

# THE GOVERNOR'S COMMITTEE ON *Simple, Fair, and Low Taxes*

## **TAX CREDIT REFORM:**

*Recommendations To Make Missouri A Best-In-Class State*

***June 30, 2017***

## ***Executive Summary***

In his Executive Order establishing this Committee, Governor Eric Greitens called on the Committee to investigate whether reform of special interest tax credit programs could fund tax rate cuts for all Missourians, creating a simpler, fairer, and lower tax burden. Today, this Committee answers that call with a resounding “yes.”

Among other changes, the Committee is recommending that:

- (1) A broad majority of underperforming tax credit programs will be subject to the appropriations process, so that special interest tax credits are not unfairly privileged over spending on schools, roads, and other vital government services. Additionally, the Committee recommends that a state-issued tax credit should be denied if it does not show a positive fiscal return to the state, if the recipient fails to show a technical or financial ability to perform, or if the activity would occur without state incentives.
- (2) The State Low Income Housing Tax Credit (LIHTC) program, which currently returns 42-cents of housing for every state dollar invested, will be converted into a low interest loan program for affordable housing construction. This will result in the same amount of money being available for low income housing construction, without wasting millions on well-connected insiders. Also, the Committee recommends that the state repurchase outstanding LIHTCs in exchange for state issued bonds, a proposal that may save Missouri taxpayers \$200-250 million over the next 10 years
- (3) The State Historic Preservation Tax Credit Program and the State Brownfield Redevelopment Program, neither of which have objectively delivered on their economic development promises, be converted to a new State Rehabilitation Tax Credit program, with an annual cap of \$50 million, as opposed to the current Historic Preservation cap of \$140 million. Additionally, this incentive will not be available for redevelopment of private homes, and will be capped at no more than \$2 million per project.
- (4) To improve tax administration, the Director of Revenue will repeal all outdated or inapplicable regulations, create a statewide tax advisory committee, and present a slate of candidates to the Governor for the appointment of a Taxpayer Advocate. Additionally, the General Assembly should enact a General False Claims Act to rein in waste, fraud, and abuse.

# I. BACKGROUND AND OVERVIEW

On January 25, 2017, Governor Eric Greitens created the Governor's Committee on Simple, Fair and Low Taxes (the "Committee") to evaluate Missouri's tax policies and tax credit programs and provide detailed recommendations for reform.<sup>1</sup> Governor Greitens charged the Committee with four main goals: (1) compare Missouri's tax credit programs and its tax rates to those of peer states; (2) assess the economic impact of existing State tax credit programs; (3) assess the possibility of financing cuts to overall State tax rates with cuts to tax credit programs; and (4) recommend comprehensive tax reform legislation to the Governor no later than June 30, 2017.<sup>2</sup>

The Committee was composed of the following ten members:

- Joel Walters, Director, Missouri Department of Revenue (Chairman)
- Will Scharf, Policy Director, Office of Governor Eric Greitens (Vice-Chairman)
- Hon. Dan Hegeman, State Senator
- Hon. Andrew Koenig, State Senator
- Hon. Will Kraus, State Senator
- Hon. Jay Barnes, State Representative
- Hon. Elijah Haahr, State Representative
- Hon. Holly Rehder, State Representative
- Jason Crowell, former State Senator
- John Lamping, former State Senator

## A. Guiding Principles

The Committee adopted six core principles to guide its recommendations:

- **(1) SIMPLE.** Too often, tax policies are complex and difficult to navigate. Compliance costs from unduly complicated taxes divert resources from more productive uses. Increasingly, businesses hire a multitude of accountants and lawyers, just to ensure that they are not violating tax law. These massive compliance costs reduce the funds available for productive investment. Furthermore, they act as a barrier to entry by driving out new entrants and depressing small business creation.<sup>3</sup>
- **(2) FAIR.** Simply put, taxpayers in similar situations should be treated the same<sup>4</sup>
- **(3) LOW.** As stated in the Governor's Executive Order creating the Committee, "Missourians should pay no more in taxes than absolutely necessary to fund the essential services of state government."<sup>5</sup> High taxes can harm families and businesses alike. For example, high taxes may deter job-creating business activity, robbing taxpayers of crucial opportunities to earn a living and provide for their families.

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<sup>1</sup> Exec. Order No. 17-07 (2017), <http://www.sos.mo.gov/CMSImages/Library/Reference/Orders/2017/17-07.pdf> [hereinafter Exec. Order No. 17-07].

<sup>2</sup> *Id.*

<sup>3</sup> See *A Guide to Tax Reform in Missouri: Report for the Governor's Committee for Simple, Fair, and Low Taxes*, Governor's Committee for Simple, Fair and Low Taxes (May 1, 2017) (statement of Aaron Hedlund, professor at University of Missouri) [hereinafter Hedlund].

<sup>4</sup> See *id.*

<sup>5</sup> Exec. Order No. 17-07.

- **(4) EFFICIENT.** Taxpayers deserve policies that encourage and reward positive choices. Too often, tax policies cause individuals and businesses to “make decisions for reasons that have little to do with fundamental economic realities.”<sup>6</sup> Tax policies should be designed to discourage wasteful expenditure and encourage job creation and community investment.
- **(5) TRANSPARENT.** Taxpayers should be able to tell where the State’s revenue comes from and where it goes. Taxes and incentives hidden in complex statutes and sweetheart deals with lobbyists conceal the cost of government and empower lobbyists to tilt the tax code in their favor. Tax policies should be clear and transparent to help taxpayers hold their government accountable.<sup>7</sup>
- **(6) STABLE/PREDICTABLE.** A sound tax system should be stable and predictable.<sup>8</sup> Many business investments in communities take several years, and reliable tax forecasting is crucial to encourage long-term job creation and community development.<sup>9</sup> For specific taxes, predictability means a stable rate structure and tax base.<sup>10</sup> Additionally, Missouri is required to balance its budget every year, and unexpectedly low tax revenues can result in painful budget shortfalls.<sup>11</sup>

## **B. The Committee’s Process**

Following its inception, the Committee invited subject matter experts and members of the public to share their insight at public hearings, town hall meetings, and via written comment.<sup>12</sup> The Committee’s town hall meetings in Maryville, Hannibal, Cape Girardeau, and Springfield ensured that Missourians throughout the State had input in the Committee’s recommendations for Missouri’s tax environment and tax credit programs.<sup>13</sup>

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<sup>6</sup> See Hedlund, *supra* Note 3.

<sup>7</sup> See, e.g., *Testimony of Missouri Society of CPAs: Hearing Before the Governor’s Committee on Simple, Fair and Low Taxes* (May 15, 2017)(statement of John Lindbloom, Chair, Missouri Society of CPAs); see also *State Business Tax Reform: Presentation to Missouri Governor’s Committee for Simple, Fair and Low Taxes: Hearing Before the Governor’s Committee on Simple, Fair and Low Taxes* (May 15, 2017)(statement of Robert Cline, Former Senior Advisor, Organization for Economic Cooperation and Development).

<sup>8</sup> See Hedlund, *supra* Note 3.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *Open Meeting Notices*, OFFICIAL MISSOURI STATE WEBSITE, <https://www.mo.gov/meetings/> (last visited June 12, 2017); see also Press Release, Office of Missouri Governor Eric Greitens, Governor’s Committee on Simple, Fair and Low Taxes Town Hall Meetings Schedule (May 10, 2017), <https://governor.mo.gov/news/archive/advisory-governor%E2%80%99s-committee-simple-fair-and-low-taxes-town-hall-meetings-schedule>; see also Press Release, Office of Missouri Governor Eric Greitens, Governor’s Committee on Simple, Fair and Low Taxes Request for Public Comments (April 18, 2017), <https://governor.mo.gov/news/archive/governor%E2%80%99s-committee-simple-fair-and-low-taxes-request-public-comments>.

<sup>13</sup> See Press Release, Office of Missouri Governor Eric Greitens, Governor’s Committee on Simple, Fair and Low Taxes Town Hall Meetings Schedule (May 10, 2017), <https://governor.mo.gov/news/archive/advisory-governor%E2%80%99s-committee-simple-fair-and-low-taxes-town-hall-meetings-schedule>.

The Committee received testimony at its public hearings from the following subject matter experts:

- Todd Iveson, Missouri Department of Revenue, Director of Taxation Division
- Sallie Hemenway, Missouri Department of Economic Development, Director of Business and Community Services Division
- Mike Downing, Missouri Department of Economic Development, Acting Director
- Randy Hilger, Missouri Study Commission on State Tax Policy, Chairman
- Jared Walczak, Tax Foundation, Policy Analyst
- Douglas L. Lindholm, Council on State Taxation (COST), President & Executive Director
- Jeanette Mott Oxford, Empower Missouri, Executive Director
- Dan White, H&R Block, Director, Finance and Assistant Treasurer
- Nancy McLernon, Organization for International Investment, President and CEO
- John Lindbloom, Missouri Society of Certified Public Accountants, Chair
- Robert Cline, Former Organization for Economic Cooperation and Development Senior Advisor and State Tax Policy Consultant
- Aaron Hedlund, University of Missouri Department of Economics, Assistant Professor of Economics
- Brian Smith, EY, Principal – Central Region Credits & Incentives Leader
- Emily Howell, EY, Senior Manager – Missouri Credits & Incentives Leader
- Joseph Christofanelli, EY, Senior Manager – Indirect Tax
- Dylan Grundman, Institute on Taxation and Economic Policy, Fiscal Policy Analyst
- Rod Chapel, Missouri NAACP, President
- Patrick McKenna, Missouri Department of Transportation, Director
- Steven Stogel, DFC Group, Inc., President; Co-Chair of the 2010 Missouri Tax Credit Review Commission
- Charles Gross, Former State Senator; Co-Chair of the 2010 Missouri Tax Credit Review Commission
- Mark Gardner, Gardner Capital, Chairman
- John Cook, Gardner Capital, Executive Vice President of Investments
- Stephen Acree, RISE, Executive Director and President
- Kelly Forck, Missouri Soybean Association, District Director
- William F. Fox, The University of Tennessee-Knoxville Boyd Center for Business and Economic Research, Director
- Peter J. Czajkowski, Stifel, Nicolaus & Company, Director of the Municipal Securities Group
- Gina Martin, Stifel, Nicolaus & Company, Director

## II. TAX CREDITS

### A. Overview

Missouri's use of tax credits is extensive and expanding. At its core, a tax credit is simply a financial instrument that can be used to offset a tax liability. But in Missouri, tax credits have become the primary tool chosen by the legislature to incentivize economic development and other types of public behavior. Since adopting the first tax credit program in 1973, the Senior Citizen's Property Tax Credit, the use of tax credits has expanded to several dozen programs, accounting for over \$575 million in redemptions in FY 2016.<sup>14</sup> Missouri's twelve largest tax credit programs by issuances are as follows:

**TABLE 1**<sup>15</sup>

<b>1. TAX CREDIT TYPE</b>	<b>2. FY 2016 (\$)</b>	<b>3. FY 2007-FY 2016 (\$)</b>
Low Income Housing	101,939,700.00	1,349,011,062.00
Missouri Quality Jobs	64,746,974.78	312,232,683.33
Historic Preservation	59,590,350.87 <sup>16</sup>	1,007,875,646.12
Missouri Works	23,741,677.22	27,477,384.78
Missouri Manufacturing Jobs	16,369,064.74	38,248,885.74
Infrastructure Development	14,826,445.78	202,353,374.30
Neighborhood Assistance	13,761,480.00	109,839,962.00
Affordable Housing Assistance	13,171,092.00	72,269,177.00
Brownfield Remediation Tax	9,831,947.29	140,700,906.83
Missouri Works Retain Jobs	9,380,750.00	66,861,202.00
New Markets Tax Credit AKA Qualified Equity Investment	9,319,024.49	111,795,478.12
Business Use Incentives for Large Scale Development-BUILD	9,040,815.85	83,772,195.27

Initially, it should be noted that since Missouri's 2010 Tax Credit Review Commission Report, the level of tax credit redemptions has continued to increase.<sup>17</sup> This should be cause for concern — the animating rationale for the creation of that Commission was Missouri's spectacular growth in tax credit usage.

