providing housing that is affordable to our fellow citizens is currently one of our more essential political, economic, and humanitarian challenges. The Greater Boston Housing Report Card 2005-2006, prepared by the Center for Urban and Regional Policy at Northeastern University (the "Report Card")[i] estimates that "more than a third of the [Commonwealth's] affordable housing inventory is in some potential jeopardy", and that "[p]reserving the existing affordable stock is usually more cost effective than replacing it with new construction." These sentiments are echoed in the 2006 Massachusetts Qualified Allocation Plan ("QAP"). This seminar will explore, from a transactional viewpoint, how this issue can be addressed. We also hope to generate legislative and regulatory synergy to meet these goals.

Clearly, we can replace a loss of affordable housing by producing additional affordable housing. I am a firm supporter of sustained affordable housing production, but I believe it is as important to preserve as affordable, the housing stock that we currently have.[ii] Affordable housing units are those units eligible for inclusion on the Commonwealth's Subsidized Housing Inventory and restricted to occupancy by households earning 80 percent or less of the Area's Median Income ("AMI"), currently $59,550 for a family of three.[iii]

Massachusetts currently has more than 172,300 renter households in need of units priced below $500 per month. However, the Commonwealth's total affordable housing stock is only 130,000 units.[iv]

In addition to our failing to provide sufficient housing for the low-income and elderly population, which mostly is an affordable rental issue, there is a dearth of moderately priced housing suitable to attract and retain a young workforce, which is what we need right now to fuel our region, stop the flow of relocation, and to provide a constant stream of consumers for our big box stores; tenants for our residential complexes; and a labor force that will service our businesses. The people that utilize, or could be utilizing affordable housing are our bus drivers, teachers, support personnel, sales staff, first responders, college educated white-collar workers, younger professionals, and mid-to low-level managers.[v]

Even though affordable housing production reached its highest level to date in 2005 (when construction began on developments that will provide 2,058 new units of housing for income eligible tenants or homebuyers) we still need more affordable rental and for-sale units. Moreover, we cannot afford to lose any of our existing supply of affordable housing.

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Most affordable housing development in the Commonwealth is being completed relying on (i) Mass. Gen. Laws §40B (which has been the principal stimulant of production for the past three years); (ii) Subsidized development, such as utilizing federal (or state) low income housing tax credits, HOME funds ($750,000 maximum per project; $50,000 maximum per affordable unit in entitlement communities and $65,000 maximum per affordable unit in non-entitlement communities);[vi] HUD 202, 223(d) and 811 programs, project–based Section 8 Vouchers ("PBV's") [vii], and state-specific programs, such as The Housing Innovations Fund (for non-profit developers), the Housing Stabilization Fund (same maximum limits as for HOME funds; can combine with local HOME funds, but not state HOME funds), the Facilities Consolidation Fund (for non-profit developers)[viii], the Housing Development Support Program, the Affordable Housing Trust Fund, the Historic Tax Credit Program, and programs of the Massachusetts Housing Partnership Fund and the Massachusetts Housing Finance Agency; or (iii) Inclusionary mandates, such as a set-aside of affordable units or a developer's payment in lieu of providing affordable units. Interestingly, although it has its problems[ix], the 40B statute is now responsible for much of the region's <u>*market rate*</u> development <u>as well as its affordable development</u>. The question is whether the statute is stimulating affordable housing development, or merely providing market-rate housing with an affordable housing by-product, and if so, whether such development is preferable to dedicated affordable housing projects. Affordable housing development in the Commonwealth appears to be largely undertaken by market rate developers who build affordable units merely as a means to obtain their comprehensive permits. 40B development, therefore, may be argued to be moderately increasing our affordable housing inventory, but unless we are preserving units or projects as affordable when their restrictive use covenants expire, we will not be sustaining our affordable housing inventory in the long term. Accordingly, focusing on fixing the 40B program's oversight, and giving preservation a higher priority, rather than "cracking down" on the 40B program may be a more adept course of action.[x] An added wrinkle that we have experienced over the past two years is that escalating construction costs have been vexing developers in general, and affordable housing developers in particular. Rising costs are especially problematic for the producers of low-income housing, who cannot pass the additional costs along to the consumer. With the energy and resource issues that we are facing globally, it might be appropriate to assume that such cost increases will continue to be a part of the development landscape for the foreseeable future.

