This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Initiatives and Tools for the Preservation of Affordable Housing in Illinois

Kelli Harsch, Kathie Soroka, Benjamin J. Swartzendruber, Glenn A. Graff, and Paul Davis

I. Illinois Affordable Housing (Donation) Tax Credit 404
A. Overview of Illinois Donation Credits........ 404
B. Donation: Permitted Uses........ 406
C. Types of Property That May Be Donated 408
D. Sponsor........ 410
E. Reservation, Allocation, and Transfer of Credits 411
F. How to Use Donation Credits to Preserve Affordable Housing........ 413
1. Donation of Property—Owner Keeps Benefit of Credits........ 413
2. Bargain Sale of Property 414
3. Donation of Property and Sponsor Keeps Credit Proceeds 414
4. Donation of Property for Use in a Low Income Housing Tax Credit Project........ 414
II. Illinois Federally Assisted Housing Preservation Act........ 416
A. What Programs Are Covered by the Act? 417
B. Notice Period........ 417
C. Offer 418
D. Obstacles to Success........ 419
E. Legal Troubles 420
III. Real Estate Tax Tools........ 420
A. Income-Based Assessment May Create a More Realistic Basis for Taxation Than Other Forms of Valuation........ 421
B. Complete Exemption from Property Tax May Be Available for Projects Operated Charitably by Nonprofits........ 423
C. Special Tax Classification in Cook County, Illinois, Targets Relief to Multifamily Housing 426
IV. Tax Increment Financing........ 429
A. Generating TIF 429
B. Effect on Other Taxing Bodies........ 429
C. Eligible Costs 430

Kelli Harsch, Kathie Soroka, Benjamin J. Swartzendruber, Glenn A. Graff, and Paul Davis are attorneys at the firm of Applegate & Thorne-Thomsen, P.C. in Chicago.

D. Creating a TIF Area—Eligibility 431
E. Creating the Redevelopment Plan 431
F. Elements of Redevelopment Plan 432
G. Creating a TIF Area—Process 432
H. Use of TIF Funds 433
I. Method of TIF Subsidy 433
J. Basic Terms of a Redevelopment Agreement 434
K. Conclusion 435
V. Conclusion 435

This article examines three State of Illinois programs and a somewhat lesser-known, yet formidable, statutory restriction on sales of federally assisted buildings that enhance the preservation of affordable housing within the state. The newest of these, the Illinois Affordable Housing Tax Credit Program, commonly known as the donation credit program, had been so widely pursued in connection with the development of affordable housing that the state modified its program requirements to ensure proper utilization of the credit throughout the state.[1] The other two programs and the preservation statute alluded to above have had varied levels of impact but have all contributed to the retention of affordable units within Illinois.

I. Illinois Affordable Housing (Donation) Tax Credit

As noted above, a relatively recent tool for use in the preservation and construction of affordable housing in Illinois is the affordable housing tax credit, commonly known as the donation credit. The donation credit program not only encourages the donation of property or funds to the sponsor of an affordable project but often generates a source of equity or soft debt through the sale of the credit itself to investors. This portion of the article describes the mechanics of qualifying for and receiving the donation credit and also discusses how to employ the credit in the preservation of affordable housing.

A. Overview of Illinois Donation Credits

On August 23, 2001, the Illinois Affordable Housing Tax Credit Act was signed into law. The act was intended to encourage the donation of money or property to nonprofit sponsors of affordable housing. To that end, donors[2] are provided with a tax credit against Illinois state income tax equal

1. Substantial modifications were made to the rules governing donation credit on March 30, 2007. 31 Ill. Reg. 5797 (Apr. 13, 2007).

2. As originally enacted, the donation credit was only available to "taxpayers" that made donations to nonprofit organizations. Unfortunately, this reference to taxpayers appeared to preclude governmental and other nontaxable entities from participating in the program as donors. To avoid this interpretation, § 214 of the Illinois Income Tax Act was amended on July 24, 2003, to clarify that credits could be

to 50 percent of the value of the money or property donated.[3] Such credit is available through December 31, 2011, and may be carried forward for up to five years following a year in which the amount of the credit exceeds tax liability.[4] The act charged the Illinois Housing Development Authority (IHDA) with authority to draft regulations for the donation credit program. Such regulations appear at part 355 of title 47 of the Illinois Administrative Code (Rules).[5] In addition, the Illinois Department of Revenue has issued regulations covering certain income tax aspects of the credit.[6]

An important feature of the donation credits is the ability of the donor to either (i) use the credits to reduce its Illinois income tax liability or (ii) transfer the credits to other taxpayers. To facilitate such a transfer, the donation credit is issued in the form of a certificate to the donor. Through its endorsement of the certificate, the donor can transfer and assign all of its rights, title, and interest in the certificate and credits to a credit purchaser. Because many donors would be unable to use the large amount of donation credits that can be generated by a donation, the ability of the donor to sell the credits and thus monetize them through a sale has greatly expanded the appeal of the credit.[7] In practice, many donors will allow the sponsor to leverage its donation by keeping any proceeds from the sale of the credits for use in the housing project.[8]

---

received by tax-exempt donors. This change was very important to the success of the program because a significant amount of the donations are received from governmental entities in the form of land donations and cash donations, as well as from other organizations that do not pay taxes, such as charitable organizations.

3. 35 Ill. Comp. Stat. 5/214 (2008).

4. *Id.*; Ill. Admin. Code tit. 86, § 100.2190(d) (2004).

5. Ill. Admin. Code tit. 47, § 355 (2007).

6. Ill. Admin. Code tit. 86, § 100.2190.

7. The necessity of allowing the credit to be sold is shown by the following example. If an individual donated $500,000 to a nonprofit sponsor, such a donation could create $250,000 of donation credits. In order to fully use the $250,000 of donation credit, the individual would need to have $8,333,333 of taxable income in order to generate $250,000 of income tax at Illinois's 3 percent tax rate. 35 Ill. Comp. Stat. 5/201(a). The number of donors that have taxable income in any year in excess of $8 million may be very limited. By allowing a donor to sell the credits, many more donors would be able to participate in and benefit from the donation credit program. In addition, because there is no restriction on who can buy the credit (other than the requirement for the buyer to make a minimum donation to the sponsor), a market for donation credits has developed consisting of large corporations and high-net-worth individuals.

8. Governmental entities or tax-exempt nonprofit organizations are the donors most likely to allow the sponsor to keep the proceeds of a credit sale. For example, a sponsor could approach a potential donor to solicit a donation of $100,000 for an affordable housing project. If the sponsor can persuade the donor to also donate

Procedurally, the donation credit program is relatively straightforward. A sponsor must apply for and receive a reservation of credits from IHDA and/or the City of Chicago Department of Housing, which are the two governmental bodies that administer the program.[9] The act limits the total amount of donation credits available each year. The maximum credit ceiling, originally set at $13 million in 2003, has increased by 5 percent in each subsequent year. The credit ceiling for fiscal year 2009 is $18,292,305.[10] IHDA receives and allocates 75.5 percent of the available credits, while the City of Chicago allocates the remaining 24.5 percent.

B. Donation: Permitted Uses

Donation credits are generated by the donation of cash, securities, or real or personal property to a not-for-profit sponsor.[11] The donation must have a value equal to at least $10,000.[12] The donation of services is not eligible for the credit.[13] In addition, donations must be made to a sponsor without consideration,[14] and funds used by a donor to acquire an ownership interest in the project do not qualify as a donation.[15]

In order to qualify as a donation, the donated asset must be used by the recipient sponsor solely for (i) "costs associated with purchasing, rehabilitating, constructing, or providing or obtaining financing for an affordable housing project"; (ii) "an employer-assisted housing project"; (iii) "technical assistance"; or (iv) "general operating support of the sponsor."[16] The donation of an existing building to a sponsor qualifies as a donation under the act, provided that the building will be used as part of an affordable

---

to it the proceeds of the sale of the credit, the sponsor would receive an additional $42,500 (assuming the credits were sold for $0.85 per credit). Thus, a $100,000 donation would result in $142,500 of benefit for the project. Many governmental agencies and grant-making foundations look favorably upon grant requests that demonstrate that other subsidies such as donation credits will be received.

9. The term *agency* will be used to refer to either IHDA or the City of Chicago, Department of Housing.

10. Ill. Hous. Dev. Auth., FY2009 Fact Sheet for Illinois Affordable Housing Tax Credits (2008), www.ihda.org/admin//Upload/Files//61c7e8a9-629a-4cc3-a123-f4100a5fecdc.pdf.

11. 20 Ill. Comp. Stat. 3805/7.28 (2008) (definition of *donation*); Ill. Admin. Code tit. 47, § 355.103,.301.

12. Ill. Admin. Code tit. 47, § 355.303.

13. *Id*. § 355.301.

14. *Id*. § 355.103 (definition of *donation*).

15. *Id*. § 355.308.

16. *Id*. § 355.103 (definition of *donation*); *cf*. 20 Ill. Comp. Stat. 3805/7.28 (definition of *donation*) (in promulgating regulations under the act, IHDA has clarified that donations that are used for providing or obtaining financing for an affordable housing project qualify as donations).

housing project. In the most basic sense, the donation of a building is effectively paying the cost of purchasing the project.

An affordable housing project includes (i) rental projects where at least 25 percent of the units are affordable to and occupied by households making no more than 60 percent of area median income; or (ii) for-sale developments where each unit or home is to be sold to a family with income no greater than 60 percent of area median income, and total principal, interest, property taxes, and insurance payments do not exceed 30 percent of the home buyer's gross household income.[17] To date, the majority of affordable housing projects that have benefited from the donation credit have been rental projects.