Missouri's tax credits typically fall into three broadly defined categories: (1) those whose primary purpose and justification are to incentivize economic development, such as the Missouri Works Program; (2) those whose primary purpose is non-economic and mainly are used to support community development

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<sup>14</sup> *Testimony of Sallie Hemenway: Hearing Before the Governor's Committee on Simple, Fair and Low Taxes* (April 24, 2017) [hereinafter *Sallie Hemenway*] (statement of Sallie Hemenway, Director of Business & Community Services, Mo. Dept. of Economic Development); see also MISSOURI TAX CREDIT REVIEW COMMISSION, REPORT OF THE MISSOURI TAX CREDIT REVIEW COMMISSION 10, 26 (2010). [hereinafter 2010 MISSOURI TAX CREDIT REVIEW COMMISSION REPORT]

<sup>15</sup> See DEPT. OF ECONOMIC DEVELOPMENT, 10 YEAR TAX CREDIT REPORT (2017) (received pursuant to the Committee's request). [Hereinafter 10 YEAR TAX CREDIT REPORT (2017)]

<sup>16</sup> This refers only to those credits that have been authorized—currently the Department of Economic Development has received applications exceeding the total statutory cap for Historic Tax Credits for FY2016.

<sup>17</sup> See THE OFFICE OF MO. STATE AUDITOR, MISSOURI STATE AUDIT OF TAX CREDIT PROGRAMS at 8 (June 2017), available at <https://app.auditor.mo.gov/Repository/Press/2017051896073.pdf> [hereinafter 2017 TAX CREDIT AUDIT].

programs, such as the Neighborhood Assistance Program (“NAP”), Youth Opportunities Program (“YOP”), and Pregnancy Resource Center Program (“PRC”, and collectively with NAP, YOP, and other similar programs, “Benevolent Tax Credits”); and (3) those programs that have combined economic development and social purpose goals, notably the Low Income Housing Tax Credit program (“LIHTC”).

The Committee has received hundreds of public comments and heard from numerous witnesses at town hall style meetings across the State. From these interactions with the public, the Committee acknowledges the great amount of good that Benevolent Tax Credits are accomplishing throughout the State. The Committee heard a number of moving stories about non-profit recipients of Benevolent Tax Credits providing counseling to sex trafficking victims,<sup>18</sup> caring for foster children,<sup>19</sup> and providing critical care for newborn lives.<sup>20</sup> In total, Benevolent Tax Credit programs make up less than 4% of total redeemed tax credits each year.<sup>21</sup> Some of these programs are thinly spread—for example, the Shelter for Victims of Domestic Violence Tax Credit’s \$2 million allocation is spread evenly throughout the State, with some eligible centers receiving less than \$50,000.<sup>22</sup> This modest allocation is made, despite the fact that these Benevolent Tax Credit programs have all the hallmarks of a successful tax credit program: (1) each tax credit recipient fulfills a public purpose; (2) many of these credits are competitively awarded; and (3) the amounts that are expended are modest compared to the programs’ positive results. The Committee recommends that the General Assembly consider expanding several of the Benevolent Tax Credit programs, and specifically recommends that such expansions could be achieved by reducing tax credit programs whose efficiency and efficacy is less certain.

Upon inspection, the Committee concluded that a number of Missouri’s tax credit programs are not well designed. Many programs are structured as entitlements with little to no oversight. Indeed, several of Missouri’s tax credit programs provide less than \$0.30 of economic benefit for each dollar of tax credit awarded.<sup>23</sup> Broad, general reforms are necessary to ensure that Missouri’s tax credit programs provide a positive return for the taxpayers’ investment.

## ***B. General Recommendations for All Tax Credits***

A well-designed economic incentive program should embrace the following principles:

- “The incentive should facilitate an action that likely would not occur without the incentive;
- State funding should be the lowest amount necessary to facilitate the action;
- If the purpose is related to creating an economic benefit, the net state fiscal benefit of the project *must* be positive;
- The incentive should be designed to provide maximum efficiency to the State;
- The incentive should be fair and easy to access for eligible applicants;
- The incentive should minimize complexity and the need for professional guidance;

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<sup>18</sup> *Public Comment at Town Hall in Hannibal: Hearing Before the Governor’s Committee on Simple, Fair and Low Taxes* (May 22, 2017) [hereinafter *Town Hall in Hannibal*].

<sup>19</sup> *Public Comment at Town Hall in Cape Girardeau: Hearing Before the Governor’s Committee on Simple, Fair and Low Taxes* (June 2, 2017) [hereinafter *Town Hall in Cape Girardeau*].

<sup>20</sup> *Public Comment at Town Hall in Springfield: Hearing Before the Governor’s Committee on Simple, Fair and Low Taxes* (June 7, 2017) [hereinafter *Town Hall in Springfield*].

<sup>21</sup> *Sallie Hemmery*, *supra* note 14. This does not include Senior Citizen Property Tax Credit.

<sup>22</sup> *Town Hall in Hannibal*, *supra* note 18.

<sup>23</sup> See MO. DEPT. OF ECONOMIC DEVELOPMENT, REPORT ON MISSOURI TAX CREDITS ADMINISTERED BY THE DEPARTMENT OF ECONOMIC DEVELOPMENT 13, 38, 156 (Feb. 2017) [hereinafter 2017 DED TAX CREDIT REPORT].

- The incentive should be properly tracked and should ensure accountability to the taxpayers;
- The public purpose should be clearly defined for each incentive – with clear goals, objectives, and benefits to the State;
- Separate programs for specific types of businesses should be disfavored; and
- The incentive program should be flexible.”<sup>24</sup>

These goals should form the basis for any discussion regarding tax credit reform. In order to meet these goals, the Committee recommends instituting broad guidelines applicable to all of Missouri’s economic development tax credit programs. The most notable recommendation is to subject all tax credits to discretionary approval by the Missouri Department of Economic Development (“DED”). Currently, several tax credit programs (most notably the Historic Preservation Tax Credit program) are not subject to any State discretion.<sup>25</sup> This means that there is no assurance that a specific authorization of a tax credit application will actually meet the State’s goals or constitute an efficient and effective use of State resources.

Thus, first and foremost, the Committee recommends that DED be granted the discretion to deny any tax credit application if it fails to meet any one of four simple tests:

**1. RECOMMENDATION: ALLOW DENIAL OF ANY TAX CREDIT APPLICATION THAT FAILS TO MEET A PUBLIC PURPOSE**

All tax credits should meet a legislatively defined “public purpose” that is periodically reviewed and amended by the General Assembly. Some may point out that by the creation of a tax credit program itself, the legislature necessarily makes determination of a public purpose. While this may be true for purposes of a review of compliance with Article X, Section 3 of the Missouri Constitution,<sup>26</sup> it is not persuasive as a practical matter. Broadly drafted tax credit programs allow agency-level determinations to shift the implementation of a program away from the path that the General Assembly originally envisioned. Thus, the fact that a given authorization may survive a constitutional challenge does not shed light on whether or not it meets the public’s current needs.

This can be counteracted through a general public purpose statute under which the General Assembly specifically enumerates acceptable and non-acceptable “public purposes” that tax credits must achieve. For instance, if desired, the legislature could state that the use of a tax credit “in furtherance of addressing urban blight” is acceptable, but could also specify that the use of tax credits to improve an existing four star luxury hotel is not.<sup>27</sup> The precision adopted would be up to the desire of the legislature. In practice, this reform would mean that DED, or such other administering agency as the General Assembly sees fit, must certify the specific statutory public purpose that the issuance of the tax credit would further. If the administering agency were unable to do so, then the application would be denied.

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<sup>24</sup> *Testimony of Mike Downing: Hearing Before the Governor’s Committee on Simple, Fair and Low Taxes* (April 24, 2017) [hereinafter *Mike Downing*] (statement of Mike Downing, Acting Director of Mo. Dept. of Economic Development)

<sup>25</sup> *Sallie Hemmway*, *supra* note 14.

<sup>26</sup> *See generally* *Manzara v. State of Missouri*, 343 S.W.3d 656 (Mo. 2011) (en banc) (Wolfe, J., concurring) (noting the broad grant of public purpose under the Missouri Constitution).

<sup>27</sup> *Cf.* Lynn Horsley & Steve Vokrodt, *InterContinental, a premier KC hotel, seeks ‘blight’ designation*, KANSAS CITY STAR (Sept. 2, 2016), <http://www.kansascity.com/news/local/article99693672.html> (four-star hotel sought blight designation to establish a new sales tax to pay for a \$16 million renovation); *Mike Downing*, *supra* note 24.



## **2. RECOMMENDATION: ALLOW DENIAL OF A TAX CREDIT APPLICATION IF THE ACTIVITY WOULD OCCUR WITHOUT STATE INCENTIVES**

State incentives should only be used to incent activity that would not otherwise occur.<sup>28</sup> The importance of this point is self-evident — if the market would naturally incentivize an activity to occur, there is no need for government intervention. At the Committee’s public hearings and town hall meetings, many tax credit recipients told the Committee that the continued existence of their activities and programs would be jeopardized if certain tax credit programs were retired. But in practice, most of Missouri’s tax credit programs do not require applicants to demonstrate that the proposed project would not occur without State incentives. Thus, the Committee is left with the uneasy conclusion that some tax credit recipients have no true need for tax credit rewards. A simple showing by an applicant that “but for” the award of tax credits, the applicant’s project would not occur, would ensure that truly needy applicants are not elbowed out by applicants whose awards would essentially constitute a private windfall.

In practice, this reform would mean that DED, or such other administering agency as the General Assembly sees fit, would require an applicant to show a financing gap. This would require an applicant to show its financial condition, its efforts to secure funding from other sources, and a meaningful showing that it truly needs the requested tax credit. If the applicant were unable to do so, then the administering agency could deny the application.