The core of the preservation issue is that rental developments built with federal and/or state subsidies from 1960-1990, may be converted from low-income to market rate housing once the restrictions that limited their occupancy to low-income residents expire. Between now and 2010, more than 18,000 affordable units in 42 Greater Boston communities are at risk. In addition, much of the public housing stock of the region's municipalities requires additional investment to allow it to preserve its functionality and extend its life.[xi]

Therefore, while production remains a priority, preservation has become increasingly important in maintaining the affordable housing inventory.

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From the public policy perspective, the QAP recognizes that new tax credit projects are competing with preservation projects that have use restrictions expiring during the next few years and significant unmet capital needs. With market-rate developers and/or REIT'S waiting in the wings, these units will be lost unless there is intervention. The QAP currently sets aside 35% of its annual tax credit allocation to large-scale projects and preservation projects, and the QAP also recognizes that replacement cost far outweighs the cost to the Commonwealth of helping to preserve the existing affordable housing stock. The QAP's conclusions are based on a capital needs study which estimated that $10,000 in new capital per unit would be needed to address rehabilitation needs. Nevertheless, the QAP expressly makes production of affordable housing a priority to preservation of affordable housing. Maintenance of an acceptable affordable housing inventory does, however, require us to advance both the preservation and production fronts. The key to achieving this balance is to ensure that preservation projects can be a profitable exercise for those providing/retaining the housing, whether they be for-profit or non-profit enterprises.

II. QAP set-aside requirements for preservation projects:

1. The project must fill a genuine, documented affordable housing need based on a market study;
2. The project must have a positive impact on the surrounding neighborhood;
3. The project must be developed relying on the QAP's Sustainable Development Principles, which are to:

    i. Redevelop First;

    ii. Concentrate Development;

    iii. Be Fair;

    iv. Restore and Enhance the Environment;

    v. Conserve Natural Resources;

    vi. Expand Housing Opportunities;

    vii. Provide Transportation Choice;

    viii. Increase Job Opportunities;

    ix. Foster Sustainable Businesses; and

    x. Plan Regionally.

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4. The project must be consistent with Fair Housing policies;

5. The project must be architecturally compatible with the surrounding neighborhood, contain elements of "green design", and the units constructed must be well-designed, desirable places to live;

6. The project must include units to be rented/sold to very low income persons, i.e. those people earning less than 30% of AMI (currently $59,550 for a family of three);

7. The project must have the support of local elected officials and neighborhood groups;

8. The development team must have financial strength, and an excellent record in affordable housing development and management;

9. The project's intended scope of work must be appropriate;

10. The project's total development cost should be reasonable; the developer fee and overhead should be consistent with the DHCD's written standards, and the construction and development budget(s) should include reasonably estimated hard and soft costs;

11. The project's estimated post-construction operating costs must be submitted to DHCD;

12. The project's financing must contain a reasonable public subsidy;

13. The development team cannot unduly profit from the project (profit is capped at 20%)[xii]; and

14. The project should foster a recognizable public purpose.

III. QAP criteria for competitive scoring:

1. Conformity with Set-Aside Categories (i.e., a minimum project size of eight units – no maximum; 75% of the units should have two or more bedrooms; preference for projects that include family housing);

2. Quality of Site;

3. Evidence of Local Support or Local Representation;

4. Creditworthiness of Sponsor/Owner;

5. Evidence of Site Control;

6. Identification of All Financing Sources;

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7. Status of Compliance Monitoring of Other Tax Credit Projects;
8. Good Standing with Respect to Other State Housing Programs;
9. Commitment to a Thirty-Year Term of Affordability;
10. Provision of Tenant Supportive Services;
11. Inclusion of Units for Very Low Income Persons or Families (i.e. those that earn less than 30% of AMI);
12. Consistency with the Commonwealth's Sustainable Development Principles (listed above);
13. Fair Housing Narrative; and
14. Compliance with the Federal mandate that at least 10% of the credit available in 2006 be allocated to projects involving "qualified non-profit organizations."