Donations are also permitted in connection with "employer-assisted housing projects." In such projects, an employer will make a donation that is used to assist employees of the employer in obtaining affordable housing near the workplace.[18] A key difference between the employer-assisted housing project and an affordable housing project is that in an employer-assisted housing project, assistance can be provided to employees with incomes below 120 percent of area median income, as opposed to the more restrictive standard for affordable housing projects, which is limited to income less than 60 percent of area median income. Donations to the sponsors are most commonly used to pay for down payment and closing costs assistance.[19] The act reserves $2 million of the credit ceiling for employer-assisted housing projects (an amount not subject to an annual increase).[20]

A donation also may be applied to technical assistance and general operating support. Technical assistance represents costs that a sponsor may incur for (i) planning for an affordable housing project or an employer-assisted housing project, (ii) assistance with the application for donation credits, or (iii) the counseling services provided to prospective home buyers in connection with (a) a for-sale affordable housing project or (b) an

17. 20 Ill. Comp. Stat. 3805/7.28 (definition of *affordable housing project*); Ill. Admin. Code tit. 47, § 355.103 (definition of *affordable housing project*).

18. Ill. Admin. Code tit. 47, § 355.103 (definition of *employer-assisted housing project*); *cf*. 20 Ill. Comp. Stat. 3805/7.28 (definition of *employer-assisted housing project*) (the Rules clarify that donations must be made to a sponsor and that the sponsor provides the housing assistance).

19. Ill. Admin. Code tit. 47, § 355.103 (definition of *employer-assisted housing project*); 20 Ill. Comp. Stat. 3805/7.28 (definition of *employer-assisted housing project*). Donations can also be used to provide employees with reduced-interest mortgages, mortgage guarantee programs, rental subsidies, and development account savings plans.

20. 20 Ill. Comp. Stat. 3805/7.28(e)(1); Ill. Admin. Code tit. 47, § 355.403. Rule 355.403 provides that in the event that all of the credits set aside for employer-assisted housing projects are not used, the excess shall be available for affordable housing projects, technical assistance, or general operating support.

employer-assisted housing project.[21] Donations can also be made for general operating support, which includes any "[a]ny cost incurred by a Sponsor, directly or indirectly, in connection with an Affordable Housing Project or an Employer-Assisted Housing Project."[22] Importantly, such costs can also include a proportionate amount of the sponsor's general overhead expenses.[23] The act reserves $1 million of the credit ceiling for technical assistance and general operating support (an amount not subject to an annual increase).[24] The amount of the credit that is attributable to technical assistance and general operating support in connection with an affordable housing project, moreover, is limited to 10 percent of such project's overall credit allocation.[25] The 10 percent limitation does not apply to employer-assisted housing projects.[26]

C. Types of Property That May Be Donated

The most straightforward donation is a contribution of cash to the nonprofit sponsor.[27] Other types of property that can be donated include personal property, securities, waived permit fees, and below-market loans. Most prevalent, however, and most applicable to the preservation of affordable housing, are donations of real estate, which may include existing affordable housing projects.[28]

The Rules allow not only for the outright donation of fee simple title, the beneficial interest in a land trust, or a ground lease of at least fifty years but also for the "bargain sale" of real property at a price below its fair market value.[29] In a bargain sale, the amount of the donation is the difference between the appraised value of the property and the sale price.[30]

21. Ill. Admin. Code tit. 47, § 355.103 (definition of *technical assistance*); *see also* 20 Ill. Comp. Stat. 3805/7.28 (definition of *technical assistance*).

22. Ill. Admin. Code tit. 47, § 355.103 (definition of *general operating support*); *see also* 20 Ill. Comp. Stat. 3805/7.28 (definition of *general operating support*).

23. Ill. Admin. Code tit. 47, § 355.103 (definition of *general operating support*).

24. 20 Ill. Comp. Stat. 3805/7.28(e)(2). The Rules provide that in the event not all of the credits set aside for technical assistance or general operating support are used, the excess shall be available for affordable housing projects or employer-assisted housing projects. Ill. Admin. Code tit. 47, § 355.406.

25. Ill. Admin. Code tit. 47, § 355.407.

26. *Id.*

27. Cash donations must be documented by a copy of a check, wire–transfer, or other evidence.*Id.* § 355.304.

28. *Id.* § 355.306.

29. *Id.* Note that Rule 355.306 contains different evidentiary requirements for donations of fee simple interest (copy of deed), real property held in land trusts (copy of trust and trust transfer document), and ground leases (copy of lease).

30. *Id.* § 355.306. The Rules' allowance of a bargain sale is an important clarification. Without this clarification, there could have been an issue as to whether a transfer in exchange for a below-market payment could qualify under the Rules'

For donation credit purposes, the value of all real estate donations is determined by an independent appraisal, obtained from an Illinois-licensed appraiser, that is completed within six months of the date of such donation.[31] The applicable agency may commission a second appraisal of the property, and the donation's fair market value will be deemed to be the lesser of the two appraised amounts.[32]

The determination of the fair market value of donated real estate must consider existing legal restrictions on the property.[33] The authors' experience has been that legal restrictions requiring a property's use as affordable housing that are placed on the property concurrently with and as part of the donation process do not need to be considered in valuing the donated property. Because a project must be maintained as affordable housing for at least ten years in order to qualify for the donation credit,[34] it is not uncommon for the donor of the property to require that such property be used for affordable housing for at least a ten-year period. The ability of an appraiser to disregard an affordable housing restriction placed on the property as part of the donation prevents the value of the donation from being reduced merely by a donor requiring that the property be used as required by the donation credit act and Rules.

On March 30, 2007, IHDA adopted several amendments to the Rules. One such amendment added Rule 355.311, which limits donations by governmental entities.[35] This rule prohibits donations from the federal government or donations consisting of funds indirectly received from the federal government. Although it added certain restrictions with respect to donations from state or local governmental entities, Rule 355.311 also added additional types of donations that only governmental donors are permitted to make under the donation credit program.[36]

Under the newly enacted Rule 355.311, only four types of donations from state and local governments may qualify for donation credits: money, waived permit fees and other customary charges, real property, and loans at below-market interest rates. Donations of money from state or local government entities are allowed only to the extent that such money does not

---

general requirement that a a transfer of property only qualifies as a donation if it is transferred without consideration. *See id*. § 355.103 (definition of *donation*) (a donation is "[m]oney, securities, or real or personal property that is provided without consideration to a Sponsor").

31. *Id*.

32. *Id*.

33. *Id*.

34. *Id*. § 355.103 (definition of *compliance period*).

35. 31 Ill. Reg. 5797 (Apr. 13, 2007).

36. Ill. Admin. Code tit. 47, § 355.311. Section 355.311 of the Rules provides the only exception to the general exclusion of federal and state governmental entities from the definition of *donor* under § 355.103 of the Rules.

come directly or indirectly from any federal or state program related to affordable housing or is not required to be repaid from the operations of the affordable housing project.[37] Donations of real estate from state and local governments are subject to the same rules as real estate donations from nongovernmental entities.[38]

Rule 355.311 allows waivers of permit fees and other customary charges such as water and sewer permit fees, hook-up charges, or impact fees to qualify for donation credits.[39] This change acknowledges that state and local governments often make valuable contributions to an affordable housing project by waiving fees that would normally be charged on projects not designated as affordable housing. To qualify as a donation, the fee waiver must be made in favor of the nonprofit sponsor (as opposed to a partnership that may ultimately own the affordable housing project).

Rule 355.311 also now allows for donations consisting of below-market loans that are made by state and local governmental entities.[40] The amount of a below-market loan donation equals the present value of the difference between market interest and actual interest to be paid over the term of the loan.[41] The authors are not aware of any donations consisting of below-market loans that have been made to date, and they anticipate a number of uncertainties with respect to this category of donation. For instance, how does one determine whether a loan bears a below-market interest rate? Would one use the applicable federal rate as defined in § 1274 of the Internal Revenue Code of 1986, or some other rate? Also, what discount rate would be applied in calculating the present value of the foregone interest? These and other questions are not addressed in the Rules or other guidance from IHDA and will need to be clarified before this aspect of the program is put into practice.

D. Sponsor

A donation must be made to a qualifying sponsor. *Sponsor* is defined by the act as a not-for-profit entity that falls within at least one of three categories: (i) it is organized under the laws of Illinois or another state and has as a purpose either the development of affordable housing or home ownership education, depending on the use to which the donated property will be put; (ii) it is organized for the purpose of constructing or rehabilitating affordable housing units and has been issued a ruling from the IRS that the organization is exempt from income taxation under provisions of the Code; or (iii) it is an organization designated as a community development corporation by the U.S. government under Title VII of the Economic Opportunity

37. *Id*. § 355.311(a).
38. *Id*. § 355.311(c).
39. *Id*. § 355.311(b).
40. *Id*. § 355.311(d).
41. *Id*.