## **3. RECOMMENDATION: FOR ECONOMIC DEVELOPMENT TAX CREDITS, ALLOW DENIAL OF APPLICATIONS THAT FAIL TO DEMONSTRATE A POSITIVE FISCAL RETURN TO THE STATE**

A final key recommendation for economic development-focused tax credit programs is the assurance that the expenditure of tax credits will leave the State’s budget in a better position. The rationale for such a requirement, again, is self-evident. If the tax credit program’s goal is economic growth, a negative return to the State’s fiscal bottom line suggests that the expenditure of public funds resulted in only private enrichment - that is, the tax credit recipient’s personal profit exceeded the return to Missouri’s taxpayers. This is not a proper public purpose.<sup>29</sup> For economic development to be within the public good, Missouri’s taxpayers should receive a net economic benefit.

This is a workable requirement for all economic development tax credits. First, DED already models the fiscal return for several tax credit programs, including the Brownfield Remediation tax credit. Although some members of the Committee have reservations about the efficacy of DED’s modeling, their concerns are that the current modeling *overstates* the fiscal impact. But most state lawmakers agree that if DED cannot find a model that indicates a positive return to the State budget, then there is little to no chance that a project will provide a net economic benefit to the taxpayers.

This recommendation would not impose a major burden for applicants. During the Committee’s hearings and town halls, nearly all of the economic and redevelopment tax credit recipients who spoke assured the Committee that the issuances of tax credits resulted in significant multipliers of indirect economic activity.<sup>30</sup> While the Committee questions the accuracy of multipliers and estimates of indirect economic

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<sup>28</sup> *Mike Downing*, *supra* note 24.

<sup>29</sup> See *Curchin v. Missouri Ind. Dev. Bd.*, 722 S.W.2d 930, 934 (Mo. 1987) (en banc).

<sup>30</sup> *Town Hall in Cape Girardeau*, *supra* note 19; *Town Hall in Hannibal*, *supra* note 18; *Public Comment at Town Hall in Maryville: Before the Governor’s Committee on Simple, Fair and Low Taxes* (May 17, 2017) [hereinafter *Town Hall in Maryville*], *Town Hall in Springfield*, *supra* note 20.

benefit (see Historic Preservation Tax Credit section below), tax credit users could certainly have an opportunity to make such a showing to DED. DED Acting Director Mike Downing recommended that DED could approve a greater percentage of high-quality tax credit applications by requiring applicants to show that their projects would provide a 2-to-1 benefit to the State.<sup>31</sup> The Committee believes that this is a sound approach and recommends its adoption.

**4. RECOMMENDATION: ALLOW DENIAL FOR ANY APPLICANT WHO FAILS TO SHOW TECHNICAL OR FINANCIAL ABILITY TO PERFORM**

It would improper to award tax credits to any entity that cannot prove its ability to bring its proposed project to completion.<sup>32</sup> Unfortunately, this safeguard doesn't exist for several key tax credit programs including most notably the historic tax credit redevelopment program.<sup>33</sup> A proposal would be to allow DED to deny awards to applicants who are unable to amply demonstrate a technical and financial ability to perform their proposed project.

Additionally, the Committee recommends two new policies to ensure that Missourians are protected from wasteful or unscrupulous use of tax credits:

**5. RECOMMENDATION: ANNUALLY APPROPRIATE THE AMOUNT OF TAX CREDITS FOR EACH PROGRAM AND ALLOW FOR GUBERNATORIAL WITHHOLDING**

The Committee found that many of the concerns related to tax credits center on the sheer amount that are authorized, issued, and redeemed each year. Past Tax Credit Review Commissions and reports have noted that several tax credit programs' unrestrained growth and lack of annual oversight from the General Assembly have been significant contributors to Missouri's state of massive annual tax credit liabilities.<sup>34</sup> The Missouri Tax Credit Review Commission's 2010 Report concluded that annual appropriations for tax credits would be unworkable.<sup>35</sup> But in the past seven years since that Commission's report, it appears clear that their conclusion was not correct — annual appropriations for new authorizations of tax credits have been empirically proven to work.

In 2014, the General Assembly passed SB 729, which subjected the Wood Energy Tax Credit to a statutory cap of \$6 million and a command that "[t]here shall be no tax credits authorized under sections 135.300 to 135.311 unless an appropriation is made for such tax credits."<sup>36</sup> In practice, this means that the General Assembly, through the normal budget process, sets the total amount of Wood Energy Tax Credits that may be authorized in a given year. The success of this approach is clear, as the Wood Energy Tax Credit has not experienced breakneck growth in authorizations or issuances since the adoption of annual appropriations. DED has been able to effectively manage this program with its annual appropriation

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<sup>31</sup> *Mike Downing, supra* note 24.

<sup>32</sup> See Susan Berfield, *A Missouri Town's Sweet Dreams Turn Sour*, BLOOMBERG BUSINESSWEEK (Jan. 5, 2012), <https://www.bloomberg.com/news/articles/2012-01-05/a-missouri-towns-sweet-dreams-turn-sour> (reporting on Mamtek incident in Moberly, Mo.);

<sup>33</sup> Cf. Tim Logan, *Chinese sweetener deal turns sour*, ST. LOUIS POST-DISPATCH, Sept. 22, 2011, [http://www.stltoday.com/business/local/chinese-sweetener-deal-turns-sour/article\\_7447d3e0-67cd-52d9-b0e7-031a038ad0ed.html](http://www.stltoday.com/business/local/chinese-sweetener-deal-turns-sour/article_7447d3e0-67cd-52d9-b0e7-031a038ad0ed.html).

<sup>34</sup> See, e.g., 2010 MISSOURI TAX CREDIT REVIEW COMMISSION REPORT, *supra* note 14, at 3, 11.

<sup>35</sup> *Id.* at 10, 26.

<sup>36</sup> RSMO. § 135.305.

requirement, and there is no reason to believe that funding via appropriations would not work for other programs.<sup>37</sup>

In addition, the Committee recommends that the Governor be expressly granted the right to withhold issuances of new tax credits in the event of a fiscal emergency. Under Article IV, Section 27 of the Missouri Constitution, the Governor is charged with stabilizing the budget through his ability to withhold line item expenditures.<sup>38</sup> But under current law, it appears that the Governor may not have a ready path to exercise the same powers in regards to the issuance of new tax credits, even if it is readily apparent that fiscal disaster is on the horizon. This should be remedied. As such, the Governor should be granted the authority to restrain tax credit issuances to prevent future budget shortfalls.

## **6. RECOMMENDATION: ENACT A GENERAL FALSE CLAIMS ACT TO REIN IN FRAUD, WASTE, AND ABUSE**

In its 2010 report, the Tax Credit Review Commission identified issues of non-compliance with tax credit program requirements as a significant matter of concern to be addressed by the General Assembly.<sup>39</sup> In response to these concerns, the Tax Credit Review Commission recommended the creation of “strict statutory clawbacks to be enforced by the state[.]”<sup>40</sup> A “clawback” is a statutory or contractual provision that enables the administering agency to recapture a tax credit already issued or to require repayment of the tax credit’s face value in the event of failure to perform or other default.<sup>41</sup> For transferable tax credits, clawback provisions typically provide a remedy against the initial recipient of the credit rather than a subsequent purchaser.

Since the Tax Credit Review Commission’s 2010 report, it has become apparent that the risk of non-compliance can often be one of outright fraud. One of Missouri’s most visible examples was the failure of the Mamtek sucralose facility in Moberly.<sup>42</sup> While the tax credits authorized in that project were never issued due to the configuration of the Missouri Works Program,<sup>43</sup> the Committee is concerned that most of the State’s tax credit programs lack adequate safeguards to prevent fraud. With the sheer volume of tax credits issued each year in Missouri, taxpayers deserve protection from unscrupulous tax credit recipients’ fraud, waste, and abuse.

Upon the Committee’s review, few of the tax credit programs’ current protections go far enough to ensure taxpayers’ protection. Contractual clawbacks are often ineffective; many applicants subject to clawback penalties are functionally bankrupt by the time that DED refers the case to the Attorney General’s Office. A contractual right that can’t realistically protect the taxpayers is of little use.

As such, the Committee recommends the adoption of a robust General False Claims Act that would apply to any issuances of tax credits. The Committee believes that such an act should be exclusively administered, overseen, and instituted by the Missouri Attorney General’s Office. Along with treble damages for fraud, the General False Claims Act should include broad injunctive provisions, investigative powers, and

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<sup>37</sup> As discussed *infra*, the Committee recommends that this appropriation process not include Missouri Works as it would frustrate the ability to compete with other states.

<sup>38</sup> See MO. CONST. art. IV, § 27.

<sup>39</sup> 2010 MISSOURI TAX CREDIT REVIEW COMMISSION REPORT, *supra* note 14, at 13.

<sup>40</sup> *Id.*

<sup>41</sup> *Sallie Hemmway*, *supra* note 14.

<sup>42</sup> See Berfield, *A Missouri Town’s Sweet Dreams Turn Sour*, *supra* note 32.

<sup>43</sup> As discussed in the section on Missouri Works, benefits are only awarded if the promised jobs from the economic development proposal actually come to fruition. See *infra* Part II.F.

criminal penalties for applicants who abuse the system. Such an act would provide assurances to the taxpayers that, should tax credits be misappropriated by unscrupulous recipients, their hard earned tax dollars would not be lost. A proposed act is attached to this report.

### ***C. Tax Credit Stability Fund***

Under Missouri's current tax credit system, most programs' expenses are "off-book." This means that despite the fact that tax credits have a very real effect on the overall State budget, that vast majority of tax credits are not handled through the normal appropriations process within the General Assembly. As one member of the Committee commented at a public hearing, most important legislative priorities are subjected to the budget appropriations process each year, including care for the elderly and disabled.<sup>44</sup> There is no good reason that tax credits should not be subject to the same discernment. In addition to the lack of legislative allocation, the General Assembly does not readily track the total amount of tax credits that are authorized pursuant to the various tax credit programs. Moreover, statutory caps on tax credits are valuable tools to rein in the extreme excesses of tax credit programs. For example, the General Assembly may wish to restrict the volume of tax credits authorized during lean years of State revenue. However, Missouri's current tax credit system is not set up to do this.

### **7. RECOMMENDATION: THE GENERAL ASSEMBLY SHOULD CREATE A TAX CREDIT STABILIZATION FUND ("TCSF") TO PRE-PAY FOR NEW TAX CREDIT AUTHORIZATIONS.**

In practice the TCSF would act as a "supercap" over all tax credit programs to ensure that the General Assembly regulates the State's volume of tax credit usage. In addition, the TCSF would prevent the State from issuing tax credits without a defined plan on how to pay for them. Figure 1.1 below sets forth a diagram for a potential TCSF.

In Step 1, the General Assembly would decide annually how much should be appropriated to the State's tax credit programs. Figure 1.1 assumes an appropriation of \$250 million from the General Assembly. If desired, additional tax credit programs could be phased into the TCSF each year. Eventually, the TCSF would set an overall cap for virtually every Missouri tax credit program. The Committee recommends that the General Assembly transition a majority of Missouri's tax credit programs into the TCSF over a period of five years, beginning with the state Historic Preservation Tax Credit and Low Income Housing Tax Credit programs, which constitute a significant portion of the State's annual tax credit authorizations, issuances, and redemptions.