Requirements to be a "Qualified Non-Profit Organization":

- Must be an Internal Revenue Code ("IRC") Section 501(c)(3) or (4) entity;
- Must have as one of its exempt purposes the fostering of low income housing;
- The By-Laws should not have a prohibited affiliation with, or be controlled by a for-profit organization; and
- The entity must: (1) own an interest in the project; (2) materially participate in the development or management of the project throughout the tax credit compliance period (within the meaning of IRC Section 469(h)); and (3) the entity may, but is not required to, possess a right of first refusal to acquire the project at the end of the tax credit compliance period.

IV. A Transactional Analysis:

In the following situation, we look at an example wherein a developer/operator seeks to preserve its affordable housing inventory by either refinancing expiring use properties; using rehabilitation tax credit funding to reposition the asset and continue its restricted use; or considers an acquisition of its properties by another non-profit owner with a promise to continue the affordability restrictions.

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- The developer/operator could set up a 501(c)(3) entity with an affordable housing preservation purpose (the "preservation entity").

- The preservation entity could choose to be certified by a participating HOME jurisdiction ("PJ") as a Community Housing Development Organization ("CHDO"), as such is defined under 24 C.F.R. 922(a), in order to access HOME set-aside funds.[1] PJ's under the HOME program must reserve not less than 15% of their HOME allocations for housing to be developed, sponsored or owned by CHDO's. This set-aside is in addition to regular HOME allocations.

- The CHDO must have effective "project control" as a developer, owner or manager in order to obtain HOME set-aside funds. Development or construction of facilities utilizing only tenant based rental subsidies are not considered eligible for CHDO set-aside funds. To be considered a developer, a CHDO must obtain the financing and perform the rehabilitation on the project. The CHDO can own the project or transfer ownership to another entity for long-term ownership and management. Note that *developer fees* negotiated with the PJ are *eligible soft costs* under Section 92.206 of the HOME regulations.

- Non-profits that do not meet the CHDO qualification criteria can still receive HOME funds, but not CHDO set-aside funds. Furthermore, up to 10% of a PJ's CHDO set-aside funds may be used for project specific loans, such as pre-development expenditures, including consulting, legal, engineering or architectural fees, feasibility studies, developer fees, site control costs, title costs, construction loan commitments, and zoning approvals. Furthermore, Under Section 92.208 of the HOME regulations, PJ's may use up to 5% of their annual HOME allocations (separate from the 15% set-aside) for payment of the CHDO's operating expenses, that is, costs reasonable and necessary for the operation of the CHDO, including salaries, wages, and other employee compensation and benefits, communication costs, taxes, insurance, equipment, materials and supplies.

- The preservation entity would obtain <u>new</u> funding and <u>acquire</u> the tax credit properties in an arms-length transaction. The transaction would need current limited partner consent, as well as State and/or Federal consents.[2]

- The financing could involve low income housing tax credits in their various forms, such as re-syndicated 9% tax credits (see the QAP set-aside requirements described above)[3],

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[1] A CHDO must be a legally organized, private non-profit entity certified by a PJ that (i) has a purpose to provide decent housing affordable to low and moderate income people; (ii) a minimum number of representatives of the low-income community serving on the Board of the CHDO; and (iii) has a history of serving the community in which it intends to use the HOME funds.

[2] An interesting consideration is whether the preservation entity can raise additional funding for future acquisitions.

[3] This option would utilize the QAP set-aside and would require compliance with the above set-aside requirements as well as the requirement that the recipient entity not have submitted another tax credit application during the ten (10) years preceding this application.