Act of 1964.[42] The Rules adopt a more restrictive definition of the first category of sponsor than does the act; more specifically, the Rules require that the Illinois nonprofit corporation must have a purpose of constructing or rehabilitating affordable housing units in Illinois.[43] In addition, the Rules have clarified that a limited liability company that has a not-for-profit organization as its sole member can also qualify as a sponsor.[44]

Sponsors involved in affordable housing projects consisting of either multifamily housing projects or rental single-family projects must meet an additional requirement. Sponsors of such projects must materially participate in the development and operation of the project throughout a ten-year compliance period.[45] The material participation requirement is satisfied if the sponsor is the owner of the project, is the managing general partner or managing member of the owner, or holds a controlling interest in such entities.[46] Because some projects are structured where the sponsor is not part of the ultimate project ownership but instead plans to provide services to the project, the material participation requirement can also be satisfied by the sponsor's provision of (i) personal services to tenants or prospective tenants of a multifamily housing project or a rental single-family project; or (ii) professional services to a multifamily housing project on a "regular, continuous, and substantial basis" for more than 300 hours each year during the ten-year compliance period.[47]

E. Reservation, Allocation, and Transfer of Credits

A sponsor must apply to one of the agencies for an allocation of donation credits.[48] Although the Rules prescribe the minimum factors to be considered by the agencies in allocating donation credits,[49] IHDA and the City of Chicago use different application forms and have their own procedures for deciding which projects will receive credits. Successful applicants are awarded a reservation letter setting forth an approved maximum amount of credits.[50] The donation must occur within twelve months of the date of the reservation, a deadline that may be extended with agency approval to

42. 20 Ill. Comp. Stat. 3805/7.28 (2008) (definition of *sponsor*).
43. Ill. Admin. Code tit. 47, § 355.103 (definition of *sponsor*).
44. *Id*.
45. *Id*. § 355.206,.310.
46. *Id*.
47. *Id*. § 355.103 (definition of *material participation*).
48. *Id*. § 355.203.
49. *Id*. § 355.204.
50. *Id*. § 355.205(b). The annual requests to the agencies for donation credits generally exceed the available amount of credits, thus resulting in some projects not receiving credits. Although donation credits are typically oversubscribed, the excess demand for the credits is generally seen as less than the excess demand for other

twenty-four months for affordable housing projects and employer-assisted housing projects.[51] This twenty-four month deadline is critical because there is no provision allowing for credits that are reserved but not allocated within the twenty-four months to return to the agency. Thus, a failure to receive the required donation will result in the permanent loss of such credits.

The allocation of donation credits to a project is conditioned on receipt by the agency of a substantial amount of documentation, including the certification by a sponsor as to compliance with the act and Rules, the ownership structure of the sponsor and owner, and execution and recordation of a regulatory agreement.[52] A regulatory agreement must also be entered into that will restrict the tenant income and rent levels as described above and that prohibits transfers of the project or changes to the owner's organizational structure without agency consent.[53] In addition, the sponsor must certify the receipt and amount of the donation.[54]

The Rules provide that the date of allocation for an affordable housing project is the date of the "initial closing" of such project.[55] The initial closing is when all legal requirements for the funding of the project have been satisfied and funds are available for distribution.[56] This generally means that the credit certificate is issued in conjunction with the closing of construction financing for the project. It is critical to note that under the Rules, the credits must be allocated within twenty-four months of the date of the reservation.[57] Given that affordable housing projects often involve multiple layers of financing that often progress at different speeds, projects will sometimes have a tight time frame requiring receipt of the donation and achievement of construction closing within twenty-four months. Fortunately, once donation credits are allocated, there is no potential recapture of the credits except in cases of fraud committed by the donor.[58]

Once the agency has determined that a qualifying donation has occurred to a sponsor in fulfillment of the statutory and regulatory requirements and that initial closing has been achieved, it will issue the credit certificate to the donor. The sponsor must execute and attach a certification of donation to the credit certificate. Once the certificate has been issued

---

forms of governmental financing, such as LIHTCs under Section 42 of the Code or governmental loans with low-interest rates or with reduced-payment requirements.

51. *Id*. § 355.205(d); *see also id*. § 355.103 (definition of *reservation*).
52. *Id*. § 355.205(c).
53. *Id*. § 355.207.
54. *Id*. § 355.208.
55. *Id*. § 355.209.
56. *Id*. § 355.103 (definition of *initial closing*).
57. *Id*. (definition of *reservation*).
58. *Id*. § 355.210.

and the required sponsor certification received, the donor may transfer the certificate and credits to one or more tax credit purchasers in exchange for cash consideration. The Rules anticipate and provide for such transfer as long as such an investor has "made a Donation to an Affordable Housing Project."[59] In practice, this requirement is usually satisfied in accordance with the minimum donation amounts prescribed by the Rules: $10,000 or, if the amount of credits transferred is less than $100,000, 10 percent of such lesser amount of credits.[60]

F. How to Use Donation Credits to Preserve Affordable Housing

One of the important facets of the donation credit program is its ability to assist in preserving affordable housing. The credits can be used in a number of scenarios.

1. Donation of Property—Owner Keeps Benefit of Credits

One common scenario is where the owner of an affordable housing project wants to sell the project and monetize its investment. Potential purchasers of the project may want to convert the project to market-rate housing or even tear the building down and use the site for other purposes. The donation credits provide an incentive to the current owner to donate the project to a sponsor that will continue to use the property for affordable housing. The donor should receive a federal income tax deduction[61] if it donates the property to a sponsor that is exempt from taxes under Code § 501(c)(3), and it will also be able to use the donation credits to reduce its own Illinois tax liability. For example, a project owner could donate a project appraised for $500,000 to a sponsor. The owner could receive up to $250,000 of donation credits as well as a federal charitable deduction. Although the owner has not received the full $500,000 fair market value of the project, the combination of federal and Illinois tax benefits would equal approximately 70 percent of the project's $500,000 value.[62] For some project owners, this level of return provides a sufficient ability to receive some benefits from the project while allowing the project to continue to provide affordable housing. As discussed above, donors that are unable to use all of the tax credits, including tax-exempt donors that do not pay tax, can instead sell the credits to tax credit purchasers. Thus, the owner of a project worth $500,000 could donate the property and generate $250,000 of tax credits that could be sold for $212,500 (assuming a credit price of $0.85 per credit). In this

59. *Id*. § 355.309; *see also* 20 Ill. Comp. Stat. 5/214(C) (2008) (permitting transfers to donors as well as purchasers of land designated solely for affordable housing projects).

60. *Id*.

61. I.R.C. § 170 (2006).

62. The calculation of the owner's actual savings would depend on the owner's federal and state tax bracket and the tax rates in effect at the time of the donation.

scenario, the owner is able to monetize the credits and retain the federal deduction for the charitable contribution to a tax-exempt entity.[63] It is also important to view the above transactions from the sponsor's perspective. It has received a project worth $500,000 for no cost.

2. Bargain Sale of Property

The donation structure described above can be further enhanced in a bargain sale structure. For example, the owner of the $500,000 project could sell it to a sponsor for $200,000. The result of the bargain sale would be a $300,000 donation resulting in $150,000 of donation credits. If the owner sold the credits for $0.85 per credit, it would receive $127,500 for the credits. Thus, the owner would receive $327,500 in cash proceeds as well as some federal tax benefits associated with the charitable contribution of the property. The return to the owner has been significantly enhanced through the use of the bargain sale structure. However, this enhancement has come at a cost to the sponsor: it has now received a $500,000 project at a cost of $200,000. Nevertheless, from the sponsor's perspective, the bargain sale approach provides $300,000 in tangible benefits to the project provided it can finance the $200,000 cost.

3. Donation of Property and Sponsor Keeps Credit Proceeds

Another variation on the donation credit structure is where the property is owned by an owner that is extremely benevolent (generally, a state or local governmental entity or a charitable organization). If the owner does not wish to profit from the sale of the project but instead wishes to ensure continued use of the project to provide affordable housing, then there is an opportunity to bring to a project even more resources that can then be used to rehabilitate the project. In this scenario, the owner donates the project to the sponsor and allows the sponsor to keep the proceeds of a credit sale. A project worth $500,000 would generate $250,000 of credits. The sponsor would also receive the $212,500 of proceeds generated from the sale of the credits, which could be used to rehabilitate the project. In this scenario, the sponsor has received a $500,000 building and $212,500 of credit proceeds—a very desirable outcome.

4. Donation of Property for Use in a Low Income Housing Tax Credit Project

All of the above scenarios can be coupled with the federal Low Income Housing Tax Credit (LIHTC) program under Code Section 42 when the

63. Note that because the credits are sold at a discount of $0.85 per credit and because such a sale itself may be taxable, the owner's benefit from the transaction would be less than the 70 percent it would receive if the credits were used by the owner.

project will undergo a substantial rehabilitation. This is accomplished by the sponsor, after receiving the building donation, transferring the project to a partnership or limited liability company that would own the project and generate LIHTCs. The use of LIHTCs can bring significant equity, allowing for a substantial rehabilitation of the project. This is by far the most common use of the donation credit.

Although the LIHTC program is very detailed and beyond the scope of this article, an extremely brief summary would be that ten years of LIHTCs can be generated based on the costs of rehabilitating a residential rental project.[64] In addition, a lesser but still significant amount of LIHTCs can sometimes be generated from the costs of acquiring a project that will also be rehabilitated.[65]

An example of a combination of LIHTCs and donation credits would be as follows. Assume that the sponsor received a donation of a project valued at $500,000 and wanted to perform $2 million of rehabilitation work and incur $300,000 of other costs not eligible for LIHTCs. The sponsor could sell[66] the project to an LIHTC partnership[67] for the appraised $500,000 value.[68] If $450,000 of the sales price was allocable to the building (and only $50,000 allocable to the project land),[69] the $450,000 of build-

64. LIHTCs are generally allocated by state credit agencies from a limited amount of credits allowed under Section 42 of the Code. I.R.C. § 42(h)(3)(C) (2000). In Illinois, IHDA and the City of Chicago can both make allocations of LIHTCs. LIHTCs can also be generated through the use of tax-exempt bonds. *See* I.R.C. § 42(h)(4) (2006).

65. Note that there are a number of technical requirements that must be met in order to be eligible for LIHTCs based on the costs of acquiring a project. These requirements include: (i) the project must be "purchased" by the entity that will own the project for fifteen years and generate the LIHTCs, (ii) the project cannot have been placed in service in the prior ten years, and (iii) the seller of the project cannot have more than a 50 percent relationship to the buyer of the project. I.R.C. § 42(d)(2) (2000).