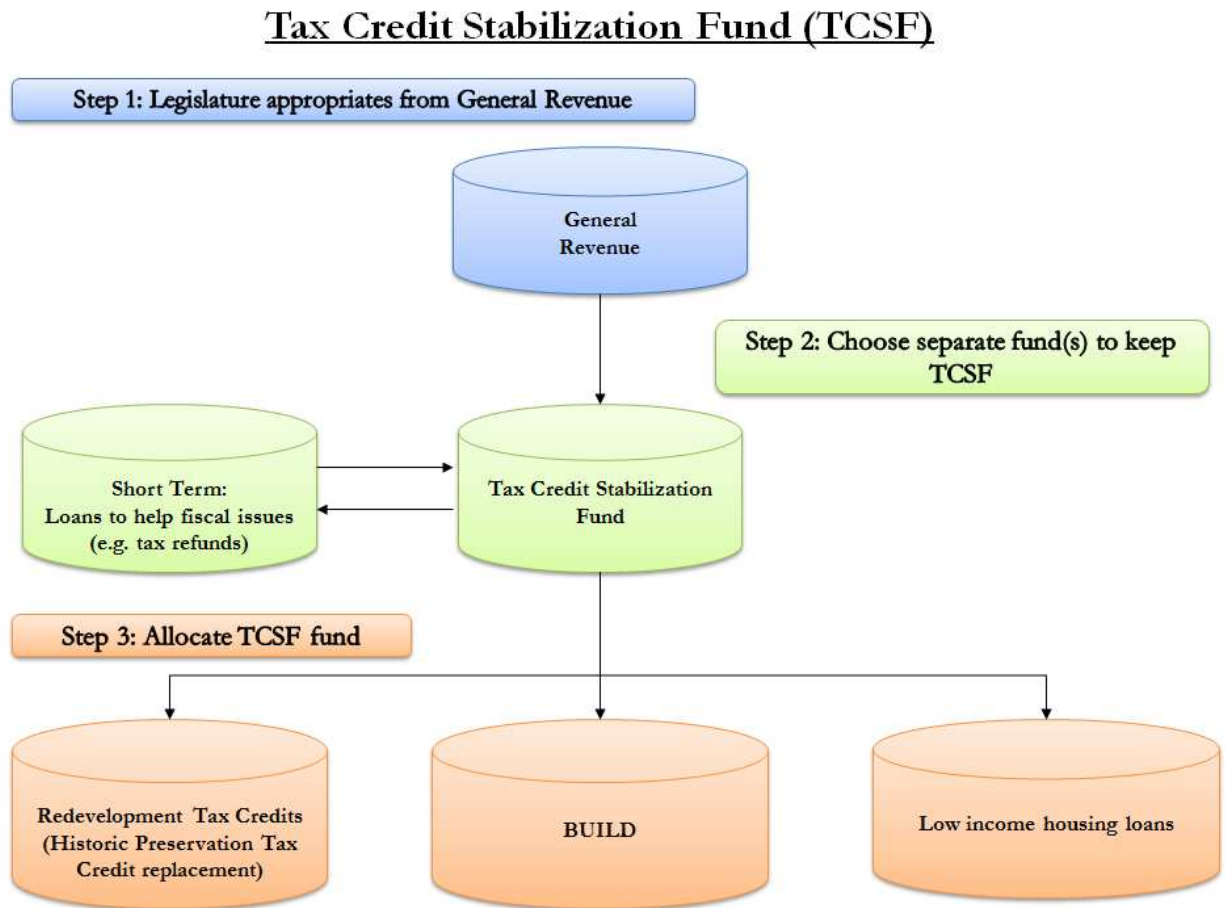
In Step 2, the TCSF funds would be placed in a separate fund dedicated for the redemption of tax credits. This fund could provide the State with short-term loans in order to stabilize revenue spikes and needs for immediate short-term funding, such as State tax refunds and unforeseen emergency management expenses.

In Step 3, the Governor would recommend funding levels for each program subject to the TCSF. The Governor could not recommend an amount in the aggregate that would exceed the total cap set decided by the General Assembly. The General Assembly would then decide whether to accept these proposed individual program caps.

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<sup>44</sup> Comments of Jason Crowell, Minutes of June 5, 2017 Regular Meeting.

**FIGURE 1.1**



#### ***D. Low Income Housing Tax Credits***

Missouri’s Low Income Housing Tax Credit (“LIHTC”) program provides incentives for the construction and maintenance of affordable rental housing throughout the State.<sup>45</sup> Under Missouri’s LIHTC program, the Missouri Housing Development Commission (“MHDC”) is authorized to issue a state tax credit equal to 9% of a development’s eligible costs to qualified owners of affordable rental housing developments, capped at the total amount of federal LIHTCs awarded to such development.<sup>46</sup> MHDC has discretion to select the most competitive developments and allocate state LIHTCs accordingly.<sup>47</sup> Missouri also offers a

<sup>45</sup> MO. HOUSING DEV. COMMITTEE, LOW INCOME HOUSING TAX CREDIT PROGRAM 1 [hereinafter MHDC LIHTC PROGRAM SUMMARY] (submitted upon letter request from Governor’s Committee on Simple, Fair and Low Taxes).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

LIHTC equal to 4% of a development's eligible costs for developments financed with tax-exempt bonds, capped at \$6 million per year for a period of 10 years (i.e. \$60 million).<sup>48</sup>

The state LIHTC program was created to supplement the federal LIHTC program, which annually allocates a set amount of federal LIHTCs based on the State's population each year.<sup>49</sup> MHDC may grant state LIHTCs up to the amount of federal LIHTCs allocated to Missouri in a given year, set annually by the U.S. Internal Revenue Service.<sup>50</sup> In FY 2016, MHDC authorized over \$167 million of state LIHTCs in addition to a matching amount of federal LIHTCs, resulting in over \$300 million of state and federal LIHTCs committed to affordable housing developments within Missouri.<sup>51</sup>

To be eligible for the state LIHTC, a recipient must:

- (1) Own at least part of the proposed affordable housing development;
- (2) "Develop rental housing that:
  - (A) Rents at least 20% of its units to families earning 50% of the area median income, or
  - (B) Rents at least 40% of its units to families earning 60% of the area median income;
- (3) Maintain the affordability of the rental units by restricting rents for an extended period of time, typically 30 years;
- (4) Assist in the production of financially viable, market-appropriate housing in areas of greatest housing need in the State; and
- (5) Be sponsored by an entity with prior successful housing experience and the ability to proceed in an expeditious manner."<sup>52</sup>

LIHTCs are issued annually in equal increments over a period of 10 years and may be carried back up to 3 tax years or carried forward up to 5 tax years.<sup>53</sup> LIHTCs may be transferred among owners within a development's ownership structure, but not to persons outside the ownership group.<sup>54</sup> Developers who receive LIHTCs typically team with investors to share ownership of the development.<sup>55</sup> These ownership groups are often formed by third-party syndicators, who receive a portion of the LIHTC proceeds for their efforts.<sup>56</sup>

There are "nearly 100,000 active affordable housing units in Missouri," and roughly 60% of them were built using state LIHTCs.<sup>57</sup> Over the course of four town hall meetings, many Missourians described a significant need for affordable housing throughout the State. Phyllis Woehr, a tenant in a Maryville LIHTC development, explained to the Committee that accessible affordable housing had enabled her to live

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<sup>48</sup> *Id.*

<sup>49</sup> See THE OFFICE OF MO. STATE AUDITOR, ECONOMIC DEVELOPMENT: LOW INCOME HOUSING TAX CREDIT PROGRAM at 4 (March 2014), available at <https://app.auditor.mo.gov/Repository/Press/2013014719305.pdf> [hereinafter 2014 LIHTC AUDIT].

<sup>50</sup> MHDC LIHTC Program Summary, *supra* note 45, at 1.

<sup>51</sup> See 2017 DED TAX CREDIT REPORT, *supra* note 23, at 13.

<sup>52</sup> MHDC LIHTC Program Summary, *supra* note 45, at 1-2.

<sup>53</sup> See RSMO. § 135.352.4.

<sup>54</sup> See 2014 LIHTC AUDIT, *supra* note 49 at 5.

<sup>55</sup> See *id.* at 6.

<sup>56</sup> See *id.*

<sup>57</sup> See *State Supported Affordable Housing Tax Credit Discussion: Hearing Before the Governor's Committee on Simple, Fair and Low Taxes*, (June 12, 2017) (statement of Peter J. Czajkowski, Director of Municipal Securities Group, Stifel, Nicolaus & Company) [hereinafter *Stifel Presentation*].

independently after being confined to a wheelchair.<sup>58</sup> Accessible, affordable independent living developments provide an alternative to costly nursing homes and enable residents to live with dignity. Affordable housing is also a critical piece of workforce development. Jonas Arjes, Executive Director of the Taney County Partnership, conveyed Branson's dire need for affordable housing to accommodate workers.<sup>59</sup> According to Mr. Arjes, Branson has approximately 1,000 vacant jobs that remain empty due to a dearth of affordable housing for would-be workers.<sup>60</sup> Missouri's LIHTC program has played a role in many affordable housing developments throughout the State, and a number of Missourians implored the Committee to recommend continuing and strengthening the program.

Though Missouri's LIHTC program has assisted with numerous affordable housing developments across the State, it is widely criticized as an inefficient use of public funds.<sup>61</sup> Although Missouri authorizes as many tax credits as the federal LIHTC program, experts estimate that the state LIHTC program has led to the construction of just 33% more affordable housing units than would have been constructed under the federal program alone.<sup>62</sup> In short, Missouri's LIHTC program costs as much as the federal LIHTC program, but delivers only one third of the results.

As of 2014, Missouri realized only \$0.42 of affordable housing for each dollar of state LIHTC awarded.<sup>63</sup> And over the last 15 fiscal years, Missourians have received only \$0.12 of economic benefit for each dollar of state LIHTC awarded.<sup>64</sup> In other words, over the past ten fiscal years, Missouri has authorized over \$1.6 billion of state LIHTC and received less than \$192 million in return, for a loss of over \$1.4 billion.<sup>65</sup> As of 2013, Missouri's LIHTC program financed affordable housing construction at an effective interest rate to the State of over 19%, an extremely high rate considering that Missouri holds a AAA bond rating and should be able to borrow money at a much lower rate.<sup>66</sup> A Missouri Tax Credit Review Commission report rightly concludes that this anomaly "should be a source of great embarrassment to Missouri."<sup>67</sup>

Despite its low efficiency, Missouri's LIHTC program has become the State's largest tax credit program. For FY 2017, Missouri is on a pace to authorize \$205 million LIHTCs.<sup>68</sup> For comparison, the State's Youth Opportunities Tax Credit Program and Neighborhood Assistance Tax Credit Program, which provide much-needed resources, mentoring and activities to Missouri's neediest people, are capped at \$6

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<sup>58</sup> *Testimony of Phyllis Woehr: Hearing Before the Governor's Committee on Simple, Fair and Low Taxes* (May 17, 2017) (statement of Phyllis Woehr at Maryville Town Hall).