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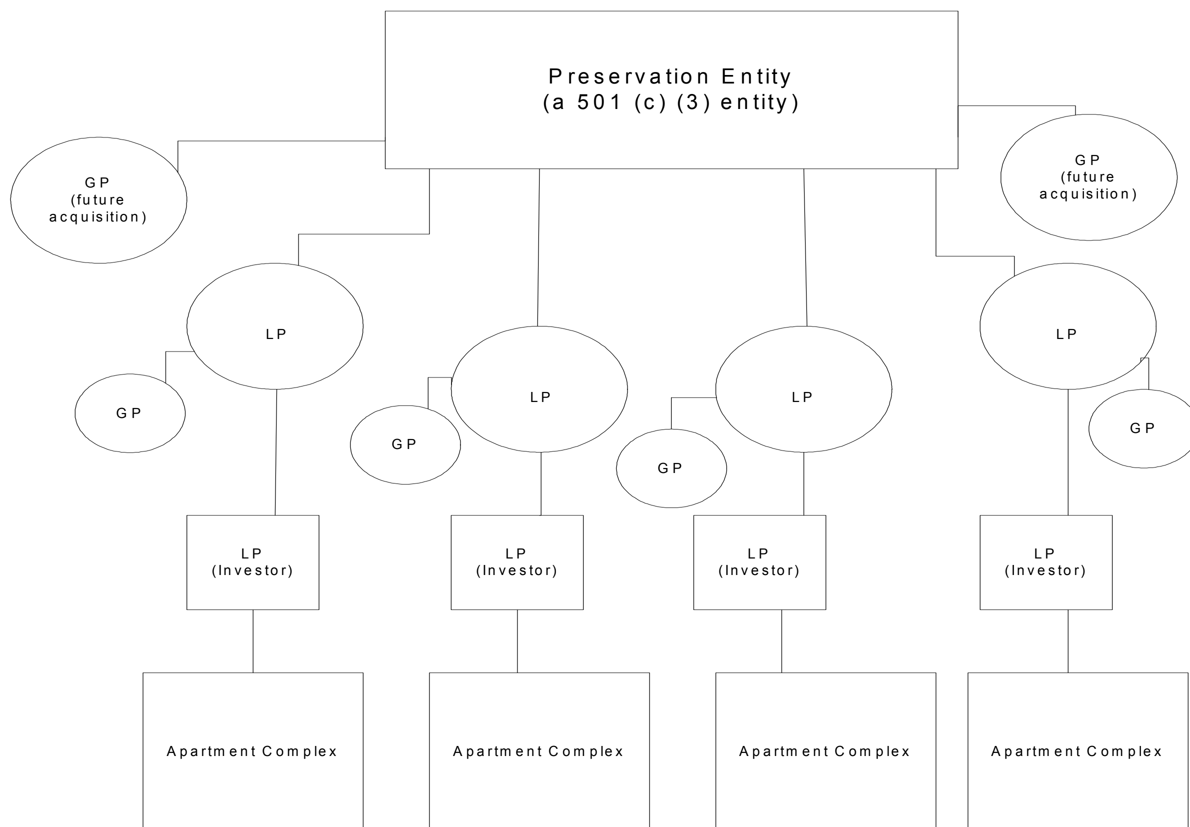
bond financing (credit enhanced or insured by Fannie Mae or the Municipal Bond Insurance Agency ("MBIA"), or rated by S&P/ Moody's if publicly placed bonds) without tax credits, or tax-exempt bond financing with 4% tax credits (see below) and HOME funds, or a combination thereof.

- The bonds could be issued through a conduit issuer, based upon several programs, including private activity bond allocations, HUD funding, or through Commonwealth specific funding programs, such as state low-income housing tax credits, historic tax credits, HOME funds, housing stabilization funds, affordable housing trust funds, and so forth.

- The new entity will obligate itself to preserve the subsidies and rent restrictions; and keep the properties affordable for up to 40 years.[xiii]

Moreover, the following discussion on acquisition tax credits would apply.

A Possible Structure:



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V. 4% Acquisition Tax Credits

I. OVERVIEW

To qualify for acquisition tax credits:

1. The project must be acquired by a purchase from an unrelated party (see II. B below, i.e. the 10% rule);

2. The project must satisfy a 10-year hold period; and

3. The project must be "substantially rehabilitated."

II. UNRELATED PARTY ACQUISITION

A. A purchase of a project is generally self-explanatory, and (1) excludes any carryover basis transaction, per IRC Section 42(d)(2)(D)(ii)(I) and (2) excludes inheritance, per IRC Section 42(d)(2)(D)(ii)(II).

1. A "Carryover basis transaction" is a transaction where the IRC does not require immediate recognition of gain or loss (buyer's basis in the asset is determined by reference to seller's basis in the asset). Examples of carryover basis transactions include:

(a) contributions to corporations, per IRC Section 351;

(b) subsidiary liquidations, see IRC Sections 332 and 334;

(c) contributions to partnerships, per IRC Section 721;

(d) technical partnership terminations, see IRC Sections 721 and 732; and

(e) gifts, per IRC Section 1015(a).

B. The rule for "Unrelated Party" is that buyer and seller must be less than 10% related. See IRC Sections 42(d)(2)(D)(iii), 267(b) and 707(b)(1). Accordingly, the preservation entity needs to be owned by a current (less than 10%) owner of the expiring use properties. For determining this 10% ownership structure with respect to partnerships, look to cash flow, back-end interests and fees (including fees payable to affiliates).