66. If the project did not qualify for LIHTCs based on the costs of acquisition, the sponsor can sometimes make a capital contribution of the property to the project partnership.

67. In order to qualify for LIHTC acquisition credits, the sponsor's interest in the capital and profits of the LIHTC partnership must be less than 50 percent. I.R.C. § 42(d)(2)(B)(iii), (D)(ii).

68. It is common in such transactions for the sponsor to receive some of the sales price in the form of seller financing that is paid out of project cash flow and future sale or refinance proceeds. In a situation where the sponsor receives the property in a bargain sale, the transaction would be structured to ensure that the project partnership would pay the sponsor an amount sufficient for the sponsor to immediately convey the bargain sale price to the original owner/donor.

69. LIHTCs are only available for the costs of acquiring a "building" and for rehabilitation costs capitalized into the cost of the building. I.R.C. § 42(d)(1), (e)(2)(A) (2000).

ing costs could generate LIHTCs in the amount of $16,350 per year for ten years, or a total of $163,500 of LIHTCs.[70] If such LIHTCs were sold to an investor in the project partnership for $0.75 per LIHTC, this would generate an additional $122,625 of funds available for the rehabilitation of the project. In addition, $2 million in rehabilitation costs would generate $180,000 of LIHTCs per year for ten years, or $1.8 million total LIHTCs.[71] Syndication of these credits at $0.75 would result in an additional $1.35 million of proceeds to pay for the rehabilitation.

Total project costs would be the $2 million rehabilitation and perhaps $300,000 of other costs not qualifying for LIHTCs, for a total of $2.3 million. Of this amount, LIHTCs could generate $1,460,363 of the required funds. Furthermore, if the original owner of the project were willing to allow the sponsor to keep the proceeds of the sale of the $250,000 of donation credits and those credits were sold at $0.85 per credit, then an additional $212,500 of proceeds would be generated. The sponsor could loan or make a capital contribution of these funds to the partnership to pay for rehabilitation costs. Thus, of the total $2.3 million of project costs, $1,672,863 (or 72.7 percent) could be paid for with LIHTCs and donation credits. The project would only need to obtain $627,138 in bank or other financing. By reducing the financing needs of the project to less than 28 percent of total project costs, donation credits and LIHTCs have combined to create a powerful source of financing for the preservation and rehabilitation of affordable housing.

II. The Illinois Federally Assisted Housing Preservation Act

The State of Illinois passed legislation on July 14, 2004, known as the Federally Assisted Housing Preservation Act, which was codified in the Illinois Compiled Statutes as 310 Ill. Comp. Stat. 60/1-10.1. The purpose of this act is to "preserve and retain to the maximum extent possible, as housing affordable to low and moderate income families or persons, those privately owned dwelling units that were provided for such purposes with federal assistance."[72]

This act assists in preserving affordable units by granting tenants' associations the right to purchase their building upon the occurrence of certain triggering events, including the main target of the legislation, nonrenewal of Section 8 contracts. According to the Chicago Rehab Network, 42,578 units in Illinois were under project-based Section 8 contracts expiring in the

70. These figures are calculated using the March 2009 acquisition credit rate of 3.27 percent. Rev. Rul. 2009-8, I.R.B. 2009-10 (Feb. 19, 2009).

71. The annual tax credit rate on rehabilitation expenditures is no less than 9 percent for projects placed in service after July 30, 2008, and before December 31, 2013. I.R.C. § 42(b)(2) (2000).

72. 310 Ill. Comp. Stat. 60/2 (2008).

years 2007–2012.[73] When these contracts are up for renewal, unless otherwise restricted, landlords may opt out of the program.[74] As a result, most of the 42,578 units are at some risk of nonrenewal. Of the 42,578 units, 8,000 are classified as high-risk for nonrenewal by the Chicago Rehab Network.[75]

A. What Programs Are Covered by the Act?

The types of programs included in the definition of *assisted housing* under the act are (1) Section 8 project-based rental assistance; (2) Housing and Urban Development (HUD) Below Market Interest Rate Program (§ 221(d)(3)); (3) § 236 of the National Housing Act; (4) § 202 of the National Housing Act; (5) § 101 of the Housing and Urban Development Act of 1965, a rent supplement program; (6) rural rental housing under §§ 514 and 515 of the Housing Act of 1949; and (7) the LIHTC program under Section 42 of the Internal Revenue Code.[76]

B. Notice Period

When the owner of assisted housing wishes to sell, dispose of, complete prepayment, or complete a termination of federal assistance under of the aforementioned programs, the owner must notify tenants and all affected public entities (including the mayor of the city in which the assisted housing development is located, the public housing authority in whose jurisdiction the assisted housing development is located, and the IHDA) of its intent at least twelve months in advance of taking this action.[77] This twelve-month notice period coincides with HUD's requirement that an owner notify tenants twelve months in advance of the owner's intent to not renew a Section 8 contract.[78] By including public entities in the notice provisions, the state and relevant municipalities are better able to track these developments and assist in preservation efforts if they so desire. To that end, IHDA has been posting the notices it receives on its website so that any interested party can stay informed.[79]

After receipt of the notice of the owner's intent to not renew under the relevant federal assistance program,[80] the tenants have sixty days to inform the owner (1) that they have formed a tenants' association (which

73. The Affordable Housing Fact Book, www.chicagorehab.org/crn/factbook/index.aspx (last visited July 5, 2009)

74. Office of Multifamily Hous., U.S. Dep't of Hous. & Urban Dev., Section 8 Renewal Policy: Guidance for the Renewal of Project-Based Section 8 Contracts 2-2 (2008), available at www.nhlp.org/html/pres/s8renew%2011-7-01.pdf.

75. The Affordable Housing Fact Book, supra note 73.

76. 310 Ill. Comp. Stat. 60/3(e).

77. *Id.* 60/4.

78. Office of Multifamily Hous., supra note 74, at ch. 8-2.

79. Ill. Hous. Dev. Auth., Downloads, www.ihda.org/Downloads.aspx?FileCategoryID=1,6&SetSearchString=Preservation%20Act (last visited July 5, 2009).

80. In that notice, owners must provide the following information:

must represent a majority of tenants in the assisted housing building)[81] and (2) of the name of the person designated by the association as the tenants' representative.[82]

Once the tenants' association is formed, it may enter into an agreement with a nonprofit or private purchaser who will agree to maintain the affordability restrictions and represent the residents' interests. Because it is unlikely that the tenants' association will have the funding with which to purchase the property itself, these types of partnerships can be helpful to provide the needed equity. Once an agreement is entered into between the association and the purchaser, the purchaser will assume the association's rights and responsibilities under the act.[83]

C. *Offer*

Following the receipt of the information regarding the existence of the tenants' association, the owner has sixty days to provide the association with a bona fide offer for sale of the property.[84] This bona fide offer must include the sales price, terms of the financing that the buyers would assume, the terms of any seller financing, and information on any improvements that the seller plans to make.[85] The association has ninety days to respond to the owner that it intends to purchase the property.[86] No other information has to be given by the association to the owner at this point in the process.

After notifying the owner that it intends to purchase the housing, the association has an additional ninety days during which to make a bona fide offer to the owner evidenced by a purchase contract and earnest money equal to 5 percent of the offer.[87] During this ninety-day period, the owner must make available to the association documents related to the functioning of the property, including information on operating expenses, inspections, capital expenditures, and vacancy rates.[88] If there is no agreement on price within sixty days of the ninety-day period, the fair market value will

---

1. "the address of the assisted housing";
2. "characteristics of the property including the number of units, and the names and addresses of the owners";
3. "the date on which the owner intends to sell, lease, complete prepayment, complete termination, or otherwise dispose of the property"; and
4. "a detailed list of affordability restrictions applicable to the property."

310 Ill. Comp. Stat. 60/4.

81. *Id.* 60/3(g).
82. *Id.* 60/4(b).
83. *Id.*
84. *Id.* 60/5.
85. *Id.*
86. *Id.* 60/6(a).
87. *Id.* 60/7(a).
88. *Id.* 60/6(b).

be determined by two independent appraisers, one hired by the owner and one hired by the association. If the appraisers are unable to reach agreement on the fair market value, the parties can agree to take an average of the two appraisals or jointly hire a third appraiser whose decision would be binding.[89] Once an agreement on price is made and a purchase contract is signed, the association must agree to close within ninety days from the date of the contract.[90]

D. Obstacles to Success

This statute aids in preservation efforts by allowing tenants the right to purchase their federally assisted building and maintain the building's affordability. However, there are two main obstacles to the act's implementation: time and money. If a tenant association does not already exist at the time the twelve-month notice is sent, there are only sixty days within which to form an association representing a majority of tenants. This is a challenge and one addressed by other states and municipalities with similar statutes with longer notice periods. For example, San Francisco requires owners to send notice to tenants eighteen months prior to their nonrenewal. The tenants' association, or other qualified entities, receive notice at fourteen months; and the receipt of an offer from the tenants' association, or other qualified entity, is required no later than eight months prior to the termination of the federal assistance.[91] The overall time frame is similar to the Illinois act; however, two significant differences are (1) the initial notice to the tenants is sent six months earlier than in Illinois, giving the tenants more time to develop a plan to address the contents of the notice; and (2) unlike the Illinois act, which requires the tenants' association be formed within sixty days of the initial notice, the San Francisco act only requires an offer be made prior to eight months before the expiration of the federal assistance. Consequently, if there is no tenants' association, the San Francisco approach effectively provides ten months to form an association and find equity to purchase the building.