<sup>59</sup> *Testimony of Jonas Arjes: Hearing Before the Governor's Committee on Simple, Fair and Low Taxes* (June 7, 2017) (statement of Jonas Arjes, Executive Director, Taney County Partnership, at Springfield Town Hall).

<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., Virginia Young, *Is Missouri's Costly Housing Tax Credit Untouchable Because of Industry's Clout?*, ST. LOUIS POST-DISPATCH (March 3, 2014), [http://www.stltoday.com/business/local/is-missouri-s-costly-housing-tax-credit-untouchable-because-of/article\\_0e46846e-fa2a-55aa-ad07-7409cd0a64d6.html](http://www.stltoday.com/business/local/is-missouri-s-costly-housing-tax-credit-untouchable-because-of/article_0e46846e-fa2a-55aa-ad07-7409cd0a64d6.html); Christine Harbin, *Low Income Housing Tax Credit Mathematics*, SHOW-ME INST. (July 22, 2010), <http://showmeinstitute.org/blog/transparency/low-income-housing-tax-credit-mathematics>.

<sup>62</sup> See *Stifel Presentation*, *supra* note 57.

<sup>63</sup> 2014 LIHTC AUDIT, *supra* note 49, at 11.

<sup>64</sup> See 2017 TAX CREDIT AUDIT, *supra* note 17, at 20.

<sup>65</sup> See 10 YEAR TAX CREDIT REPORT (2017), *supra* note 15.

<sup>66</sup> See *Missouri's Top-Grade AAA Credit Rating is Reaffirmed*, THE KANSAS CITY STAR (April 28, 2016), <http://www.kansascity.com/news/business/article74468407.html>; see also 2014 LIHTC AUDIT, *supra* note 49, at 13-14.

<sup>67</sup> See CRAIG A. VAN MATRE ET AL., SUPPLEMENTAL (AND MINORITY) REPORT BY CERTAIN MEMBERS OF THE MISSOURI TAX CREDIT REVIEW COMMISSION 8 (2012). [Hereinafter 2012 TAX CREDIT REVIEW COMMISSION SUPPLEMENTAL (AND MINORITY) REPORT]

<sup>68</sup> See 2017 DED TAX CREDIT REPORT, *supra* note 23, at 12.

million and \$16 million, respectively.<sup>69</sup> From FY 1997 to 2013, Missouri exceeded its projections for authorized LIHTCs by \$842 million.<sup>70</sup> And as of FY 2016, there are \$827,860,826 of state LIHTCs outstanding and an additional \$476,266,990 obligated, casting an ominous \$1.3 billion shadow over future state budgets.<sup>71</sup>

The state LIHTC's loss of value is largely due to the credit's federal tax consequences. The state LIHTC reduces the amount of state taxes payable, which reduces the federal tax deduction for state taxes paid.<sup>72</sup> The credit's additional loss of value is funneled to syndicators and investors.<sup>73</sup> And in many cases, developers redeem state LIHTCs simultaneously with another type of state tax credit for the same expense - this practice of "stacking" depletes State resources and produces no additional economic benefit to the State. Despite the State's massive investment in its LIHTC program, Missourians receive a disproportionately small amount of affordable housing in return.

Missouri has one of the two largest state LIHTC programs in the country.<sup>74</sup> As of 2012, Missouri spent \$28.60 per person on its LIHTC program.<sup>75</sup> The next highest-spending state spent just over \$20.00 per person on its LIHTC program, and most other states spent far less.<sup>76</sup> While Missouri and Georgia link their state LIHTC caps to the federal LIHTC allocations they receive each year, most states with their own LIHTC programs institute a much lower cap.<sup>77</sup> For example, Massachusetts caps its program at \$20 million per year (but will drop to \$10 million in 2019), Colorado caps its state LIHTC program at \$5 million per year, and Oklahoma caps its program at \$4 million per year.<sup>78</sup>

Despite the state LIHTC program's size and inefficiency, it may be possible to deliver affordable housing for a much lower price. Stifel, Nicolaus & Company ("Stifel") illustrated the state LIHTC program's investor model under existing law (see Figure 1.2 below), noting the great lengths investors and developers employ in order to comply with Missouri law.<sup>79</sup> However, Stifel introduced the Committee to a state LIHTC model that would reduce complexity, increase the state credits' value, and introduce added budget stability to the State's general revenue (see Figure 1.3 below).<sup>80</sup>

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<sup>69</sup> See *Youth Opportunities Tax Credit Program*, MO. DEPT. OF ECONOMIC DEVELOPMENT (rev. April 2013), <https://ded.mo.gov/sites/default/files/programs/flyers/YOPPProgramSummary13.pdf>; *Neighborhood Assistance Tax Credit Program*, MO. DEPT. OF ECONOMIC DEVELOPMENT (rev. Aug. 2016), <https://ded.mo.gov/sites/default/files/programs/flyers/NAPProgramSummary2016.pdf>.

<sup>70</sup> See 2014 LIHTC AUDIT, *supra* note 49, at 12-13.

<sup>71</sup> *Sallie Hemmway*, *supra* note 14.

<sup>72</sup> *Testimony of Mark Gardner: Hearing Before the Governor's Committee on Simple, Fair and Low Taxes*, (June 5, 2017) (statement of Mark Gardner, Chairman, Gardner Capital); 2014 LIHTC AUDIT, *supra* note 49, at 13.

<sup>73</sup> 2014 LIHTC AUDIT, *supra* note 49, at 11.

<sup>74</sup> See *id.*

<sup>75</sup> See *id.* at 11.

<sup>76</sup> See *id.*

<sup>77</sup> See *id.* at 12.

<sup>78</sup> See *State LIHTC Program Descriptions*, NOVOGRADAC & COMPANY LLP, <https://www.novoco.com/resource-centers/affordable-housing-tax-credits/application-allocation/state-lihtc-program-descriptions> (last visited June 22, 2017).

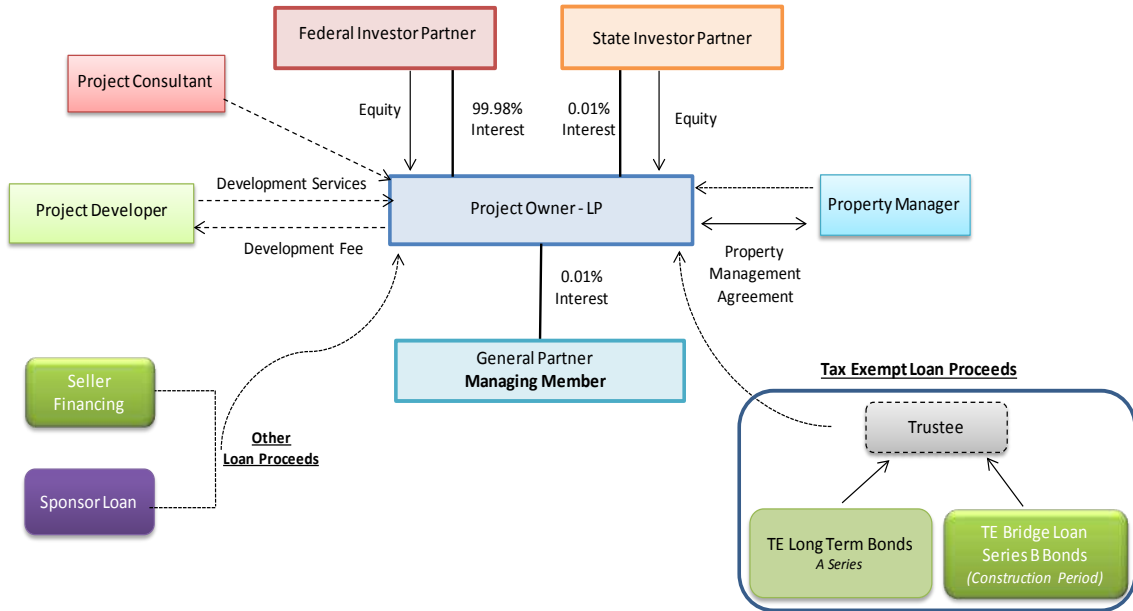
<sup>79</sup> See *Stifel Presentation*, *supra* note 57, at 12.

<sup>80</sup> See *Stifel Presentation*, *supra* note 57, at 21.



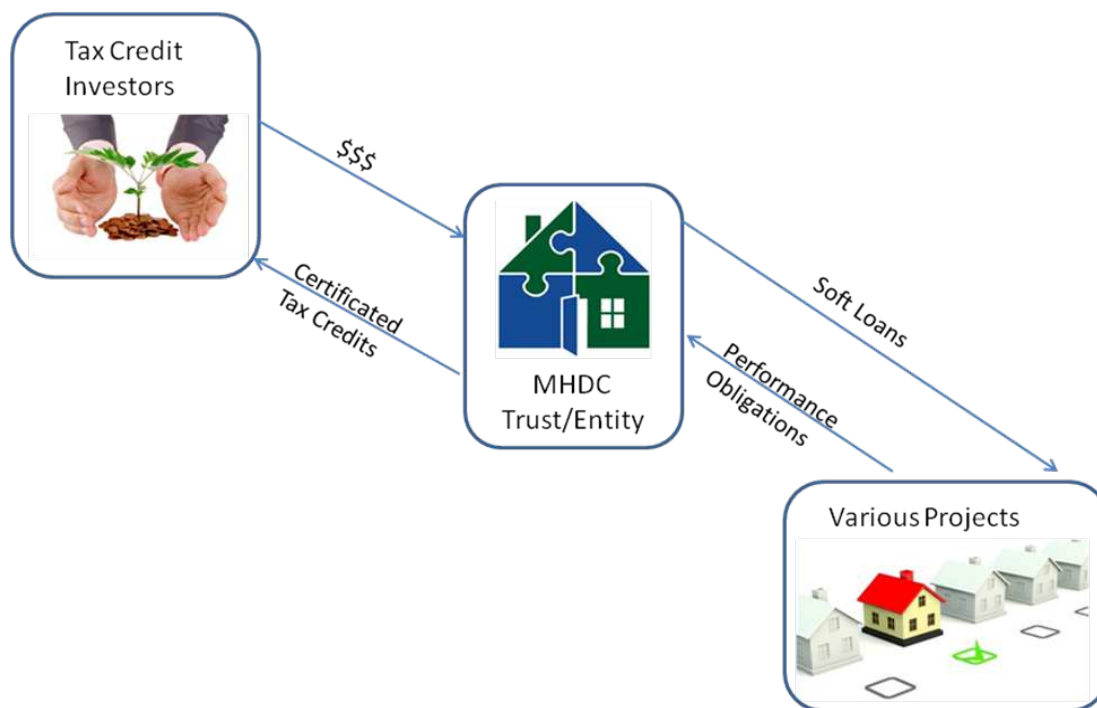
**FIGURE 1.2:**

**TYPICAL LIHTC PROJECT ORGANIZATIONAL CHART (UNDER CURRENT MISSOURI STATUTES)<sup>81</sup>**



<sup>81</sup> See *Stijel Presentation*, *supra* note 57, at 12.

