Representing the Community Partner in Joint Ventures Utilizing Low Income Housing Tax Credits

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Introduction

Low Income Housing Tax Credits (LIHTC) dominate the landscape for affordable housing financing. Transactions using LIHTC are complex and expensive. Investors will not be attracted to a project unless the developer has a strong track record in complying with LIHTC rules and restrictions, as well as a strong balance sheet standing behind the various guaranties that developers must sign at closing.

Larger, sometimes national, nonprofits successfully compete for LIHTC allocations, but smaller community-based nonprofits often lack the LIHTC experience and the balance sheet to undertake a LIHTC deal on their own. For smaller nonprofits, the route to utilizing LIHTC may be to enter into a joint venture with an experienced LIHTC developer. In this essay, "community partner" refers to a 501(c)(3) nonprofit entity with comparatively less experience and a smaller asset base that wishes to serve as a co-developer with an experienced LIHTC developer.

An experienced LIHTC developer may want a community partner for several reasons. The community partner may have strong ties and deeply rooted experience in the neighborhood where the project will be located. That local knowledge can be crucial to developing a good marketing plan, to obtaining land use and zoning approvals that require community meetings or the support of local officials, and to understanding what services might be made available to low-income residents from other resources in the neighborhood. If the experienced developer is a for-profit company, the

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community partner's participation may qualify the project for an allocation of 9% credits under the non-profit set-aside.[1]

This essay examines the issues to be navigated, and negotiated, in a LIHTC joint venture between an experienced developer and a community partner.

Brief Overview of LIHTC Transactions

The dominant federal subsidy program for construction and rehabilitation of affordable housing is the federal LIHTC program.[2] According to the U.S. Department of Housing and Urban Development's Office of Policy Development and Research, the program uses an average of $9 billion in forgone revenue each year to subsidize the costs of building affordable rental units.[3] The HUD database shows 52,006 projects and 3.55 million housing units placed in service using low-income housing tax credits between 1987 and 2021.[4] Amounts expended on the LIHTC program in forgone taxes exceed the amounts spent directly on public housing capital and operating costs, and represent about one-fifth of the cost of all other major federal housing assistance programs combined.[5]

LIHTC offers tax credits to owners of newly constructed or substantially rehabilitated affordable housing rental projects, which may be claimed over a ten-year period.[6] The amount of tax credits received by the owner of the project is a function of the costs of the new construction or rehabilitation, the percentage of the project devoted to affordable housing relative to market-rate housing, and whether the project is receiving 9% credits or 4% credits. The owner of the project will be structured as a limited partnership or limited liability company, controlled by the developer. The partnership agreement or operating agreement of the project owner will provide that virtually all of the tax credits (and the valuable depreciation deductions) received by the ownership entity will be allocated to the investor limited partners or investor members. In return, the investors agree to contribute money towards the development of the project. In this way, the tax credits

[1] 26 U.S.C. § 42(h)(5)(A). To qualify under the nonprofit set-aside, the nonprofit must (1) be tax-exempt under section 501(c)(3) or 501(c)(4) of the Internal Revenue Code; (2) not be affiliated with or controlled by a for-profit organization; and (3) include in its exempt purpose the fostering of low-income housing. 26 U.S.C. § 42(h)(5)(C).

[2] 26 U.S.C. § 42 et seq.

[3] U.S. Dept. of Housing and Urban Development, Office of Policy Development and Research, Low-Income Housing Tax Credit (LIHTC), https://www.huduser.gov/portal/datasets/lihtc.html (last visited Feb. 14, 2024).

[4] U.S. Dept. of Housing and Urban Development, Office of Policy Development and Research, Low-Income Housing Tax Credit (LIHTC): Property Level Data (May 4, 2023), https://www.huduser.gov/portal/datasets/lihtc/property.html.