Under the Illinois act, even if a tenants' association is already in existence at the time the notice is received, finding enough money and/or a nonprofit or private purchaser partner may be difficult in the time frame allotted. Tenants' associations are not generally capitalized to the extent they would need to be to purchase the building on their own. Nonprofits and private purchasers who may be interested buyers may also have difficulty committing financial resources within only a few months.

These timing restraints and the likely delays in securing capital necessarily mandate the process of organizing to occur even prior to anyone receiving notice of nonrenewal under the act. Some Illinois organizations have

89. *Id.*
90. *Id.* 60/7(c).
91. S.F., CAL., ADMIN. CODE § 60.8(d) (2009).

been attempting to do this through the education of tenants. Resources are limited for this type of effort, but without it, there is little opportunity for this act to meet its goal of preserving affordable housing units.

E. Legal Troubles

To date, the act has not been challenged in Illinois state or federal courts. However, a similar act in Minnesota was challenged and determined by the U.S. Court of Appeals for the Eighth Circuit in *Forest Park II v. Hadley* to violate the Supremacy Clause.[92] In *Forest Park II*, the property owners were attempting to prepay their mortgage under the federal § 236 program when they were informed that in addition to the federal rules governing their prepayment, they also had to follow state rules, which included a twelve-month notice of repayment to tenants and a tenant impact statement. They brought suit claiming that the state ordinance preempted federal law.[93] The court of appeals ruled in the property owners' favor, finding that the Minnesota statute did violate the Supremacy Clause because in order for Minnesota to enforce its own statutes, it would be ". . . standing in the way of an owner's exercise of its federally granted right to prepay and withdraw from the program."[94] The court attempted to limit its holding to the prepayment process, specifying, "We do not suggest that all state attempts at preserving existing federally subsidized, low-income housing are preempted. . . . When however, these state programs place additional requirements on federal program participants, restrict the exercise of the participants' federally granted prepayment rights, or create delays in the prepayment process, they are preempted."[95]

The ruling in *Forest Park II* was followed by the Supreme Court of New York County ruling in *Real Estate Board of New York v. City Council of City of New York*, which held that Local Law 79, a law passed by the New York City Council that allowed tenants' associations the right of first refusal to purchase buildings withdrawing from federal assistance programs, is preempted by federal housing law.[96]

These two rulings cast a shadow on the legality of the Illinois act, which includes the same prepayment requirements as the Minnesota statute and similar requirements as New York Local Law 79.

III. Real Estate Tax Tools

Real estate taxes are a significant annual operating expense for any property. For many low-income housing developments with tight budgets, the way that real estate taxes are assessed on a property can often make the difference between operating at a profit and running a deficit. Recogniz-

92. 336 F.3d 724 (8th Cir. 2003).
93. *Id.* at 727.
94. *Id.* at 734.
95. *Id.*
96. 842 N.Y.S.2d 218 (2007).

ing the significant tax burden that most affordable housing projects must sustain, the State of Illinois and its municipalities employ three main tools to minimize that burden for owners of low-income housing: (1) income-based assessments, a valuation method that levies taxes based on the income a project generates rather than its cost of construction or its value in a restriction-free market; (2) exemption, which is available for certain projects controlled by nonprofits and run charitably if the project complies with the applicable statutory guidelines and constitutional requirements; and (3) special classifications, such as Cook County's Class 9 and Class S classifications offering reduced assessment rates for certain low-income multifamily and Section 8 housing projects that comply with the county's guidelines. Although each has its own shortcomings and challenges, these tools can offer significant relief to a qualifying project's operating budget, making its preservation more feasible.

A. Income-Based Assessment May Create a More Realistic Basis for Taxation Than Other Forms of Valuation

Illinois employs an ad valorem system of taxation, meaning that it taxes property based on its value.[97] Property taxes in Illinois are levied on the local level:[98] a property's county or municipality will assess its value, and that assessed value is multiplied by a municipality-specific tax rate to determine the amount of taxes owed.[99] Generally, a property's assessed value is recorded as one-third of its actual value,[100] according to one of three methods: (1) cost, i.e., the price paid for the property; (2) market-rate, i.e., the fair market value as compared with similar property; and (3) income, i.e., a consideration of the economic productivity to the owner and the net operating income of the property. The income method recognizes the impact that income restrictions have on property. Because the

97. 35 Ill. Comp. Stat. 200 (2008).

98. Illinois does not have a state property tax. For more information on real estate taxation in Illinois, see Ill. Dep't of Revenue, Form P-TAX 1004: Illinois Property Tax System: A general guide to the Local Property Tax Cycle (rev. 11/2002), available at www.revenue.state.il.us/Publications/LocalGovernment/ptax1004.pdf (last visited Mar. 3, 2008).

99. Although a detailed analysis of the mechanics involved in determining each individual property's real estate tax owed is beyond the scope of this article, it is worth noting that the general description of the taxation method above omits a step: after the locality assesses a property's value, that value is multiplied by a state-imposed "equalization factor" meant to equalize all assessments at 33-1/3 percent of the property's fair market value to account for variances in assessment levels. This equalized assessment amount is then multiplied by the applicable tax rate to determine the amount of tax owed.

100. 35 Ill. Comp. Stat. 200/9-145,-210. Unless otherwise provided, a property will be valued at 33-1/3 of its "fair cash value," which the statute defines as "[t]he amount for which a property can be sold in the due course of business and trade, not under duress, between a willing buyer and a willing seller." *Id.* 200/1-50.

cost and market-rate methods generally do not consider the impact of income restrictions, those methods tend to result in higher assessments. Straightforward and fair, the income method is not particularly controversial once assessors become familiar with it and the statutory regulations requiring its use.

The Illinois Property Tax Code (PTC) requires low-income housing to be assessed by the income method if such housing is rural rental housing financed by § 515 or housing that qualifies for the LIHTC pursuant to Section 42 of the Internal Revenue Code.[101] According to the statute, when assessing such projects, "local assessment offices must consider the actual or probable net operating income attributable to the property."[102] Furthermore, in assessing LIHTC projects, § 10-260 of the statute requires that "emphasis shall be given to the income approach, except in those circumstances where another method is clearly more appropriate."[103] The statutory text expressly reflects the legislature's intent to preserve low-income housing, stating that this valuation method should

> help to insure that [projects'] valuation for property taxation does not result in taxes so high that rent levels must be raised to cover this project expense, which can cause excess vacancies, project loan defaults, and eventual loss of rental housing facilities for those most in need of them, low-income families and the elderly.[104]

Employing the income-based valuation method creates a more realistic assessment of a low-income housing development. Income restrictions, by definition, limit an LIHTC project's net operating income. Without employing the income method, an LIHTC project could be assessed at the same amount as a comparably sized market-rate development with a similar unit mix. Because the LIHTC project generates limited income by maintaining affordable rents in accordance with deed restrictions, applicable governmental regulations, and regulatory agreements, the unrestricted market-rate development should generate more income and have a much higher value. Assessments that do not consider the income restrictions on LIHTC projects create an unfair and unnecessary burden on taxpayers with limited operating income.

To take advantage of the income valuation method, taxpayers must notify the assessor of its applicability. Taxpayers must certify that the subject project qualifies for LIHTCs in accordance with Section 42,[105] and ultimately the taxpayer must provide the information necessary for the assessor to perform the income valuation.

---

101. *Id.* 200/10. The statute also states that such low-income housing shall be valued "at 33 and one-third percent of the fair market value of [its] economic productivity to the owners of the projects." *Id.* 200/10-235.

102. *Id.* 200/10-245.

103. *Id.* 200/10-260.

104. *Id.* 200/10-235.

105. *Id.* 200/10-250(b).

The challenges with the income valuation method typically center around its implementation at the individual assessor level. Assessors tend to prefer the other valuation methods. The cost and market-rate methods are simpler, quicker, and determined more easily. Evidence supporting the assessor's valuation is easier to produce and to document. They make intuitive sense and do not require knowledge of LIHTC regulations. Therefore, prior to the passage of § 10-260 of the PTC, assessors could and would typically choose the other valuations over the income method.

Moreover, in the early application of the income method, assessors would include the value of the tax credits in determining the property's income, which developers found to unfairly inflate the assessed value of their projects. The inclusion of tax credits in a project's income was supported by *Rainbow Apartments v. Illinois Property Tax Appeal Board*,[106] a 2001 case before the Illinois Appellate Court, Fourth District. The controversy in *Rainbow Apartments*, however, was based on 1995 facts and preceded a 1999 amendment to the PTC explicitly excluding LIHTCs from taxable property.[107]

With the amended definition of *property*, the statutory provision requiring assessors to consider the "net operating income attributable to the property" clearly excludes the value of the tax credits. Although assessors unfamiliar with this legislative and case history may continue to include tax credits' value upon their initial assessment, straightforward explanations of the statutory provisions generally convince assessors to exclude the tax credits' value.

Therefore, although falling short of the potential benefits of complete exemption or specialized classification, the income valuation method offers a fair approach to real estate tax assessments in a straightforward and broad-reaching way.

B. Complete Exemption from Property Tax May Be Available for Projects Operated Charitably by Nonprofits

The PTC also offers complete exemption from real estate taxes for charitably operated housing developments that meet the statutory guidelines and requirements of the state constitution. Such projects must be "actually and exclusively used for charitable or beneficent purposes,"[108] as such charitable use is determined by Illinois case law and adhered to by the Department of Revenue (DOR). Projects must apply for exemption, and DOR's review of the application can be quite stringent, with the burden of proving qualification for exemption resting on the applicant. Although exemption is a significant benefit to the projects that fit DOR's interpretation of Illinois case law on property tax exemption, working more with DOR

106. Rainbow Apartments v. Ill. Prop. Tax Appeal Bd., 762 N.E.2d 534 (Ill. App. Ct. 2001).

107. 35 Ill. Comp. Stat. 200/1-130.