**FIGURE 1.3: ALTERNATIVE LIHTC PROJECT FINANCING CHART<sup>82</sup>**



First, Stifel suggested that certificating state LIHTCs could immediately increase their value.<sup>83</sup> LIHTC certificates would provide investors with a transferable credit that wouldn't require ownership of the affordable housing project, thus reducing the need for the complex ownership structure shown in Figure 1.2.<sup>84</sup> This simplicity and transferability would provide more favorable federal tax treatment, lower investors' costs, and ultimately make the state LIHTC more valuable.<sup>85</sup> To ensure that the State realizes the best price for certificated LIHTCs, MHDC could auction them off to the highest bidders.<sup>86</sup>

Second, the certificated LIHTC proceeds could be used to issue direct loans to affordable housing developments.<sup>87</sup> This would eliminate the need for costly, inefficient third-party syndication, resulting in more dollars going toward affordable housing - Missouri could get more affordable housing for the same

<sup>82</sup> See *Stifel Presentation*, *supra* note 57, at 20.

<sup>83</sup> See *Stifel Presentation*, *supra* note 57.

<sup>84</sup> See *id*.

<sup>85</sup> See *id*.

<sup>86</sup> See *id* at 24. The auction would be run as a Dutch auction, in which the asking price would start at a high amount and then decrease until one bidder bought the new LIHTC credits with one bid. A Dutch auction maximizes the benefit for the seller, since the seller receives the highest price that the highest bidder is willing to pay. In a standard auction, the seller would only receive a price that is one increment higher than the price that the second highest bidder is willing to pay.

<sup>87</sup> See *Stifel Presentation*, *supra* note 57, at 19.

amount of tax credits.<sup>88</sup> The loans would be subject to the same recapture protections provided by Missouri's current LIHTC - if a development failed to meet compliance guidelines, the loan would not be forgiven.<sup>89</sup>

Third, the State could reduce its current LIHTC obligations by repurchasing outstanding LIHTCs in return for the new, more valuable certificated tax credit.<sup>90</sup> This immediate approach could allow the State to reduce its outstanding LIHTC liabilities by 15-20% for all tax credits repurchased.<sup>91</sup>

Missourians have a sincere need for high-quality affordable housing, but Missouri's LIHTC program produces disproportionately low affordable housing units compared to taxpayers' massive investment. The following recommendations would vastly improve the existing LIHTC program and provide quality affordable housing at a fairer, lower price for Missourians.

**8. RECOMMENDATION: CONVERT THE STATE LIHTC PROGRAM TO A LOW- OR NO-INTEREST LOAN PROGRAM (THE "LIH LOAN PROGRAM") FOR AFFORDABLE HOUSING CONSTRUCTION, AS DEMONSTRATED IN FIGURE 1.3 ABOVE.**

- Switching to the LIH Loan Program would eliminate most of the inefficiencies of the current tax credit program, including federal tax consequences and third-party syndication fees. 100% of State LIH Loans would go toward housing construction, a vast improvement from the current LIHTC's 42% efficacy.
- MHDC has an AA+ bond rating and could effectively transition from issuing LIHTCs to LIH Loans.
- MHDC's enabling statute currently permits MHDC to form a nonprofit corporation to be called the Missouri Equity Fund Support Corporation ("MEFSC") in order to syndicate credits. The existing statute could be amended to give MEFSC the authority to issue LIH Loans to developers and separately issue new certificated tax credits to investors via auction.
- Proceeds from certificated tax credit sales could be allocated directly to LIH Loans. In the interim, sale proceeds could build interest in a trust fund, which could provide additional affordable housing support through LIH Loans.
  - Alternatively, proceeds from tax credit sales could be remitted to the State's general revenue and the General Assembly could appropriate funds for the LIH Loan Program.

**9. RECOMMENDATION: REPURCHASE OUTSTANDING LIHTCS THROUGH MHDC'S NONPROFIT ENTITY AND EXCHANGE THEM FOR BONDS, POTENTIALLY SAVING THE STATE 15-20% OF ITS OUTSTANDING LIHTC LIABILITIES IN THE PROCESS.<sup>92</sup>**

- Under a certificated tax credit model, MHDC would issue certificates that investors could purchase to reduce their Missouri tax liability. Unlike the current state LIHTCs, certificated tax credits could be transferred to persons outside of the ownership group, expanding the pool of potential investors.<sup>93</sup> This would increase the credits' marketability.
  - MEFSC could be authorized to issue bonds necessary to pay current state LIHTC holders for their outstanding credits, which would be cancelled by the State (the "LIHTC Repurchase Program").

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<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *Stifel Presentation*, *supra* note 57.

<sup>91</sup> See *id.*

<sup>92</sup> See *Stifel Presentation*, *supra* note 57.

<sup>93</sup> See 2014 LIHTC AUDIT, *supra* note 49, at 14.

- According to Stifel, for every dollar of outstanding LIHTCs repurchased, the State could save approximately 15-20% of its associated liability.<sup>94</sup>

**10. RECOMMENDATION: SUBJECT THE LIH LOAN PROGRAM TO THE OVERALL TAX CREDIT STABILIZATION FUND AUTHORIZATION CAP (DISCUSSED ABOVE) AND SUBJECT THE LIHTC REPURCHASE PROGRAM TO APPROPRIATIONS.**

- The TCSF would place a cap on the overall amount of LIH Loans issued in a given year, and the LIH Loan Program would be subject to appropriation for the General Assembly to adjust the program's budget allocation as needed.
  - Affordable housing is important, but in a world of limited resources, the LIH Loan Program must be evaluated along with other critical budget needs like schools and mental health funding.
- Under appropriations, the General Assembly could decide the amount of outstanding state LIHTCs to be repurchased each year, saving the State 15-20% for every dollar of credit repurchased.

**11. RECOMMENDATION: INCLUDE A 5-YEAR SUNSET PROVISION FOR THE LIH LOAN PROGRAM AND LIHTC REPURCHASE PROGRAM.**

- A sunset provision would require the General Assembly to conduct an in-depth review of the LIH Loan Program and LIHTC Repurchase Program to determine whether the programs are achieving their intended purposes, and if not, how to address any shortcomings in future years.
- A sunset provision has been widely recommended in recent years,<sup>95</sup> and there is no reason why the LIH Loan Program or LIHTC Repurchase Program should be exempt from regular review.<sup>96</sup>

**E. Historic Preservation Tax Credits**

Missouri's Historic Preservation Tax Credit ("HPTC") program provides "an incentive for the redevelopment of commercial and residential historic structures" within the State.<sup>97</sup> Under Missouri's HPTC program, DED is authorized to provide a tax credit for "25% of the eligible costs and expenses for the rehabilitation of approved historic structures."<sup>98</sup> The State may grant up to \$140 million of HPTC per fiscal year; however, projects receiving under \$275,000 of HPTC are not limited by the \$140 million cap.<sup>99</sup> Missouri's HPTC program also provides tax credits of up to \$250,000 per project to rehabilitate owner-occupied residences.<sup>100</sup>

Applicants are entitled to the HPTC if they meet the following requirements:

<sup>94</sup> See *Stifel Presentation*, *supra* note 57.

<sup>95</sup> See, e.g., 2014 LIHTC AUDIT, *supra* note 49, at 15; 2017 TAX CREDIT AUDIT, *supra* note 17, at 17-18.

<sup>96</sup> See 2010 MISSOURI TAX CREDIT REVIEW COMMISSION REPORT, *supra* note 14, at 10-11; 2012 TAX CREDIT REVIEW COMMISSION SUPPLEMENTAL (AND MINORITY) REPORT, *supra* note 67, at 3.

<sup>97</sup> See *Historic Preservation Tax Credit Program*, MO. DEPT. OF ECONOMIC DEVELOPMENT (rev. Feb. 2014), [https://ded.mo.gov/sites/default/files/programs/flyers/HistPres\\_ProgSummary\\_2016\\_0.pdf](https://ded.mo.gov/sites/default/files/programs/flyers/HistPres_ProgSummary_2016_0.pdf) [hereinafter *HPTC Program Summary*].

<sup>98</sup> See *HPTC Program Summary*, *supra* note 97.

<sup>99</sup> See RSMo. § 253.550.2.

<sup>100</sup> See RSMo. § 253.550.3.

- (1) “An eligible property must be:
  - (A) listed on the National Register of Historic Places;
  - (B) certified by the Missouri Department of Natural Resources (“DNR”) as contributing to the historical significance of a certified historic district listed on the National Register; or
  - (C) located within a local historic district that has been certified by the United States Department of the Interior;”
- (2) The applicant is a for-profit entity (i.e. the applicant cannot be a not-for profit or governmental entity); and
- (3) “The costs and expenses associated with the rehabilitation must exceed 50% of the property’s total basis (i.e. the cost to acquire the property).”<sup>101</sup>

HPTCs must be applied to the recipient’s taxes in the year in which they are issued. If the HPTCs cannot be applied in the year they were issued, they may be carried back up to 3 tax years or carried forward up to 10 tax years.<sup>102</sup>

Missouri’s HPTC program is the State’s second-largest tax credit program in terms of issuances and authorizations, accounting for over \$1.2 billion in authorized tax credits, over \$1 billion of issued tax credits, and over \$1 billion of redeemed tax credits from FY 2007 through 2016.<sup>103</sup> Additionally, the United States National Park Service provides a federal HPTC that entitles recipients to a tax credit equal to 20% of a project’s qualified rehabilitation expenses.<sup>104</sup> In FY 2016, Missouri historic rehabilitation projects were authorized to receive over \$600 million of federal HPTC and over \$90 million of Missouri HPTC.<sup>105</sup> According to St. Louis developer Steven Stogel, since the state HPTC program’s creation in 1998, Missouri has incurred more qualified rehabilitation expenses than any other state, and St. Louis has incurred more qualified rehabilitation expenses than any other city in the country.<sup>106</sup>

Missouri has far and away the largest state HPTC program in the country.<sup>107</sup> In a 2014 audit of Missouri’s HPTC program, the State Auditor noted that Missouri could lower its cap on HPTC authorizations from \$140 million per year to \$75 million per year and still have one of the largest HPTC programs of any state.<sup>108</sup>

At the Committee’s town hall meetings across the State, a number of Missourians spoke in favor of the state HPTC program. Developers in Hannibal, Cape Girardeau, and other Missouri cities have used HPTC to redevelop historic downtown areas and attract businesses and residents to long-vacant urban cores.<sup>109</sup> Some may claim that the HPTC is a powerful tool to recover blighted areas and spark economic

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<sup>101</sup> See *HPTC Program Summary*, *supra* note 97.

<sup>102</sup> See RSMo. § 253.557.1.