III. 10-YEAR HOLD RULE

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There must be a period of at least 10 years between the date of acquisition of the project by the taxpayer and the later of (a) the date the project was last placed-in-service or (b) the date of the most recent nonqualified substantial improvement of the project. See IRC §42(d)(2)(B)(ii).

A. ***Placed-in-Service.***

1. A building is placed in service when it is producing income for its intended purpose, or when the taxpayer takes depreciation on the building. As a practical matter, the issuance of a certificate of occupancy generally signifies "placed-in-service." The definition of "placed-in-service" is also important for historic tax credits.

2. The IRS has said that, "In general, a transfer of the property results in a new placed in service date if, on the date of the transfer, the property is ready and available for its intended purpose." Rev. Ruling 91-38. *See also* 2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-91 (1986), 1986-3 (Vol. 4) C.B. 91. *See also* Priv. Ltr. Rul. 20009032 and Priv. Ltr. Rul. 942010.

3. Generally, if the following questions in connection with a project's acquisition can be answered in the negative, then the acquisition is not a placed-in-service event, and can be excluded from 10-year calculations:

(a) Was the project fit for any purpose at the time it was acquired?

(b) Did the previous owner take any depreciation deductions on the project?

(c) For residential rental structures, (i) was a certificate of occupancy or other similar permit ever issued? (ii) did the previous owner ever lease, or attempt to lease, the project?

(d) Did the previous owner obtain any building permits or undertake any rehabilitation expenditures?

(Note that this is not the official position of the IRS.)

4. *Undoing a Placed-in-Service Event.*

The IRS issued PLR 200309009, which states that the sale of a building, and the related placed-in-service event can be rescinded if, (a) the sale and rescission occur in the same taxable year, and (b) the rescission is valid under state law (i.e., all parties are returned to the position(s) they would have been in, had the sale never occurred).

B. ***Relevant Exceptions to Placed-in-Service.***

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1. A carryover basis transaction, or an inheritance, is not a placed-in-service event (recall that these transactions are also not "purchases" for purposes of acquisition credits). IRC Sec. 42(d)(2)(D)(ii)(I) and IRC Sec. 42(d)(2)(D)(ii)(II).

2. Placement in service by a governmental unit or a qualified nonprofit organization is not counted in calculating the 10-year hold requirement. IRC Sec. 42(d)(2)(D)(ii)(III). For this rule to apply, (a) the acquisition by the governmental unit or nonprofit must itself satisfy the 10-year rule and (b) all income earned by the property (while owned by the governmental unit or nonprofit) must be exempt from federal tax.

C. ***A Problem Transfer.***

If a project is acquired before the end of its compliance period, the buyer can claim the project's low-income tax credits from and after the acquisition date (assuming the project continues to comply with all Section 42 requirements); however, the buyer cannot claim new acquisition credits for its purchase. IRC Sections 42(d)(7)(A)(ii) and 42(f)(4). *See also* Rev. Rul. 91-38.

D. ***Nonqualified Substantial Improvement.***

1. Note that the definition of "nonqualified substantial improvement" is similar, but not identical to the definition of "substantial rehabilitation" as described in item IV below.

2. "Substantial Improvement" means capital improvements made during any 24-month period, if the aggregate cost of the improvements equals or exceeds 25% of the building's adjusted basis, as of the start of the 24-month period. IRC Sec. 42(d)(2)(D)(i)(III).

3. "Nonqualified Substantial Improvement" is any substantial improvement, if the project is subject to Code Section 167(k) (ACRS depreciation) or Code Section 168 (as it existed prior to 1986), but not if the project is subject to MACRS or straight-line depreciation. In most cases, the definition of "nonqualified substantial improvement" will not apply after 2001, because Code Section 167(k) expired in 1991.

4. Accordingly, going forward, and in the vast majority of cases, the 10-year rule will be determined by reference to placed-in-service dates, and not by reference to nonqualified substantial improvements.