108. *Id.* 200/15-65.

may be necessary to demonstrate how different kinds of low-income housing developments fit into that interpretation.

To qualify for exemption, a property must be used for charitable purposes. Any applicant for property tax exemption under the charitable purposes exception must show evidence of six factors that indicate such charitable purposes, as established by the Illinois Supreme Court in *Methodist Old People's Home v. Korzen* in 1968.[109] According to *Korzen*, an applicant must prove that it (1) provides a benefit to an indefinite number of people by aiding their general welfare or reducing the burdens of government; (2) is an organization with no capital, capital stock, or shareholders and produces no profit; (3) derives its funds mainly from public and private charity; (4) dispenses charity to all who need and apply for it; (5) places no obstacles in the way of those who would avail themselves of the charity dispensed; and (6) uses the property exclusively and actually for charitable use, meaning that the primary use of the property is charitable.

In addition, the PTC lists six categories of charitable uses into which the subject property must fit. Of the six categories, low-income housing could arguably fall into three: (a) "[i]nstitutions of public charity"; (b) "[b]eneficent and charitable organizations," including such organizations that distribute, sell, or resell donated goods to support charitable activities; and (c) housing for the elderly and for individuals with developmental disabilities, financed under § 202 of the National Housing Act of 1959.[110]

Given the specific mention of § 202 projects, it should not be surprising that such projects have had the most luck meeting DOR's requirements and qualifying for exemption. To meet the requirements of exemption under this provision of the statute, the property owner must (i) be a nonprofit with 501(c)(3) status, (ii) receive financing for the development under § 202 of the National Housing Act of 1959, and (iii) provide in its bylaws that any entrance fees or fees for service will be reduced or waived according to an individual's ability to pay.[111] In conjunction with the fee waiver or reduction policy, as a measure of the fifth *Korzen* factor for being charitable, DOR also looks for a written noneviction policy in which the owner pledges not to evict tenants who fail to pay rent if the sole reason for their nonpayment is a documented financial inability to pay. Although the statute mentions § 202 only directly, DOR has also recognized the extension of the § 202 program for elderly housing to § 811 projects for the developmentally disabled through the National Affordable Housing Act of 1990 and also grants exemptions to qualifying § 811 projects under this provision.

Low-income housing projects other than § 202 and § 811 projects, however, have had limited success in securing exemptions. Most other low-income housing applicants argue for exemption under the first category,

---

109. 233 N.E.2d 537 (Ill. 1968).
110. 35 Ill. Comp. Stat. 200/15-65.
111. *Id.* 200/15-65(c).

i.e., as institutions of public charity. These applicants encounter difficulty in proving the *Korzen* factors. Most often, DOR will cite (a) a lack of charitable use, meaning that the applicant likely failed to prove either the first or sixth *Korzen* factors (providing a benefit to an indefinite number of people by aiding them or reducing the burdens of government or demonstrating primarily charitable use); or (b) a lack of charitable ownership, meaning that the applicant could not prove its 501(c)(3) status.

Proving the first and sixth *Korzen* factors can be particularly challenging for a housing development. Developments have a set number of units, and regulations govern how many individuals may reside in certain units according to bedroom count. The seeming definitiveness of the individuals served seems to conflict with the first *Korzen* factor on its face, so a project will rarely argue that it serves an indefinite number of people.[112]

As an alternative, an applicant can prove that it reduces the burdens of government. If the responsibility for providing affordable housing rests on the state, private investment, federal subsidies, and increased efficiency may all evidence a reduced burden on state government. If the resources that the government would have expended to create the same results as the applicant's project, however, do not outweigh the government resources used to develop and operate the project, the applicant will have a hard time proving that the project reduces the burdens of government. Moreover, even if these tests are met, mixed-use or mixed-income developments may encounter difficulty proving primarily charitable use.

In addition, proving 501(c)(3) status seems straightforward but, especially in the context of LIHTC developments, can be very challenging.[113] For example, only corporations and limited liability companies (LLCs) are eligible for 501(c)(3) status. This leaves the eligibility of partnerships uncertain, particularly if a for-profit limited partner is involved. DOR is currently evaluating several property tax exemption cases involving a joint venture between nonprofit and for-profit partners; it has not yet articulated its position on whether such projects can qualify for an exemption but has expressed reservations as to whether such a joint venture can be charitable given the presence of the 99.99 percent limited partner. Similarly, an LLC with for-profit members will face difficulty in demonstrating charitable ownership unless the LLC has secured its own 501(c)(3) designation. In

112. One possible argument might be that fair housing laws and other governmental regulations prohibit the creation of housing for a specific preselected group of individuals, so over the course of the development's useful life, it will serve an indefinite number of people.

113. The careful reader may note that although 501(c)(3) status is a requirement of charitable use category (c) (the § 202 exception), it does not appear to be a statutory requirement for category (a). In practice, however, the Department of Revenue will not grant exemptions to owners who cannot prove that they are entitled to 501(c)(3) treatment.

fact, even single-member LLCs may face a challenge: the IRS views single-member LLCs as pass-through entities; and although the IRS recognizes the LLC as sharing in its single member's 501(c)(3) designation, it will not award the LLC 501(c)(3) status separate or distinct from the 501(c)(3) designation of its single member. DOR has inconsistently treated tax exemption applications from single-member LLCs and has denied exemptions, citing a lack of charitable ownership despite the IRS position regarding single-member LLCs and despite the following language in the statute arguably aimed at preventing exactly this confusion:

> Property otherwise qualifying for an exemption under this section shall not lose its exemption because the legal title is held . . . (ii) by an entity that is organized as a partnership, in which the charitable organization, or an affiliate or subsidiary of the charitable organization, is a general partner, for the purposes of owning and operating a residential rental property that has received an allocation of Low Income Housing Tax Credits for 100% of the dwelling units under section 42 of the Internal Revenue Code of 1986, or (iii) . . . by a limited liability company organized under the Limited Liability Company Act provided that (A) the limited liability company receives a notification from the Internal Revenue Service that it qualifies under paragraph (2) or (3) of section 501(c) of the Internal Revenue Code; (B) the limited liability company's sole members, as that term is used in section 1-5 of the Limited Liability Company Act, are the institutions of public charity that actually and exclusively use the property for charitable and beneficent purposes; and (C) the limited liability company does not lease the property or otherwise use it with a view to profit.[114]

In maintaining its negative determination, DOR argues that the applicants described above would not otherwise qualify for exemption, as required by this provision. Clause (iii) regarding limited liability companies is weakened because the IRS does not as a matter of course notify a single-member LLC that it qualifies for 501(c)(3) status.

Developers and other housing advocates are attempting to engage DOR in discussing these topics in order to demonstrate that projects in addition to § 202 or 811 projects meet the statutory and constitutional requirements for a property tax exemption. Although the time and cost involved in meeting the burdens of proof that favor taxability temper the great benefits that the charitable use exemption offers, complete relief from property taxation provides a valuable preservation tool for the projects able to secure the exemption.

C. Special Tax Classification in Cook County, Illinois, Targets Relief to Multifamily Housing

The Illinois Property Tax Code and the constitution of the State of Illinois[115] also allow counties with more than 200,000 residents to create in-

114. 35 ILL. COMP. STAT. 200/15-65.

115. The Illinois state constitution provides thus: ". . . counties with a population of more than 200,000 may classify . . . real property for purposes of taxation." ILL.

dependent classification systems to value property for real estate tax purposes. Cook County, the county in which Chicago is located, is the only county to adopt such an alternate system. Of the Cook County classifications, Class 9 targets multifamily low-income housing, providing a lower assessed value from which taxes are determined. Class S offers a similar benefit to certain project-based Section 8 developments.[116] Although such benefits are somewhat diminished by other provisions that lower the assessment rate for standard residential properties, the Class S and, in particular, Class 9 designations have provided effective benefits to multifamily low-income housing.

Although most property in Illinois is assessed at an amount equal to 33-1/3 percent of its fair market value, Cook County's system employs separate assessment rates.[117] For example, single-family homes and residential properties with up to six units are designated as Class 1 and assessed at an amount equal to 16 percent of their fair market value. Class 9 and Class S properties are also assessed at an amount equal to 16 percent of their fair market value. Because all of these classifications assess a lower rate than the standard 33-1/3 percent, the mere existence of the alternate classification system provides the first benefit to Cook County's low-income housing.

A property owner must apply for Class 9 or Class S designation. To qualify as Class 9, a property must otherwise qualify as a Class 3 property (a category that includes all improved residential property that does not fit in another class), set aside at least 35 percent of its units for low-income or moderate-income tenants, and undergo major rehabilitation or be newly constructed.[118] The Cook County Assessor's Office has provided guidelines defining *major rehabilitation*, including rehabilitation that affects two major building systems (electrical; heating; plumbing; roofing; exterior doors and windows; floors, walls, and ceilings; exterior walls; elevators; health and safety; and code compliance) and, as of 2008, costs equal to at least $8.00 per square foot of the building's living space.[119] The property owner must

---

Const. art IX, § 4(b). In 2000, according to the census, nine Illinois counties had more than 200,000 residents: Cook County (which includes Chicago), DuPage County, Lake County, Will County, Kane County, Winnebago County, McHenry County, Madison County, and St. Clair County. The Illinois Property Tax Code also makes several distinctions between counties with more than 3,000,000 residents and counties with less than 3,000,000; according to the 2000 Census, only Cook County had more than 3,000,000 residents (with a population of about 5,375,000), and the next most populous county was DuPage County (about 904,000 residents).

116. As used herein, Section 8 shall mean project-based rental assistance for multifamily housing pursuant to Section 8 of the Housing Act of 1937 (42 U.S.C. § 1437(f) (2000)).