[5] Corianne Payton Scally, Amanda Gold, Carl Hedman, Matt Gerken & Nicole DuBois, *The Low-Income Housing Tax Credit: Past Achievements, Future Challenges*, Urban Inst. 6 (July 2018), https://www.urban.org/sites/default/files/publication/98761/lithc_past_achievements_future_challenges_final_0.pdf.

[6] 26 U.S.C. § 42(f).

are "sold" or syndicated by the developer/sponsor to the investor partners as a way of generating funds for construction or rehabilitation of the housing units. The investors also require the developer to provide a variety of guaranties to mitigate the investor's risk. These guaranties often include a construction completion guaranty, guaranties over short-term operating losses (e.g., ones that may occur during the lease-up phase, and long-term operating deficits), and guaranties related to the delivery of tax credits on the promised schedule and in the promised amounts.

After fifteen years of operations, the LIHTC program's affordability restrictions still apply to the project,[7] but the tax credits are no longer subject to recapture.[8] Thus, at Year 15, the investor members of the project ownership entity—whose participation is typically motivated by receipt of the tax credits and depreciation deductions generated by the project—will likely seek to exit the project. The expected exit of the project's investors at Year 15 is planned for at the deal's outset, and the LIHTC program provides for a nonprofit right of first refusal to purchase the project[9] as one of the well-established paths for facilitating investor exit and keeping the project operating as affordable rental housing.

In a LIHTC transaction where the developer role is shared between an experienced tax credit developer and a community partner, key issues to be negotiated include decision-making authority, economic risks and benefits, and disposition of the project in Year 15.

Decision-Making Authority

A major issue to be decided between the experienced developer and the community partner is the scope of the community partner's governance rights within the joint venture. When the developer is a for-profit entity, the starting point, from the community partner's perspective, is the guidance from the Internal Revenue Service regarding participation by a 501(c)(3) entity in a joint venture with a for-profit company. The IRS will view the activities of the joint venture as if they were conducted solely by the 501(c)(3) entity, for purposes of evaluating whether those activities further the entity's charitable purpose.[10] Relatedly, court decisions focus on whether the 501(c)(3) is in control of the joint venture, as anything short of control raises the potential for decision-making that prioritizes profit-related motivations over charitable purposes.[11]

Revenue Ruling 98-15, addressing a joint venture in the hospital context, reasoned that

[7] *Id.* § 42(h)(6)(D).

[8] *Id.* § 42(j).

[9] *Id.* § 42(i)(7).

[10] *See, e.g.*, Rev. Rul. 98-15, 1998-12 I.R.B. 15.

[11] *See, e.g.*, *St. David's Health Care System v. United States*, 349 F.3d 232, 236–37 (5th Cir. 2003), *Redlands Surgical Servs. v. Comm'r*, 113 T.C. 47, 92–93 (1999), *aff'd*, 242 F.3d 904 (9th Cir. 2001).

> a § 501(c)(3) organization may enter into a management contract with a private party giving that party authority to conduct activities on behalf of the organization and direct the use of the organization's assets provided that the organization retains ultimate authority over the assets and activities being managed and the terms and conditions of the contract are reasonable, including reasonable compensation and a reasonable term. However, if a private party is allowed to control or use the non-profit organization's activities or assets for the benefit of the private party, and the benefit is not incidental to the accomplishment of exempt purposes, the organization will fail to be organized and operated exclusively for exempt purposes.[12]

In the joint venture at issue, the exempt organization retained its exempt status because the exempt organization had voting control within the joint venture and thus maintained control over changes in activities, disposition of assets, and renewal of a key management agreement. Through its control rights, the exempt organization could ensure that the assets that it owns through the joint venture and the activities that it conducts through the joint venture are used primarily to further exempt purposes, and any benefits to private parties would be incidental to the accomplishment of charitable purposes.[13]