<sup>103</sup> See 10 YEAR TAX CREDIT REPORT (2017), *supra* note 15.

<sup>104</sup> See *Federal Tax Incentives for Rehabilitating Historic Buildings: Statistical Report and Analysis for Fiscal Year 2016* at 1-2, 6, U.S. NATIONAL PARK SERVICE (March 2017), <https://www.nps.gov/tps/tax-incentives/taxdocs/tax-incentives-2016statistical.pdf>.

<sup>105</sup> See *id.* at 9; see also *Sallie Hemmway*, *supra* note 14.

<sup>106</sup> *Testimony of Steven Stogel: Hearing Before the Governor’s Committee for Simple, Fair and Low Taxes*, (June 5, 2017) [hereinafter *Steven Stogel*].

<sup>107</sup> See THE OFFICE OF MO. STATE AUDITOR, MISSOURI STATE AUDIT OF THE HISTORIC PRESERVATION TAX CREDIT PROGRAM at 8 (Mar. 2014), available at <https://app.auditor.mo.gov/repository/press/2014018832873.pdf> [hereinafter 2014 HPTC AUDIT].

<sup>108</sup> See *id.* at 9.

<sup>109</sup> *Town Hall in Hannibal*, *supra* note 18; *Town Hall in Cape Girardeau*, *supra* note 19.

growth.<sup>110</sup> However, Missouri's HPTC program was not designed to combat blight or generate economic development and it contains no statutory safeguards to incentivize these goals.

Developer Steve Smith from St. Louis cited examples of HPTC's success by incentivizing an initial property in a downtrodden district, which attracted private follow-on investment in surrounding buildings.<sup>111</sup> Mr. Smith described his first experience with the state HPTC, which enabled him to develop the Moto Museum in midtown St. Louis.<sup>112</sup> According to Mr. Smith, after his HPTC-supported redevelopment, private investors redeveloped surrounding buildings without the use of State incentives, resulting in 55 new jobs.<sup>113</sup> Similarly, St. Louis's Cortex district launched with assistance from state HPTCs and has grown into a thriving tech and innovation center.<sup>114</sup>

From the collective comments submitted to the Committee, it is evident that the state HPTC can be a helpful incentive to establish an initial anchor redevelopment in an underutilized area. Once one such attractive property exists, private investors are more likely to redevelop the surrounding area. However, Mr. Smith's example may be an exception rather than the norm. All eligible properties are statutorily entitled to the state HPTC, and subsequent redevelopments have no need to rely fully on private investment. A subsequent redevelopment in the same area may receive the state HPTC even if its value has already risen enough to incentivize private investment.

Economic development organizations from Excelsior Springs and Hannibal expressed concern that a large majority of state HPTCs are awarded to large projects in Kansas City and St. Louis, leaving few available credits for smaller communities.<sup>115</sup> Additionally, school district officials working hard to make ends meet in Lewis County, Hannibal, and Bellevue emphasized that, for a small fraction of the state HPTC awarded each year, their districts could provide much-needed resources to educate students, pay faculty and staff, and make critical improvements to long-neglected school buildings. These school officials acknowledged the importance of HPTCs to support Missouri's past, but they emphasized that the State could realize much greater returns by investing in Missouri's future.

The public testimony was compelling, but the numbers paint a stark picture. As calculated by DED, Missourians realized only \$0.26 of direct and indirect economic benefit from each dollar of state HPTC awarded from FY 2005 through FY 2015.<sup>116</sup> In FY 2016, Missourians realized only \$0.16 of direct and indirect economic benefit for each dollar of state HPTC awarded.<sup>117</sup>

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<sup>110</sup> See, e.g., *Testimony of Steve Foutch: Hearing Before the Governor's Committee On Simple, Fair and Low Taxes* (May 17, 2017) (statement of Steve Foutch at Maryville Town Hall).

<sup>111</sup> *Testimony of Steven Smith: Hearing Before the Governor's Committee On Simple, Fair and Low Taxes*, (June 2, 2017)(statement of Steven Smith at Cape Girardeau Town Hall); see also *Testimony of Mayor Lyda Krewson: Hearing Before the Governor's Committee On Simple, Fair and Low Taxes*, (June 2, 2017)(statement of Mayor Lyda Krewson at Cape Girardeau Town Hall); see also *Testimony of Rusty Worley: Hearing Before the Governor's Committee On Simple, Fair and Low Taxes*, (June 7, 2017)(statement of Rusty Worley at Springfield Town Hall).

<sup>112</sup> *Testimony of Steven Smith: Hearing Before the Governor's Committee On Simple, Fair and Low Taxes* (June 2, 2017) (statement of Steven Smith at Cape Girardeau Town Hall).

<sup>113</sup> *Id.*

<sup>114</sup> *Testimony of Mayor Lyda Krewson: Hearing Before the Governor's Committee on Simple, Fair and Low Taxes*, (June 2, 2017) (statement of Mayor Lyda Krewson at Cape Girardeau Town Hall).

<sup>115</sup> *Tonn Hall in Maryville*, *supra* note 30; *Tonn Hall in Hannibal*, *supra* note 18.

<sup>116</sup> See 2017 DED TAX CREDIT REPORT, *supra* note 23, at 72.

<sup>117</sup> See *id.*

Several developers who benefit from the state HPTC claim that the program provides an enormous amount of indirect economic benefit to the State, up to billions of dollars of new economic output.<sup>118</sup> However, several studies suggest that these estimates do not reflect reality. DED calculates HPTCs' indirect economic benefits (e.g. jobs created) based on information provided by HPTC recipients. But as evidenced in the 2014 HPTC Audit, DED simply does not have the capacity to verify or review the accuracy of reported jobs created - it is difficult to discern whether HPTC recipients report only new, permanent jobs or include jobs that existed prior to a building's rehabilitation.<sup>119</sup>

Furthermore, it is impossible to discern how much indirect economic benefit, if any, can be attributed to state HPTCs. Determining a tax credit's actual costs and benefits is extremely difficult, primarily because it is impossible to know how much economic activity would have occurred in the absence of the tax credit.<sup>120</sup> State HPTC recipients are already eligible to receive the federal HPTC, which provides a credit of 20% of qualified rehabilitation expenses per project. Additionally, developers often use tax credits from multiple State programs on the same project, a practice known as "stacking." A developer from Kansas City suggests that stacking is "a necessary evil" despite the State's lower return on each stacked tax credit.<sup>121</sup> But as the 2014 HPTC Audit points out, stacking tax credits results in additional profits for developers, with no additional benefit to Missouri taxpayers.<sup>122</sup>

No member of the public provided a plausible explanation of public benefit from state HPTCs for owner-occupied residences. Owner-occupied residences are not eligible for federal HPTCs, and the 2014 HPTC Audit points out that state HPTCs to non-income-producing, single-family, owner-occupied residences provide a minimal economic benefit to the public.<sup>123</sup> Nonetheless, the state HPTC program entitles eligible private historic residences to receive State resources before appropriation to education, infrastructure and healthcare.

The state HPTC program is excessively large and provides an unjustifiably low direct economic benefit to Missouri's taxpayers. The Committee recommends the following statutory measures to ensure that Missourians get a fair return for their hard-earned tax dollars.

**12. RECOMMENDATION: CONSOLIDATE THE HPTC AND BROWNFIELD REMEDIATION TAX CREDIT INTO ONE REDEVELOPMENT TAX CREDIT PROGRAM (THE "RTC").**

- HPTCs and Brownfield remediation tax credits are often stacked on individual redevelopment projects. Consolidating them into one program would make sure that taxpayers don't pay twice for the same development.

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<sup>118</sup> *Testimony of James Farrell: Hearing Before the Governor's Committee On Simple, Fair and Low Taxes* (May 17, 2017) (statement of James Farrell at Maryville Town Hall).

<sup>119</sup> See 2014 HPTC AUDIT, *supra* note 107, at 18-19.

<sup>120</sup> See Jennifer Weiner, *State Business Tax Incentives: Examining Evidence of their Effectiveness* FEDERAL RESERVE BANK OF BOSTON (Dec. 2009) at 1, available at <https://www.bostonfed.org/publications/new-england-public-policy-center-discussion-paper/2009/state-business-tax-incentives-examining-evidence-of-their-effectiveness.aspx>.

<sup>121</sup> *Fontch*, *supra* note 109.

<sup>122</sup> See 2014 HPTC AUDIT, *supra* note 107, at 15.

<sup>123</sup> See 2014 HPTC AUDIT, *supra* note 107, at 13; 2010 MISSOURI TAX CREDIT REVIEW COMMISSION REPORT, *supra* note 14, at 35. (recommending limits to HPTCs authorized for non-income-producing single family residences).

**13. RECOMMENDATION: SUBJECT THE RTC TO THE OVERALL TAX CREDIT STABILIZATION FUND**

**AUTHORIZATION CAP (DISCUSSED ABOVE), NOT TO EXCEED \$50 MILLION PER YEAR.**

- The current HPTC authorization cap is \$140 million per year, and there is no cap to the amount of Brownfield remediation tax credits authorized. Apart from the HPTC authorization cap, the State has no certainty as to how many credits will be authorized, issued, or redeemed in any given year. The TCSF would place a cap on the overall amount of tax credits authorized in a given year, and the RTC program would be subject to appropriations for the General Assembly to properly allocate resources based on the program's viability to the State.
- The appropriations process would pre-fund tax credits and make it clear how much is allocated to each program. This would simplify reporting and make it easier for taxpayers to see how the State is investing their tax dollars. Additionally, this would increase predictability of State revenues allocated to specific tax credit programs and would help mitigate unforeseen budget shortfalls due to excessive tax credit redemptions in a given year.
- Capping total appropriations to \$50 million per year is justifiable given the HPTC program's poor economic returns to the State. Additionally, this cap would give the State a degree of certainty regarding the HPTCs' future impact on Missouri's budget.

**14. RECOMMENDATION: INSTITUTE A PER-PROJECT CAP OF \$2 MILLION TO ENSURE EQUITABLE FUNDING**

**OPPORTUNITIES FOR RTC PROJECTS IN LARGE AND SMALL CITIES.**

- Large projects in urban centers tend to use considerably higher amounts of HPTCs and Brownfield remediation tax credits than do modest-sized projects in rural areas of the State. A per-project cap would ensure that a handful of large RTC projects don't deplete the Tax Credit Stability Fund at the expense of projects that require only a fraction of the credits.

**15. RECOMMENDATION: INSTITUTE A PER-SQUARE FOOTAGE VALUE CAP TO PREVENT RTCs FROM SUBSIDIZING**

**UNNECESSARY EXPENSES.**

- Unnecessary expenditures that raise the value per square footage (e.g. marble counters, premium flooring) provide additional benefit to developers, but not to the public.

**16. RECOMMENDATION: INCLUDE A 5-YEAR SUNSET PROVISION FOR THE RTC PROGRAM.**

- A sunset provision would require the General Assembly to conduct an in-depth review of the RTC program and determine whether the program is achieving its intended purpose, and if not, how to address any shortcomings going in future years. A sunset provision has been widely recommended in recent years, and there is no reason why the RTC program should be exempt from regular review.<sup>124</sup>

**17. RECOMMENDATION: EXCLUDE PRIVATE RESIDENCES FROM RTC ELIGIBILITY.**

- Private residences do not provide a public benefit and should not receive public funding.