E. ***Treasury Department Waivers.***

In some cases, the Treasury Department may, for federally-assisted projects, waive the 10-year hold requirement. IRC Sec. 42(d)(6)(A). To be eligible for this waiver, (a) the project must have received financial assistance from HUD or FHA, (b) "federal mortgage funds" must be at risk (for example, there must likely be a claim (or potential claim) against a federal

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mortgage insurance fund) and (c) no prior owner of the project could have received low-income housing tax credits under IRC Section 42. *See also* Treas. Reg. § 1.42.2(d).

IV. **SUBSTANTIALLY REHABILITATED**

A. A project is "Substantially Rehabilitated" if the taxpayer incurs rehabilitation expenditures with respect to the project which exceed the greater of (i) $3,000 per unit or (ii) 10% of the project's adjusted basis (as calculated before any of the rehabilitation expenditures are made). IRC Sec. 42(d)(2)(B)(iv) and IRC Sec. 42(e)(3)(A)(ii).

B. The "substantial rehabilitation" can occur during any 24-month period of the taxpayer's choosing, even if this 24-month period does not begin until well after the project's acquisition. States can, however, require that the substantial rehabilitation occur sooner, for example: (a) by requiring the rehabilitated project to be "placed-in-service" by a particular date, and/or (b) by refusing to award tax credits unless the acquisition occurs in the same year as the tax credit allocation round is held.

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ENDNOTES

[i] The Greater Boston Housing Report Card 2005-2006: An Assessment of Progress on Housing in the Greater Boston Area, Center for Urban and Regional Policy, Northeastern University, *Bonnie Heudorfer and Barry Bluestone, at page 55*.

[ii] This sentiment is aptly expressed in an article entitled "Insiders see housing as key election issue," Banker and Tradesman, October 30, 2006. (Expanding affordable housing programs, preserving the existing affordable housing stock and maintaining existing laws that have spurred housing production in the state are among the issues [we want] the next governor to keep high on the agenda).

[iii] The Greater Boston Housing Report Card 2005-2006: An Assessment of Progress on Housing in the Greater Boston Area, Center for Urban and Regional Policy, Northeastern University, *Bonnie Heudorfer and Barry Bluestone,* at page 10.

[iv] Id. at pages 9, 48.

[v] Affordable Housing Transactions and other Alien Invaders in the Massachusetts Market, New England Real Estate Journal, June 23, 2006, *Warren A. Kirshenbaum*.

[vi] Projects receiving HOME funds directly from HUD must include matching funds. DHCD Notice of Funding Availability (Winter 2006 Affordable Housing Competition for rental projects).

[vii] All PBV voucher reservations are subject to available funding from HUD and DHCD. (Requirements: (a) Family units of 2 or more bedrooms; (b) a limit of the lesser of 8 PBVs per project, or 25% of the total project units as PBVs) PBV contract authority can be requested for up to 10 years, with the option to renew. PBV funds are used to pay the owner a portion of the monthly rent on behalf of eligible households whose incomes must generally be at or below 30% of AMI, and in no case can exceed 50% of AMI. Construction cannot begin until an Agreement to enter into a Housing Assistant Payments ("HAP") contract is signed; meaning that, projects already in construction cannot receive PBV assistance. Prior to a HAP contract being executed: (1) a subsidy layering review must be approved by HUD or a HUD designated agency for projects with any form of federal, state or local housing assistance, including tax credits and tax concessions; and, (2) an environmental review performed in accordance with 24 CFR 58 must be completed and approved by HUD. At the discretion of DCHD, up to 20% of the PBVs may be awarded to units not meeting these criteria. Sponsors must agree to comply with all Section 8 project-based voucher regulations found at 24 CFR Part 983 and any future amendments (Published October 13, 2005).

[viii] Limited to 50% of total development cost. This financing is only available for entire projects, or for units used by the department of Mental Health or Mental Retardation.

[ix] The Boston Globe in a series of articles that appeared on October 10, 2006, and October 11, 2006, detailed the lack of oversight on developers, and relying on the report by State Inspector General Gregory W. Sullivan, described a failure by the State to conduct cost certifications on projects to verify that the developer profit was a maximum of 20% of the project cost. (cf. Abuses Alleged in Housing Program, The Boston Globe, *Christine McConville* (October 10, 2006)); (Towns Urge Crackdown on Housing Law Violators, The Boston Globe, *Christine McConville* (October 11, 2006)).