In Revenue Ruling 2004-51,[14] the IRS considered a joint venture where the 501(c)(3) and its for-profit partner had co-equal control over a joint venture: each appointed half of the governing board. The 501(c)(3) (a university) also had control over the educational content of the interactive video technology produced by the joint venture. The IRS held that the 501(c)(3)'s participation did not result in the loss of tax-exempt status, because the joint venture was an insubstantial part of the entity's overall activities.[15] Furthermore, the IRS held that the 501(c)(3) was not subject to tax on unrelated business income from the joint venture activity, because the activity was substantially related to the 501(c)(3)'s exempt purpose.[16] Thus, although the IRS did not squarely address the co-equal control aspects of the arrangement, in blessing the 501(c)(3)'s participation, the IRS implied that a joint venture does not require governance control by the exempt organization, so long as the exempt organization maintains significant control over the substantive aspects of the venture's activities, in order to ensure that charitable goals are realized.[17]

[12] Rev. Rul. 98-15, 1998-12 I.R.B. 15 (internal citation omitted).

[13] *Id*. at 16.

[14] Rev. Rul. 2004-51, 2004-22 I.R.B. (June 1, 2004).

[15] *Id*. at 4. Note that, in contrast, joint venturing in an LIHTC transaction will likely be a major undertaking for a community partner, and difficult or impossible to characterize as an insubstantial part of its activities.

[16] *Id*. at 5.

[17] This is the interpretation of 2004-51 endorsed by LISC in its publication, *Joint Ventures with For Profit Developers A Guide for Community Development Corporations*. Rick Jacobus & Maegan Winning, Local Initiatives Support Corp., Joint Ventures with For Profit Developers 30–31 (Judy Turnock ed., 2006), https://www.lisc.org/media

From the standpoint of the experienced developer, the tax guidance favoring control by the nonprofit runs up against the market imperatives favoring control in the hands of the party with greater expertise and financial exposure. For the experienced developer, the allocation of decision-making authority over the joint venture cannot be divorced from the allocation of financial risk. Because the developer is providing construction completion and the various other guaranties described below, the developer expects to be in control so that the decision-making is solid and will not lead to a call on the guaranties. In addition, the developer is the experienced LIHTC player, compared to the community partner, and the thought is that decision-making should fall to the party with the comparatively greater industry expertise.

These issues must be negotiated. A compromise position can be that the developer exercises day-to-day control, but the community partner has co-equal control over major decisions affecting the development, as these are the issues that are most likely to affect the accomplishment of the charitable purpose that is motivating the community partner's involvement in the first place. Having co-equal control means the developer must consult with the community partner and reach agreement on any issue in the category of major decisions, which creates good incentives to maintain a collaborative working relationship between the parties. Major decisions may include the site plan and unit mix, the architectural design of the project, the selection of key third-party providers such as the general contractor, property manager, and architect, the development budget and operating budget, and the social services plan and delivery of services.

Allocating co-equal control over these or other major issues means that the developer and the community partner must address how to proceed if the parties simply cannot reach agreement on their own. In the experience of our clinic in negotiating on behalf of community partners, the risk of an impasse holding up the deal is the biggest concern that potential investors and other funders may raise with a co-equal control arrangement. Since it is intolerable, for all parties, that the deal run aground on a failure to reach agreement in a timely way, the joint venture agreement should contain a ready mechanism to break a deadlock. The developer may prefer that, in the event of impasse, the developer decides the issue, but of course this undercuts the idea of co-equal control. Maintaining a regime of co-equal control can be achieved by fast-track arbitration, though concern may arise that even fast-tracked processes are too slow. An alternative is to identify a project neutral—or neutrals, each with relevant subject matter expertise in a particular domain—and provide that issues reaching deadlock will be referred to the neutral for a binding decision. Our clinic has experience