117. *See* Cook County Code of Ordinances § 74-31–74-69 (2006).

118. *Id.* § 74-63(12).

119. *See* Cook County Assessor's Office, Class 9 Eligibility Bulletin (2008), available at http://cookcountyassessor.com/forms/cls9b.pdf (last visited Mar. 3, 2008). Cost-per-square-foot thresholds increase annually by the Consumer Price Index.

submit its application prior to starting the rehabilitation or construction. Class 9 status is valid for ten years and can be renewed.

Class S properties that would otherwise qualify as Class 3 properties and have been subject to a Section 8 "Mark Up to Market" contract renewal or any other Section 8 contract renewal if by a nonprofit must meet certain affordability and quality guidelines.[120] The property owner must notify the assessor's office within 120 days of the termination of its Section 8 contract and upon its application for the Section 8 contract renewal, and the property owner must apply for Class S status upon receiving the contract renewal. At least 20 percent of the property's units must be Section 8 units, and the property owner must pledge to retain at least the existing number of Section 8 units for at least five years after the expiration of its Section 8 contract.[121] The classification is valid until the termination of the property's Section 8 contract.

Because Class 9 and Class S properties would otherwise classify as Class 3 properties, the applicable benefit to these properties is most clearly seen in comparing the assessed values of the Class 9, Class S, and Class 3 properties. The Class 9 and Class S properties assess at a 16 percent value. In contrast, Class 3 properties assessed at 26 percent in 2006, 22 percent in 2007, and 20 percent in 2008 and subsequent years. Although the value of the Class 9 and Class S designations in 2009 are somewhat diminished by the new lower Class 3 level, at the peak benefit, the Class 9 and Class S designations provided a significant additional 10 percent tax relief. The Class 9 benefits may have been somewhat tempered to the extent that the Cook County Living Wage Ordinance, which requires Class 9 property owners to pay their employees a living wage,[122] may have imposed greater operating costs on projects not otherwise subject to such wage requirements.

Low-income housing proponents have said that the Class 9 program should be expanded to provide relief for all projects that meet the rental housing affordability requirements, regardless of whether or not they are newly constructed or have undertaken substantial rehabilitation. Currently, if a project was constructed prior to the Cook County code's enactment or the creation of Class 9 and such project does not require substantial rehabilitations, it does not qualify as a Class 9 project.

---

120. Cook County Code of Ordinances § 74-63 (13).

121. See Cook County Assessor's Office, Class S Eligibility Bulletin (2007), available at http://cookcountyassessor.com/forms/clssb.pdf (last visited Mar. 3, 2008).

122. Cook County Code of Ordinances § 74-63(12). The ordinance defines a living wage as "no less than $9.43 per hour if employee health benefits are provided, or $11.78 per hour without health benefits," as annually adjusted so as to be no less than 100 percent of the federal poverty line for a family of four when health benefits are included and 125 percent of the federal poverty line when health benefits are not included.

Though the current benefits of alternate classification are modest, this tool provides a wide range of potential relief depending on how it is implemented.

IV. Tax Increment Financing

Tax Increment Financing (TIF) is also used to help finance the preservation of affordable housing. This section will provide a basic description of TIF, including how TIF is generated, the formation of TIF areas, the finalization of TIF development agreements, and issues to consider in using TIF to preserve affordable housing. TIF is a development tool pursuant to state law, and forty-nine states have TIF statutes. Although there are important differences from state to state, there are some basic similar general principles. In the discussion below, reference is made to the provisions of the Illinois TIF statute.[123]

A. Generating TIF

The *increment* in TIF refers to the property taxes collected for a specified property over the amount of taxes for that property collected with respect to a "base" assessed value.[124] The amount of TIF generated by any property may vary annually as the property tax liability for that property varies, and the TIF will be paid for a specified number of years (up to a maximum term set forth in the applicable state statute). As an example, assume that the assessed value for a certain property for the 2008 tax year (the base year for the TIF area) is $1,000 and the tax rate is 10 percent, resulting in property taxes of $100. If the assessed value for the same property for the 2009 tax year increased to $1,250 with the same 10 percent tax rate, the taxes paid for the 2009 tax year would be $125. In this example, the increased amount of taxes (incremental taxes) for 2009 would be $25. If for the 2010 tax year the assessed value remained at $1,250 but the tax rate changed to 11 percent, the total taxes paid would be $137.50. However, of this amount, $110 would be attributable to the base year assessed value of $1,000 (multiplied by the 11 percent tax rate), and the remaining $27.50 would be the incremental taxes. The governmental body creating the TIF (in Illinois, it is the municipality in which the property is located) is then able to use the incremental taxes for eligible purposes under the applicable TIF statute. As noted above, the TIF can be used for a period of time specified in the applicable state statute (in Illinois, twenty-three years).[125]

B. Effect on Other Taxing Bodies

Several governmental bodies share in property tax revenues. In Illinois, these could include the municipality, local school districts, county govern-

123. See generally 65 Ill. Comp. Stat. 5/11-74.4 (2008). (Please note that this section is a general summary of statutory provisions.)

124. *Id.* 5/11-74.4-8.

125. *Id.* 5/11-74.4-3(n).

ment, water and sewer districts, library districts, community colleges, and others. The important point to remember is that the taxing districts will continue to share in the property tax revenues generated by the base year assessed valuation, but not in the increment.[126] From the example above, the taxing districts, including the municipality, would share in the $100 of real estate taxes paid in 2008 as they had for prior years. In 2009, the taxing districts would again share in the real estate taxes based on the 2008 assessed value ($100 again, assuming that the tax rate does not change), while the municipality would collect and use the $25 of incremental taxes. This would continue for the remainder of the term of the TIF area. In Illinois, if the municipality no longer has a need for the TIF from a certain area, it is to declare a "surplus" and the taxing bodies will share in the full amount of real estate taxes.[127] Although a surplus is relatively rare, one situation in which a surplus could occur is when the TIF area is created in order to support a specific project and the project developer is promised a set amount of TIF subsidy. Once that subsidy amount has been provided, the municipality may conclude that any other TIF generated in that TIF area would be surplus and can then be distributed to the taxing districts as if the TIF area had not been created. One other wrinkle is that a municipality can enter into arrangements with specific taxing bodies, agreeing to provide a portion of the TIF in consideration for the support of that taxing district for the TIF.[128] The Illinois statute also provides for payments to school districts in situations where a new development will result in additional school-age children residing in the district.[129] As one can imagine, given the effect that a TIF area can have on the tax receipts of taxing bodies, a proposed TIF area can generate much interest and scrutiny from the affected taxing bodies. However, as will be described further, the underlying theory behind TIF is that the TIF area was not going to develop on its own, without TIF assistance, so there would otherwise be small (if any) increases in tax revenues for the taxing bodies.

C. *Eligible Costs*

TIF can be used for a variety of development costs. In Illinois, eligible costs include acquisition (including acquisition of interests in property), site improvement, environmental remediation, public improvements, financing costs, relocation costs, and the cost of constructing affordable housing. Of particular interest for this article, eligible TIF costs also include the costs of rehabilitation, repair or remodeling of existing public or private buildings, and leasehold improvements.[130]

126. *Id.* 5/11-74.4-8.
127. *Id.* 5/11-74.4-7.
128. *Id.* 5/11-74.4-4.
129. *Id.* 5/11-74.4-3(q).
130. *Id.*

D. Creating a TIF Area: Eligibility

In order to create a TIF area, an Illinois municipality must comply with several statutory requirements, including preparing an eligibility study and a redevelopment plan and holding a public meeting to allow for public comment. The TIF area can be any size (with a minimum size of 1.5 acres),[131] with the basic choices ranging from a "single-user" TIF for a specific project to a broader TIF area that could include many parcels and is established for broader planning purposes. In order to qualify to be a TIF area, the designated parcels must meet the standard of being a "blighted area" or a "conservation area" as described in the statute.[132] Meeting this standard involves a finding that the specified number of eligibility factors are present throughout the TIF area. Eligibility factors include a finding of dilapidation, deterioration, code violations, illegal uses, vacancies, environmental issues, and assessed valuation growth below the municipality.[133] In addition to meeting the "blighted" or "conservation area" definition, the proposed area must meet the "but for" test, which means that the area has not, as a whole, been subject to growth and development through investment by private enterprise and would not reasonably be anticipated to develop without the TIF plan.[134] The "But For" test is an important underlying principle because it addresses the potential objection of taxing districts to TIF area creation. If the proposed TIF area was not expected to generate incremental taxes over the base year due to an increase in assessed values within the TIF area, then a taxing district was not going to receive more real estate taxes than those paid in the base year. (To relate this point to the example above, if the TIF area did not develop on its own, the taxing districts would not have an expectation of sharing in more than the $100 of tax revenues from the base year.) The eligibility study is usually prepared by an outside consultant engaged by the municipality or, for a project-specific TIF, by the property developer.

E. Creating the Redevelopment Plan

The redevelopment plan prepared in connection with creating a TIF area will describe the proposed activities to be undertaken by the municipality or by private developers to develop the area. Similar to the eligibility study, the plan is usually prepared by an outside consultant engaged by the municipality or, for a project-specific TIF, by the property developer. The plan will describe the land uses proposed for the various parcels in the area, contain an assessment of how the plan would affect other taxing districts by increasing the demand for services provided by the taxing district, and contain a projected budget describing the amounts to be spent on various

131. *Id.* 5/11-74.4-3(p).
132. *Id.*
133. *Id.* 5/11-74.4-3(a)(b).
134. *Id.* 5/11-74.4-3(n).