[x] See (Abuses Alleged in Housing Program, The Boston Globe, *Christine McConville* (October 10, 2006)); (Towns Urge Crackdown on Housing Law Violators, The Boston Globe, *Christine McConville* (October 11, 2006)).

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[xi] Public Housing in Serious Disrepair, Auditor Reports, The Boston Globe, *Matt Carroll*, (October 12, 2006) ("lack of state funds has allowed some housing for the elderly and working poor to fall into serious disrepair.").

[xii] Without a 40B alternative, the ability to satisfy neighborhood opposition or not-in-my-backyard (NIMBY) issues requires a sophisticated and dedicated strategy.

[xiii] The Federal Tax Code requires that:

Properties must meet minimum affordability requirements as follows,

Either:

a. 20% or more of the units must be both rent restricted and occupied by individuals whose income is 50% or less or area median gross income (20% @ 50%); or

b. 40% or more of units must be both rent restricted and occupied by individuals whose income is 60% or less of area median gross income (40% @ 60%).

Determination of the Tax Credit Amount

The maximum dollar amount of the Low-Income Housing Tax Credit ("LIHTC") available to a project is based on the project's total development costs, and its eligible and qualified basis. To calculate the LIHTC, total development costs are separated into acquisition and rehabilitation/new construction related soft costs. The eligible basis is found by subtracting non-depreciable and other ineligible expenses from these costs. The qualified basis is computed by multiplying the eligible basis by the percentage of low-income units. Finally, the qualified basis is multiplied by the applicable percentages according to the following general rules:

1. Projects financed with conventional (taxable) debt are generally eligible for a maximum new construction/rehabilitation LIHTC equal to approximately 9% of the project's qualified basis per year over 10 years. These 9% credits are sometimes also referred to as 70% present value credits, since their present value over 10 years equals approximately 70% of the project's qualified basis. Such credits are awarded by DHCD pursuant to a competitive funding process.

2. Federally assisted projects, including MassHousing tax-exempt financed projects, and projects receiving federal subsidies, or below-market rate loans, are eligible for a new construction/rehabilitation LIHTC of up to approximately 4% of qualified rehabilitation basis per year over 10 years. These 4% credits are sometimes also referred to as 30% present value credits, since their present value over 10 years equals approximately 30% of the project's qualified basis.

Additional rules related to federally assisted projects include the following:

a. If 50 % or more of a project's cost (i.e. total development cost including land) is financed with tax-exempt financing, then 100% of the project qualifies for the LIHTC without any charge against the state allocation. If less than 50% of the development cost is financed with tax-exempt financing, then only those expenditures financed with tax-exempt financing automatically receive the LIHTC. The balance of eligible expenditures could receive tax credits, however, through direct allocation from DHCD rather than by LIHTC's.

b. In some instances, projects may avoid classification as federally assisted by subtracting the federal subsidy dollar amount from the eligible basis prior to calculating the LIHTC, or by structuring such funds as a loan to the project at the Applicable Federal Rate ("AFR").

c. Special rules apply to the treatment of HOME subsidy funds; i.e. when HOME funds are structured as a loan at any interest rate, the subsidy dollar amount need not be subtracted from the basis.

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d. Community Development Block Grant ("CDBG") funds are exempted from consideration as federal funds when determining if a project is federally assisted.

e. Tax credit projects receiving tax-exempt financing and another federal subsidy will be restricted to a minimum 4%, credit and must generally also subtract other federal assistance dollar amounts from the eligible basis prior to calculating the credit.

f. All federally assisted tax-credit projects, except those in which tax-exempt financing constitutes the only federal subsidy other than the LIHTC, will be subject to review by HUD under Subsidy Layering Guidelines. Use of any HFA mortgage insurance, such as HFA Risk Sharing, will trigger subsidy layering.

3. Building acquisition costs are eligible only for the 4% credit regardless of financing type.

4. Land acquisition costs and other non-depreciable costs are not eligible toward the basis. Non-depreciable costs typically include amortized construction and permanent loan financing fees; credit enhancement fees; rent-up/marketing expenses; syndication legal fees; investor fees; personal property, equipment, and commercial property expenses.

5. Development located in an area identified by HUD as a Qualified Census Tract ("QCT") or a Difficult Development Area ("DDA") may be eligible for an adjustment of up to 130% of the rehabilitation basis prior to calculating the credit. Building acquisition costs are not eligible for this higher cost adjustment.