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Affordable Housing Tax Credits and Pursuing
Supportive Housing Projects

New York State Bar Association
Real Property Law Section
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Background

- What is Supportive Housing
- Mission Based
- Will Supportive Housing enhance mission and services

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Community Analysis

- Is there a need for Supportive Housing in your community?
- Will community and local zoning boards support a project?
- Community Opposition implications.

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Discriminatory Zoning

- Zoning laws typically reflect neighborhood values such as preservation of character, public safety, noise, and removal of nuisances all in the name of “public welfare”.
- However, local zoning that intentionally excludes or discourages classes of individuals simply due to their undesirability to the local residents is discriminatory and subject to legal challenge.

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Padavan Implications?

- The Padavan Law was enacted to put an end to disruptive litigation over the location of group homes housing mentally and physically disabled individuals within residential zones.
- The law allows between 4 to 14 unrelated, mentally and physically disabled individuals to reside in a single family style, group home.
- Supportive Housing projects are larger scale but community opposition is similarly unlawful as discriminatory zoning.

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Zoning Challenges

- The Padavan Law allowed group homes to bypass local zoning, as long they met state codes.
- Unlike Padavan, supportive housing projects must go through local zoning processes if the use is not permitted.
- Rezoning requires a legislative act:
 - Public hearing for adoption of local law/ordinance
 - Zoning text and map amendments
 - Conformance with the comprehensive plan (spot zoning)
 - Legislative prerogative (*i.e.* protest petitions, see Town Law 265)

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Use Variance or Special Permit

- **Use Variance**
 - Permission for a prohibited use
 - Very difficult standard
 - “Unnecessary Hardship Test” requires Public Hearing
- **Special Permit**
 - “Special exceptions”
 - Permitted under code and subject to additional requirements
 - May require a public hearing

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Property Acquisition: Contract Considerations

Is there a need for Supportive Housing in your community?

- Purchase Price
- Subject to negotiation with Seller
- Supported by the appraisal
- “Affordable” in the context of the pro forma
- Earnest Money Deposit
- How much?
- Does it become non-refundable at some point? When?
- Should it always be refundable to Purchaser?

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Property Acquisition: Contract Considerations

Contingencies: What are they and what do they mean?

- Physical Due Diligence
- Environmental Phase I/Phase II
- Geotechnical (soils, drainage, load bearing capacity)
- Approvals
- Municipal
- Funding Sources
- Seller approval

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Property Acquisition: Contract Considerations

Timing

- Coincide with capital funding awards and approvals
- Seller considerations
- Extensions: additional deposits /extension fees
- Closing: Within certain time period following satisfaction of contingencies.

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Property Acquisition: Contract Considerations

Title Searches/Survey/Municipal Searches

- Which party provides/pays
- Title Objections
- Provisions for Purchaser's right to raise objections and to terminate if Seller refuses or is unable to cure
- Brokers: Are there any? Who pays commission?
- Default: Seller/Purchaser/Remedies

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Property Acquisition: Contract Considerations

Seller's Representations and Warranties

- (1) Ownership/Authority to enter into PSA and to Sell
- (2) No other agreements to sell or lease
- (3) No tenants in possession or other rights of occupancy
- (4) Access to public right-of-way/utilities
- (5) Environmental matters
- (6) Seller certification as to Reps and Warranties

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Property Acquisition: Contract Considerations

What are your sources of Capital Financing

- 4% vs. 9% Low Income Housing Tax Credits (LIHTC)
- Gap Funding?
- Is your project Financially Viable?
- Is all due diligence complete/risks known?

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Real Property Tax Considerations

- Projects are not tax exempt as of right
- Must cover taxes in operating budget
- PILOT vs. RPTL §581-a
- Exemption Possibilities

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Real Property Tax Considerations

What is a PILOT?

- Permissive (Town, County or IDA)
- Lasts 10 years or more
- Factors to Consider
- Community opposition
- Schools, Utilities, Emergency Services
- Current property taxes should be analyzed

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RPTL §§ 412 and 412-a

- Industrial Development Agencies (“IDA”) who own property enjoy a property exemption.
- Specific forms required.
- Opt out risk
- Consult the General Municipal Law for specific provisions relating to specific IDAs

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Real Property Tax Considerations

RPTL § 581-a

- As of right, but renewed annually
- Appraised Value based on the “Income Approach”
- Does § 581-a work with operating budget?
- Can you leverage § 581-a calculation to get a PILOT

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RPTL § 581-a

- Property is subject to a regulatory agreement which requires the property owner to set aside at least 20% of the rental units for income eligible persons.
- Assessed value is determined by “using the income approach as applied to the actual net operating income, after deducting for reserves required by any federal, state or municipal programs”. Net operating income is defined as “the actual or anticipated net income that remains after all operating expenses are deducted from effective gross income, but before mortgage debt service and book depreciation are deducted.”
- The assessor must disregard any “federal, state or municipal income tax credits, subsidized mortgage financing, or project grants, where such subsidies are used to offset the project development cost in order to provide for lower initial rents as determined by regulations promulgated by the division of housing and community renewal.”
- The owner must annually submit recent financial statements, an independent auditor’s report and rent roll for the property prior to the local jurisdiction’s taxable status date. If the most recent financial statements do not reflect 12 months of occupancy, the most recent operating budget approved by the governmental body that is party to the regulatory agreement will also be accepted.

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Can Projects be Exempt?

- Public Housing Finance Law § 577
- Full or partial exemption by permission
- Alternative tax arrangement allocated by jurisdiction
- No opt out provisions for school districts

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PHFL § 577

“The local legislative body of any municipality in which a project of a housing development fund company is or is to be located **may** exempt the real property in such project from local and municipal taxes including school taxes, other than assessments for local improvements, to the extent of all or part of the value of the property included in the completed project. The tax exemption shall operate and continue for such period as may be provided by such local legislative body, but in no event for a period of more than forty years ...”

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RPTL § 420-c – New York City

- Complete or partial property tax exemption for low-income housing developed with tax credits
- Exemption duration is term of the regulatory agreement up to a maximum of 60 years. HPD may impose a payment in lieu of taxes (PILOT) as a condition for the exemption. There is no exemption for commercial space.
- At least 50% of the controlling interest in an entity owning the property be held by a charitable or social welfare organization formed under 501(c)(3) or 501(c)(4) of the federal Internal Revenue Code.
- Specific application process proscribed by the City of New York on forms to be approved by the office of Housing Preservation and Development (“HPD”).

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Thank You

QUESTIONS

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