/filer_public/1b/46/1b46d2be-c225-4b4c-a7f0-896622d2084e/08102018_resource__joint_ventures_guide-new_coverb-w.pdf; *see also* Andrew H. Foster, *Joint Ventures Between Nonprofits and for-Profits: Will Revenue Ruling 2004-51 Provide Any Comfort?*, 14 J. Affordable Hous. & Cmty. Dev. L. 95 (2005).

where co-equal control over major decisions, with provisions for fast-track arbitration or use of project neutrals to break an impasse, have proved acceptable to developers and community partners, as well as to the investors and other funders involved in the deal. And, the time and expense of resorting to arbitration or even a project neutral incentivizes the developer and community partner to work collaboratively in earnest, to avoid ever finding themselves in a deadlock situation. In our clinic's experience across many deals utilizing this structure, the disciplining effect of the desire to avoid turning to the deadlock-breaking mechanism has been quite strong, and parties have been able to work through issues without ever having to activate the project neutral or fast-track arbitration provisions.

Allocating the Deal's Economic Benefits and Risks

In LIHTC deals, the tax credits and depreciation deductions go (almost) entirely to the investors, and the economic return for the co-developers are the developer fee and the co-developers' share of cash flow. LIHTC deals are usually modelled to do just a bit better, on an operating basis, than break even. A robust cash flow can lead to a conclusion that the project was oversubsidized. Thus, the developer fee split, even more than cash flow, becomes the main economic benefit (in addition to long-term ownership of the project) over which the developer and the community partner must bargain.

On the developer's side, the claim for a larger share of the economic benefits is based on arguments about comparative expertise and financial risk, assuming the developer is providing the majority of the guaranties on the project and is shouldering the bulk of the predevelopment costs. In our clinic's experience, predevelopment loans are not widely available and, when available, cover only a small portion of the costs. The experienced developer, then, is called upon to use their financial resources to pay predevelopment costs and will be reimbursed at the project's financial closing. The developer is at risk for this outlay of predevelopment costs if the project proves unable to close.

On the community partner side, justifications for a significant share of the economics might be based on the long-standing role of the partner in providing support or services in the community. This long-standing involvement can also lead to the political support of local officials who are instrumental in crucial land use and funding decisions affecting the development. In some cases, the participation of the community partner, because of its long-time advocacy and local goodwill built up over time, is the but-for cause of the development happening at all, in the eyes of local government funders.[18] The community partner may also be significantly involved

[18] As an example, in our clinic's practice area in Chicago, the city has recently devoted a portion of its community development resources explicitly to developments that include community partners. The program prioritizes "partnerships between established and emerging development firms." Lori E. Lightfoot, City of Chicago, INVEST

in the development's operations in ways that satisfy funding sources that require significant nonprofit participation. For instance, if the project received an allocation of tax credits under the nonprofit set-aside, the credits are at risk unless the nonprofit materially participates in the operation of the project, measured by the number of hours of participation among other factors.[19] The community partner may add value on the financing side by being the recipient of grant funds, or loan funds where the category of eligible borrowers is limited to nonprofit organizations only. The community partner can then loan the funds to the owner entity partnership. This structuring technique avoids phantom income taxes for the partnership on the receipt of grant funds and allows access to nonprofit funding programs that otherwise would not be available for the project. The community partner's contributions to the funding of the development deserve recognition in allocating the economic benefits among the co-developers.

The community partner may also be instrumental in land assembly. When land is being contributed by a local government entity for policy and political reasons, the governmental grantor may be more willing to convey locally owned land to a local developer—and, even better, a neighborhood-based developer—than it would be to a developer without those strong local ties. In addition, a donation or bargain sale of land for the LIHTC project may be structured as a conveyance to the community partner as a tax-structuring mechanism. If the land were donated directly to the partnership, the partnership would pay income tax on the value of the land. Donation to the 501(c)(3) community partner would not trigger tax, and then the 501(c)(3) can make a capital contribution of the property through its participation in the project owner entity, which is also not a taxable event.