TIF-eligible costs.[135] There are also specific requirements regarding the displacement of existing housing units, discussed in the next two paragraphs below. The plan can range from being very specific to very general, usually depending on the size of the proposed TIF area and whether it is directed toward a specific development or being used as a general planning tool by the municipality. For example, a municipality may desire to encourage industrial development in a certain area and could create a TIF area in which the current uses or the proposed uses will be consistent with that goal.

F. Elements of Redevelopment Plan

A TIF redevelopment plan may also be required to address whether housing units will be displaced. If the proposed TIF plan will result in the displacement of residents from ten or more inhabited units within the proposed TIF area or if the proposed TIF area contains seventy-five or more inhabited units and the municipality cannot certify that displacement of ten or more inhabited units will not result from the plan, then the redevelopment plan must include a housing impact study.[136] A housing impact study will include information about the residential units in the proposed area, including a description of the housing (multifamily; single-family; number of rooms; whether the units are inhabited; and the racial and ethnic composition of the residents, based on the latest census). In addition, the housing impact study must identify the inhabited units that are or may be removed. For units to be removed, the study will identify those units, describe the relocation assistance to be provided, and describe the availability of replacement housing.[137]

The TIF plan must also provide that relocation assistance will be provided to low-income residents of housing units that are removed. This requirement applies to any TIF plan adopted after November 1, 1999. If the TIF plan does not have these provisions, the TIF statute still requires that the relocation assistance be paid. The relocation assistance provided must be at least the assistance that would be provided under the federal Uniform Relocation Act.[138]

G. Creating a TIF Area: Process

After the eligibility study and proposed redevelopment plan are prepared, the municipality is required to provide notices to all taxpayers of record for property within the proposed TIF area and hold a public hearing.[139] The public hearing is held to discuss the proposed TIF plan and area and to elicit public comment.

135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* 5/11-74.4-5.

If the proposed TIF plan will result in the displacement of residents from ten or more inhabited units within the proposed TIF area or if the proposed TIF area contains seventy-five or more inhabited units (as described above), the residents of the proposed TIF area are also to receive notice.[140] In addition, if the proposed TIF plan will result in the displacement of residents from ten or more inhabited units within the proposed TIF area or if the proposed TIF area contains seventy-five or more inhabited units, the municipality must also hold a public meeting.[141] These additional notice and public meeting requirements applicable to proposed TIF areas with housing units are intended to encourage public participation in the process of creating a TIF area, which should serve to assist in the preservation process.

The municipality must also convene a meeting of the Joint Review Board, which includes a representative from each of the taxing districts affected by the proposed TIF area. The Joint Review Board is advisory and will recommend to the municipality whether or not to move forward with the area and plan.[142] The final authorizing step in creating a TIF area is the adoption by the municipality of resolutions or ordinances establishing the TIF area and adopting the TIF plan. The tax year in which the TIF area is created is the base year in terms of calculating increment.[143]

H. Use of TIF Funds

As described above, TIF funds may be used for a variety of eligible costs. The municipality may spend funds itself for public improvements or other uses or may agree to transfer TIF funds to another public entity. For example, the municipality may agree to provide funds to the local school district for the rehabilitation or construction of a school. If the municipality is providing TIF funds to a private party, it will usually be done pursuant to a redevelopment agreement. Common terms of a redevelopment agreement will be discussed below, but the form of proposed agreement, or at least the terms of the agreement, will generally need to be approved by the governing body of the municipality.

I. Method of TIF Subsidy

The municipality can pay TIF funds to a developer in a variety of ways, including cash payments, the issuance of a TIF note to a developer, and payments over time from increment. The municipality can agree to pay for TIF-eligible costs directly or to reimburse the developer for costs incurred. If the municipality plans to provide cash to a developer for use during the project development period (acquisition, rehabilitation, construction), there are a few options: (i) for an established TIF area, there may be increment

140. *Id.* 5/11-74.4-6.
141. *Id.*
142. *Id.* 5/11-74.4-5.
143. *Id.* 5/11-74.4-8.

that has accrued from prior years; (ii) the municipality can issue TIF bonds, which are to be repaid from future increment from the TIF area, and use bond proceeds for the development; and (iii) in Illinois, it is possible to use increment from a contiguous TIF area. Municipalities commonly issue to developers TIF notes, which are obligations of the municipality to repay the TIF note, along with a stated interest rate, from TIF funds. If the developer needs the TIF assistance for development costs, the developer may be able to pledge the TIF note to a third-party bank to secure a loan. For example, if the amount of the needed TIF subsidy was $3 million for construction, the municipality could issue a TIF note to the developer with a principal amount of $3 million and with a stated interest rate tied to the rate that a lender will charge the developer for a $3 million construction/permanent loan. The lender will make a loan to the developer, and the developer will pledge the TIF note to the lender as security. As payments are made on the TIF note over time, they are used to repay the bank loan. The term of the TIF note will vary, depending on the transaction, but in Illinois the term cannot exceed twenty years.[144] The final basic option is TIF subsidy to be paid over time, as incremental taxes are collected.

J. Basic Terms of a Redevelopment Agreement

Although the forms of TIF redevelopment agreements vary from municipality to municipality and from transaction to transaction, one basic term of a redevelopment agreement will, of course, be a description of the amount and form of TIF subsidy. The agreement should also clearly describe the TIF that is available for the developer's project; some developers will only receive the TIF generated from their project, while others may receive all or a portion of the TIF from a broader TIF area. If the TIF being made available for the project is more than just the project-generated TIF, then the agreement should clearly state how the TIF is calculated and shared with other projects because there may be relative priorities regarding TIF among various projects. One other related term will be when the developer has the right to the TIF funds. For example, if $3 million of TIF cash is being used to help finance the construction of an affordable housing project, the full amount may not be made available all at once; rather, portions may be paid out as certain benchmarks are achieved (commencement, completion, lease-up, etc.). One other basic term will be the developer's agreement to complete the project according to the agreed-upon scope. As part of the obligation to construct, the developer may be required to hire, or to make efforts to hire, local residents or contractors or minority-owned contractors. The developer's obligations under the agreement may not end at construction because there may be requirements regarding leasing the project and (for affordable housing) maintaining affordability for a period of time. The developer should make sure that the TIF redevelopment agreement is

144. *Id.* 5/11-74.4-7.

not imposing operating covenants that are inconsistent with other requirements, like LIHTC requirements, that may also apply. The municipality will also likely want to have remedies in case the developer does not fulfill its obligations. Generally, these remedies may involve some combination of ceasing TIF funding and recapturing TIF funds already paid.

K. Conclusion

The issues that arise in providing TIF assistance to any project will generally also apply to preserving an affordable housing project, but there are a few particular concerns to note. The first is whether TIF-eligible costs have been incurred. As noted above, the Illinois TIF statute is broadly drafted to include the types of costs often associated with preserving affordable housing, such as rehabilitation, acquisition, and remediation. Generally, affordable housing projects have more TIF-eligible costs than there are TIF funds available to pay for them. The developer should also be careful to coordinate the proposed timing of the overall project closing with the time period needed to obtain TIF assistance. This is particularly true when a new TIF area must be created for the project because creating a new TIF area can take several months. Even if the housing project is in an existing area, the developer must plan for the necessary approvals from the municipality for the redevelopment agreement. For example, there may be only one opportunity a month to have a village board meet and approve an agreement. The municipality will likely require that the redevelopment agreement contain ongoing covenants regarding affordability. Finally, as a reminder, the developer must carefully plan for the tax implications of receiving TIF funds. In Illinois, TIF funds are usually granted, not loaned, from the municipality; and the funds would be a taxable grant when received. However, depending on the entity receiving the funds, the tax effects may be avoided or deferred. For example, the tax issue could be addressed by having the TIF paid to an entity exempt from federal income taxation.

Also, as noted above, under the TIF plan, the municipality must agree to provide relocation assistance to displaced low-income households, which can serve to prevent displacement from occurring. The additional public involvement in the TIF approval process for a TIF plan that involves displacement of residents can also raise awareness in a community of the need to preserve the existing housing in a TIF area.

V. Conclusion

In Illinois, the preservation of affordable housing remains a top priority of IHDA, the City of Chicago, and other governmental entities; and the use of the donation credits has been a key factor in the success of that goal. The program remains a focus of most developers and is often the deciding factor for a seller to transfer a project to a qualified not-for-profit whose mission is to preserve the housing. The Illinois Federally Assisted Housing Preservation Act has not, it appears, been the success that may have been contemplated. The short time frame of the notice provisions creates such

an obstacle to achieving the goals of the act that it is a bit daunting. It is more likely that the act prompts a seller to consider either utilizing donation credits or some other funding source to retain title and rehabilitate its property or selling the property to a party willing to leave in place the subsidy that forced the giving of the notice rather than provides a vehicle for tenant association ownership. In this manner, perhaps the act has been successful. As for real estate taxes and TIF financing (the use of which may make it counterproductive for an owner to challenge its real estate taxes), both have been utilized widely and with tremendous success. The tools that Illinois employs to provide real estate tax relief (the income-based assessment method, exemptions for charitable use, and alternate assessment classes on the county level) offer practical cost savings for operations that aid in maintaining and preserving low-income housing. In particular, the alternate assessment classes have provided necessary relief as real estate taxes have soared in the Chicago metropolitan area. The use of TIF, meanwhile, has grown exponentially in the state and, in particular, the City of Chicago as assessed values climbed quickly and steadily (until the recent past) and real estate tax revenue increased proportionately, such that TIF has become a key funding component of many affordable housing projects, relieving the burden of obtaining HOME or other funds in short supply. In conjunction with qualified allocation plan revisions and other means of addressing preservation needs, these four tools have contributed to the preservation of numerous, older HUD-financed and early LIHTC projects as affordable housing.