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Wisconsin Historic Tax Credits: A Victim of Their Own Success

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On June 23, 2014, Wisconsin temporarily suspended its historic preservation tax credit (HTC) program. The root problem behind the decision to suspend the program was an interesting one: the program was just too popular.

Background

Wisconsin first started its HTC program in 1988 under then-Gov. Tommy Thompson. Initially, any Wisconsin taxpayer who incurred qualified rehabilitation expenditures related to a certified historic structure was permitted to claim 5 percent of the expenses as a credit against the taxpayer's liability. Thompson called the 5 percent credit "a vital complement to the existing federal income tax credit for historic property rehabilitation." A similar credit against federal income taxes existed (and continues to exist) under federal law. It is currently a credit against federal income tax liability equal to 20 percent of the qualified expenditures.

The Wisconsin credit was doubled to 10 percent for the taxable year 2013. In the fall and winter of 2013, rumors circulated that the Wisconsin HTC might be eliminated. Instead, the Wisconsin Legislature proposed a bill that doubled the credit amount again to 20 percent. The initial draft of the bill included a cap on the total credits; only $4 million of HTCs was to be available for allocation among Wisconsin taxpayers during the course of a single fiscal year. That cap was removed altogether and the bill was passed in December 2013. Starting Jan.1, 2014, Wisconsin had a 20 percent credit against state income tax and the credit was unlimited for all taxpayers.

Much to the apparent surprise of state officials, the HTC proved enormously popular. Reed Hall, CEO of Wisconsin Economic Development Corporation (WEDC), indicated that, as of late June, his organization has approved more than $35 million in tax credits to Wisconsin residents during 2014 alone. According to Hall, the Wisconsin Department of Revenue estimated the total allocated credits for the entire year of 2014 would be approximately $4 million. (Recall that the cap was initially contemplated to be $4 million as well.)

Wisconsin's changes were not made in a vacuum. Approximately 35 other states have created an HTC program to promote the rehabilitation and adaptive re-use of historic buildings, many with credits in the 20 to 25 percent range for commercial projects. While each state's program varies, most include some basic elements, such as:

- specific criteria for which buildings can qualify for the credit,
- a method for calculating the value of the credit awarded (typically a percentage of the amount spent on pre-approved rehabilitation work),
- a minimum amount of rehabilitation expenditures necessary for the project to qualify for the program and/or
- regulations detailing the transferability of the credits.

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HTC advocates argue the credits are an essential tool to make development projects involving historic buildings financially feasible, spur job growth and promote economic development.

Potential Solutions

Regardless of how other states' HTCs work, it appears likely that Wisconsin will need to revisit its HTC. There are a number of potential solutions, all of varying levels of political palpability.

Reinstating the HTCs

Wisconsin could reinstate the law, essentially just lifting the moratorium. For reasons discussed below, it may need to follow this path until a more permanent solution is worked out. This route would be appropriate if the state believes the spike in projects was related to pent-up demand and, perhaps, unlikely to continue at its current pace.

Capping the Total Credits

Wisconsin could revisit a cap on the amount of credits, as was originally proposed in the fall of last year. Hall's memo calling for a moratorium highlighted the lack of a cap. If a cap is instated, there will be many questions. First, the amount of the cap will need to be debated. Second, Wisconsin will need to decide if it wants to see the credits allocated on a competitive basis, like low-income housing tax credits, or on a first-come, first-served basis.

Capping a Project's Credits

Some of the projects that have been approved for credits in 2014 were large enough to exceed the entire amount of the proposed cap. Rather than creating a cap on aggregate credit amounts, the state could cap how many credits a specific development (or taxpayer) may claim in one fiscal year.

Limiting Credits to Certain Types of Projects

Wisconsin permits tax credits to be claimed on rehabilitation expenses for "old" (pre-1936) buildings that are not necessarily designated as "historic" buildings. Perhaps Wisconsin could consider a limit on the "old" projects that have not yet been designated historic. Alternatively, Wisconsin may limit the credits only to projects large enough to qualify; or only to commercial projects. Neighboring states handle these limitations in various ways. Wisconsin has no such limitation.

What's Next

There are a number of potential fixes for Wisconsin's historic tax credit program, rather than a permanent moratorium (which no one is suggesting). Nonetheless, because 2014 is an election year for the entire Wisconsin Assembly, half of the Wisconsin State Senate and the governor, it seems unlikely that any "fixes" will make their way through the legislature and be signed into law, at least before November.

HTC advocates are calling for the moratorium to be lifted immediately. Some are even averring that WEDC overstepped its authority in calling for the moratorium. Section 238.17 of the Wisconsin Statutes indicates that WEDC "may"—not "shall"—certify a person to claim tax credits for eligible rehabilitation expenditures. WEDC relied on that statutory authority to revoke its willingness to certify any person as being eligible for the credits, regardless of compliance with statute and regardless of project size.

Although that is a potentially fair (strict constructionist) reading of the statute, it probably goes too far. It is unlikely the legislature intended WEDC to have the authority to completely shut down the HTC program by bureaucratic fiat. Using the justification posited by WEDC, it would have the authority to prevent Wisconsin from allocating HTCs indefinitely, despite any legislative intent to the contrary.

Wisconsin and its HTC developers are in a difficult position. The state has "overspent" this program's budget by approximately $31 million (or almost 9 times more than the state intended). Meanwhile, many developers have sunk costs into historic renovation projects with the good faith belief that Wisconsin would honor its tax credit law change that is less than a year old.

Wisconsin's HTC program is undergoing significant changes. As developers contemplate opportunities in Wisconsin, they should turn to trusted advisors for more information about the current state of affairs. For HTCs in Wisconsin, it seems of late the only constant is change.

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