This negotiation of economic benefit is, in many ways, a division of the pie. Where there are ways to broaden the issues in the negotiation beyond the percentage splits, there may be more opportunities to create a win-win situation. For instance, the community partner might accept a lower share of the deal's developer fee in exchange for greater involvement in, or funding for, aspects of the deal that the community partner most cares about, such as resident supportive services or property management, or greater rights over the long-term disposition of the project. In our clinic's experience, the more that the nonprofit is contributing to the project's financing

SOUTH/WEST – Two Year Update: Advancing Equity and Community Goals 10 (Nov. 2021), https://www.chicago.gov/content/dam/city/sites/invest_sw/ISW_Two Year_Update_Nov17.pdf. The RFQs for these projects include as one of the criteria: "Bidding teams formed through creative / innovative 'partnership' models that showcase equitable control, ownership, and/or decision-making authority of historically disadvantaged business partners reflecting the demographics of the community areas, which are predominantly Black and Latinx." See RFQs available online, https://www.chicago.gov/city/en/depts/dcd/supp_info/requests-for-proposals/archive.html.

[19] 26 U.S.C. § 42(h)(5)(B); 26 U.S.C. § 469(h).

and operations in the ways described above, the more successful it is in claiming a significant share of economic benefit in its negotiations.

The flip side of economic benefit is risk. In LIHTC transactions, the developer is expected to guaranty various aspects of the deal, including construction completion, operating deficits, and tax credit delivery. Because the experienced co-developer has a track record and balance sheet that can support meaningful guaranties, the developer takes on the role of primary guarantor, but the community partner may also be expected to participate. Even if the community partner has a small balance sheet, making the guaranty not particularly meaningful to the guaranteed party, the funders may still want the community partner signing guaranties to show "skin in the game"—an incentive to stick around and work out issues if the deal runs into trouble. For a community partner with a long-standing commitment to a neighborhood or a population that will be served by the development, the idea that the community partner needs to be incentivized to have "skin in the game" may seem nonsensical. In our clinic's experience, sophisticated investors and construction lenders may be willing to leave the community partner off of the guaranties, wholly or in part, since from an underwriting perspective the guaranties are not adding much value. Governmental funders may defer on guaranty issues to the investors and construction lenders, unless political or policy reasons motivate them to include the community partner on guaranties notwithstanding the negligible underwriting impact. The inclusion of the community partner on guaranties is best addressed when the project developers are in discussions with potential funders and should be evaluated in comparing competing equity and lending proposals. This highlights the importance of strong governance rights for the community partner in the joint venture. If the community partner does not have rights in deciding on the financing aspects of the project, it will not have influence on the weight given to different guaranty configurations in evaluating or negotiating funders' proposals.

If the community partner will be signing guaranties, it should be wary of guaranty obligations that may threaten its 501(c)(3) status.[20] There is guidance suggesting that a nonprofit signing guaranties bestows private benefit on the experienced co-developer who is also signing guaranties, because every dollar paid by the community partner on a guaranteed

[20] For discussion of nonprofit guaranties in LIHTC transactions, see Eric Mittereder, *Pushing the Limits: Nonprofit Guarantees in LIHTC Joint Ventures*, 22 J. Affordable Hous. & Cmty. Dev. L. 79 (2013); Roberta L. Rubin & Jonathan Klein, *Nonprofit Guaranties in Tax Credit Transactions: A New Era?*, 15 J. Affordable Hous. & Cmty. Dev. L. 314 (2006); Jonathan Klein & Roberta Rubin, *Nonprofit Guaranties in Tax Credit Transactions*, 9 J. Affordable Hous. & Cmty. Dev. L. 302 (2000); Dean M. Weiner & Howard M. Heitner, *Nonprofit Guarantees in Tax Credit Transactions: Additional Considerations from the "Market's" Perspective*, 9 J. Affordable Hous. & Cmty. Dev. L. 212 (2000); Roberta L. Rubin & Jonathan Klein, *Nonprofit Guaranties* Redux, 9 J. Affordable Hous. & Cmty. Dev. L. 317 (2000).

obligation is one less dollar than the experienced developer must pay.[21] And the IRS from time to time has instructed field agents to look for particular limitations on nonprofit guaranties when evaluating exemption applications from nonprofit entities seeking to serve as general partner in an LIHTC deal.[22] One approach to appropriately limiting community partner guaranties—and one that our clinic has frequently seen employed—is to limit the guaranty obligations to, in effect, a disgorgement of the community partner's fees and profits received from the deal. In this way, the community partner is placing at risk only the upside from the particular deal, and not its other assets.[23] (It should be noted, however, that the IRS has not explicitly endorsed this approach.)

In documenting a limitation on guaranties from the community partner, it is important to recognize the many obligations that may be contained in the deal's financing documents that are not explicitly labeled "guaranties," but functionally cause the community partner to serve as a backup for some other party's primary obligation. These kinds of obligations, however they are labeled, should be included in defining the limit of the community partner's responsibility for guaranties. For instance, an environmental indemnity agreement may contain indemnities from the project-level owner entity, from the experienced developer, and, if the community

[21] I.R.S. Priv. Ltr. Rul. 9736039. In Private Letter Ruling 9736039, the Internal Revenue Service considered a situation involving an exempt organization serving as co-general partner with a for-profit developer. The partnership agreement initially included a pledge and security agreement that would have transferred all of the non-profit's interests in the partnership, including fees and capital contributions, to the investor partners upon certain events of default by the general partners. The pledge was problematic, in the Service's view, because "[i]n addition to indemnifying the investor, this pledge would also benefit the developer because it could be exercised upon the failure of the developer to make good on its guaranties made to the investor." *Id.* The Service found a distinct private inurement concern—separate and apart from the indemnification of the investors who were the beneficiaries of the pledge—in the benefit conferred on the co-general partner/developer. The IRS approved the nonprofit's participation in the partnership only after the pledge and security agreement was removed. *Id.*; *see also* I.R.S. Priv. Ltr. Rul. 9731038 (discussing ways that the Service became comfortable with certain guaranty provisions); Tech. Adv. Mem. 8938002 (Service balances potential private inurement because of guaranties against public benefit).

[22] See Mittereder, *supra* note 20, at 87; Memorandum for Manager, EO Determinations, from Joseph Urban, Acting Director, EO Rulings and Agreements, U.S. Dept. of the Treasury, Internal Revenue Service, Low Income Housing Tax Credit Limited Partnerships (Apr. 25, 2006), *available* at https://www.novoco.com/public-media/documents/urbanmemo42406.pdf, *superseded by* U.S. Dept. of the Treasury, Internal Revenue Service, Memorandum for Manager, EO Determinations, From Robert S. Choi, Director, EO Rulings and Agreements, Low Income Housing Tax Credit Limited Partnerships (July 30, 2007), www.irs.gov/ pub/irs-tege/lihtcp_choimemo_073007.pdf.

[23] See Klein & Rubin, *Nonprofit Guaranties*, *supra* note 20, at 310; *see also* Rubin & Klein, *A New Era?*, *supra* note 20, at 316–17 (describing growing acceptance in the industry of the need to limit nonprofit guaranties).

partner is otherwise signing guaranties, from the community partner. The primary obligation to comply with environmental laws is on the project-level owner, and the community partner and experienced developer are functionally guarantors of that obligation. The same may be said for loan document covenants to provide capital to cover a shortfall or to remedy a project being out of balance, obligations to clear liens, indemnification obligations, non-recourse carve-outs for specified bad acts, and for virtually any sponsor-level obligation in the financing documents where the primary obligation is with the project-level owner entity.

Furthermore, when a lender or investor refuses to agree to the desired limit on the community partner's guaranty obligations, or refuses to exclude the community-partner from quasi-guaranty obligations like environmental indemnities and the other sponsor level obligations described above, the community partner may turn to the experienced co-developer for some relief. If the co-developer agrees to take on, as a contractual matter, the guaranties or quasi-guaranties of the community partner that exceed the desired community partner limit, then the community partner has a stronger case for arguing that its overall guaranty limit has been achieved. These provisions can be incorporated into the operating agreement or other joint venture agreement between the community partner and co-developer, or in an indemnity agreement signed at closing.

Right of First Refusal

The LIHTC statute permits a qualified nonprofit organization to have a right of first refusal, exercisable at the end of the fifteen-year compliance period, at the statutory bargain price of, essentially, the project's debt plus exit taxes (e.g., capital gains and transfer taxes).[24] Exercising the right of first refusal allows the nonprofit to take ownership of the project and ensure its continued affordability. The community partner typically wants to have the right of first refusal, given its mission and long-term commitment to the project. It is thus one of the elements in the mix in the overall negotiation of governance rights and economic split between the community partner and its co-developer. Where it falls in the community partner's list of priorities may vary, and the tradeoffs that take place in the negotiations among these different elements are unique to each deal.

When the experienced co-developer is a for-profit company, and thus ineligible for the statutory right of first refusal at the bargain price, there is seldom any issue in granting the right of first refusal to the community partner. However, if the experienced co-developer believes the project will have significant economic value at Year 15, or wants to make sure that it will participate in any new infusion of LIHTC (a resyndication) at that time, negotiations may take place over the ability to exercise the right or an exit fee to be paid to the experienced developer if the right is exercised.

[24] 26 U.S.C. § 42(i)(7).

When the experienced co-developer is itself a qualified nonprofit organization, a conflict may arise between the experienced co-developer and the community partner as to whom the right of first refusal will run. The experienced co-developer is likely to have greater expertise and resources in Year 15 than the community partner, and therefore both parties' goal of ensuring long-term affordability can be achieved by having the experienced (nonprofit) co-developer hold the right of first refusal. The community partner may, however, negotiate for a subordinate right of first refusal at the statutory bargain price, which could be exercised if for some reason the experienced co-developer declined to exercise its own right of first refusal. As is always the case with the LIHTC right of first refusal, the community partner should seek to structure the documentation as a right to acquire either the real estate project or the partners' interest in the LIHTC partnership that owns the project, whichever the community partner prefers when it is time to exercise the right. This flexibility may be useful, for instance, if there is a difference in calculation of local transfer taxes if it is a real estate purchase versus a purchase of partnership interests. In addition, the community partner may seek to negotiate for a purchase option to acquire the project at fair market value, as a right in addition to the right of first refusal at the statutory bargain price. If a triggering offer for the right of first refusal is not received or cannot be generated, or if the exercise of the right is otherwise challenged or resisted,[25] then the purchase option gives the community partner a chance to acquire the project anyway (albeit at fair market value and not at the statutory bargain price).

Conclusion

Community-based nonprofit organizations add value to LIHTC transactions and provide mission-driven leadership to maximize the contributions that LIHTC projects make to the communities where they are located. When a community organization partners with an experienced co-developer, attention must be paid to maintain adequate control rights, a fair share of the economic benefits and risks, and a chance to take over ownership in Year 15 to maintain long-term affordability. When these goals are achieved, the stage is set for a successful project and a collaborative, productive partnership between the co-developers.

[25] For discussion of disputes over the required triggers for rights of first refusal, see David A. Davenport & Samuel T. Johnson, *Year-15 Disputes in the Low-Income Tax Credit Program, Aggregators, and Their Playbooks*, 31 J. Affordable Hous. & Cmty. Dev. L. 59 (2022), and Brandon M. Weiss, *Clarifying Nonprofit Purchase Rights in Affordable Housing*, 48 Fordham Urb. L.J. 1159 (2021).