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<sup>124</sup> See 2014 HPTC Audit, *supra* note 107, at 14-15; see 2010 MISSOURI TAX CREDIT REVIEW COMMISSION REPORT, *supra* note 14, at 10; see 2012 TAX CREDIT REVIEW COMMISSION SUPPLEMENTAL (AND MINORITY) REPORT, *supra* note 67, at 3.



**18. RECOMMENDATION: ELIMINATE THE RTC CARRY-BACK PERIOD AND SHORTEN THE RTC CARRY-FORWARD PERIOD TO THREE YEARS.**

- Currently, the state HPTC may be carried back three years and carried forward up to ten years. These time periods create a window of uncertainty surrounding the credits' ultimate budget impact - their unpredictability makes it hard to properly forecast State revenues.
- Eliminating the carry-back period and shortening the carry-forward period would make the credits' revenue impact on the State more predictable and stable, which would help mitigate unforeseen budget shortfalls due to excessive tax credit redemption.

**F. Missouri Works Program**

The Missouri Works Program ("Missouri Works") provides a mix of tax incentives for in-state and out-of-state businesses that create new jobs in Missouri. Upon achieving statutorily-set job creation, wage, and health insurance targets, Missouri Works applicants are entitled to retain the State withholding tax stemming from the new jobs for a period of five to six years. Applicants creating fewer than ten new jobs must also invest at least \$100,000 of new private capital in local facilities. There is no limit to the amount of withholding tax retention granted under Missouri Works.<sup>125</sup>

Missouri Works applicants may also be considered for discretionary tax credits awarded by DED. DED may issue up to \$116 million of discretionary Missouri Works tax credits per year, and no award may exceed the net State fiscal benefit from such project.<sup>126</sup>

Notably, Missouri Works benefits are not awarded until the applicant meets agreed-upon job creation, average wage, and health insurance goals.<sup>127</sup>

DED considers the following criteria to determine awards of discretionary Missouri Works tax credits:

- The lowest amount required to obtain commitment from the applicant;
- The project's overall size (e.g. jobs, wages, and new capital investment) and quality (e.g. growth potential, and industry type);
- The applicant's level of financial stability and creditworthiness;
- The amount of economic distress surrounding the project location;
- The competitiveness of locations that could be used instead of the proposed location; and
- The amount of local incentives committed to the project.<sup>128</sup>

Since its inception in 2014, Missouri Works has become one of the State's largest tax credit programs, accounting for nearly \$115 million of authorized tax credits in FY 2016.<sup>129</sup> Additionally, the State

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<sup>125</sup> See *Missouri Works Program Summary*, MO. DEPT. OF ECONOMIC DEVELOPMENT (rev. Dec. 2016), [https://ded.mo.gov/sites/default/files/programs/flyers/MissouriWorksProgSum2016\\_0.pdf](https://ded.mo.gov/sites/default/files/programs/flyers/MissouriWorksProgSum2016_0.pdf) [hereinafter *Missouri Works Program Summary*].

<sup>126</sup> See *id.*

<sup>127</sup> See *Missouri Works Program Summary*, *supra* note 124.

<sup>128</sup> See *id.*

<sup>129</sup> See 10 YEAR TAX CREDIT REPORT (2017), *supra* note 15.

has authorized over \$244 million in withholding tax entitlements from FY 2015 through FY 2025, an average of about \$22.2 million per year.<sup>130</sup>

At the Committee's town hall meetings, Missourians suggested that Missouri Works is well worth the State's investment. Mayor Ken McClure of Springfield noted that Missouri Works has become his city's "number one tool" for business expansion, leading to major investment and new jobs from companies like 3M and O'Reilly Auto Parts.<sup>131</sup> Backing up Mayor McClure's claims, 3M manager Frederick James noted that 3M's decision to expand its Springfield facility and add local jobs wouldn't have happened without Missouri Works incentives.<sup>132</sup>

The numbers corroborate the public's perception of Missouri Works. As calculated by DED, Missourians realized \$1.95 of direct and indirect economic benefit for each dollar of Missouri Works tax credits awarded in FY 2016, which led to the creation of 5,323 actual jobs.<sup>133</sup> And over a ten-year span, DED estimated that Missourians will realize \$3.77 of direct and indirect economic benefit for each dollar of Missouri Works tax credit awarded.<sup>134</sup> Additionally, Missouri Works tax credits are not issued unless the recipient actually meets its job creation, wage, and health insurance targets - this safeguard protects the State from realizing a negative return.

The Committee considered specifically whether to subject Missouri Works benefits to the appropriation process as proposed earlier for other tax credit reforms. This would not be workable, given that Missouri Works is used in a competitive process with other states. If tax credits were the subject of annual appropriations, Missouri would likely only be able to offer conditional offers rather than concrete commitments to projects.

Missouri Works has been successful thus far, resulting in a nearly 2:1 return to taxpayers in the form of actual jobs created. The Committee recommends the following statutory measures to enhance the program and make Missouri even more competitive for high-quality jobs.

**19. RECOMMENDATION: SUBJECT MISSOURI WORKS' WITHHOLDING TAX RETENTION BENEFIT TO DED'S DISCRETIONARY APPROVAL, PURSUANT TO THE SAME GUIDELINES APPLICABLE TO THE MISSOURI WORKS TAX CREDITS.**

- Currently, businesses can qualify for withholding tax retention regardless of whether such benefit affects their decision to locate to Missouri. As long as a Missouri Works applicant meets its job creation, wage, and health insurance goals, it is entitled to the benefit.
- Shifting the withholding tax retention benefit to a discretionary award would allow DED to properly allocate the benefit to companies who would not locate to or expand in Missouri without it.

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<sup>130</sup> *Missouri Works Summary Fund Status 6-2017*, MO. DEPT. OF ECONOMIC DEVELOPMENT, (on file with the Missouri Department of Economic Development).

<sup>131</sup> *Testimony of Mayor Ken McClure: Hearing Before the Governor's Committee On Simple, Fair and Low Taxes* (June 7, 2017) (statement of Ken McClure at Springfield Town Hall).

<sup>132</sup> *Testimony of Frederick James: Hearing Before the Governor's Committee On Simple, Fair and Low Taxes* (June 7, 2017) (statement of Frederick James at Springfield Town Hall).

<sup>133</sup> See 2017 DED TAX CREDIT REPORT, *supra* note 23, at 138.

<sup>134</sup> See *id.*

**20. RECOMMENDATION: UPDATE THE MISSOURI WORKS TRAINING PROGRAM TO ALLOW JOB TRAINING PROGRAMS FOR NEW JOBS, RETAINED JOBS, OR ANY COMBINATION THEREOF.**

- According to DED, it is administratively difficult to distinguish between training programs for new jobs and retained jobs, particularly as retained jobs evolve due to automation and technological advancement. A minor statutory amendment would make it simpler for DED to allocate the Missouri Works Job Development Fund to worthy training programs.<sup>135</sup>

### **III. TAX ADMINISTRATION FOR THE DEPARTMENT OF REVENUE**

The administration of Missouri's tax system plays a material role in the State's overall business environment. Changes to the Department's administration of the tax code can often occur without legislative action. Therefore, tax administration changes can be enacted more quickly.

The Committee received written statements and listened to testimony regarding a number of areas of tax administration. As a result, the Committee would ask the Governor to instruct the Director of the Department of Revenue to undertake the following changes:

- Update the Missouri's Taxpayer Bill of Rights,
- Repeal any outdated or inapplicable regulations, as stipulated in Executive Order 17-03,<sup>136</sup>
- Promulgate new regulations to clarify ambiguity in the tax code,
- Reform the taxpayer appeals process such that:
  - Taxpayers have the same amount of time to appeal a final income tax decision as they do to protest a notice of deficiency,
  - The Department consistently determines when a final determination of a federal income tax audit triggers state reporting requirements, and
  - The Department allows taxpayers 180 days to file an amended state return.
- Create a statewide Tax Advisory Committee made up of economists, business groups, consumer groups and groups representing various levels of wage earners. The Tax Advisory Committee will advise the Director on current Missouri tax issues, and
- Present the Governor with a slate of qualified candidates to appoint to the office of Taxpayer Advocate.

### **IV. OBSERVATIONS AND WHITE PAPER REQUEST**

As shown above, the Committee has centered its recommendations on tax credit reform. The Committee has offered straightforward, targeted solutions that increase the efficiency of the tax credits listed above while increasing their effectiveness.

That is not to say that the Committee invested all of its time in tax credit reform. The Committee heard extensive testimony on Missouri's overall tax environment. Information on Missouri's corporate income tax, individual income tax, sales tax, use tax, fuel tax and tax administration provided insight into the challenges facing the State. Expert testimony and public comments discussed tax methods, tax bases, tax brackets, tax rates, state rankings, the inherent drawbacks of different types of taxes and in-depth investigations into other states' successes and failures as they have attempted to reform their tax codes.

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<sup>135</sup> Interview with Amy Sublett, Director of Division of Workforce Development, Mo. Dept. of Economic Development (June 13, 2017).

<sup>136</sup> Exec. Order No. 17-03 (2017), <http://www.sos.mo.gov/CMSImages/Library/Reference/Orders/2017/17-03.pdf>.

The Committee reviewed interesting research on the numerous exclusions, exemptions, deductions, discounts, carve-outs, credits and loopholes that inhabit Missouri's current tax regime. A number of speakers at town halls and public hearings presented intriguing findings on earned income tax credits, gross receipts taxes, discretionary cash closing funds (a popular economic incentive tool), fuel tax indexing, individual income tax rates, individual income tax brackets, the effectiveness of the corporate income tax, education savings accounts<sup>137</sup> and case law that inhibits states from collecting sales or use taxes from remote sellers.

All of the issues discussed above are worthy of further study. In order to thoroughly review Missouri's overall tax environment, the Committee requests that the Governor charge the Director of the Department of Revenue to produce a white paper with the following objectives:

1. Identify Missouri's tax laws and policies that hinder economic growth
2. Compare Missouri's tax laws and policies to other states
3. Recommend a comprehensive plan, including legislation, that would make Missouri's tax laws and policies achieve best-in-class status

The Committee's recommendations for tax credit reform would prevent well-connected developers from taking their share of State resources before the General Assembly appropriates State funds to education, public safety, roads and other crucial State programs. Tax credit reform will eliminate an unaccountable, unpredictable drain on State funds that drives up taxes for the average Missourian. Any tax credit reform should be focused on ensuring that any savings in revenue should be passed on to the tax payer to the maximum extent possible. That policy is already enshrined with the tax reforms of Senate Bill 509—to the extent that any of the proposed tax credit reforms may generate excess revenue, further automatic income tax cuts will go into effect sooner.<sup>138</sup>

Tax credit reform is one part of a larger process to lower taxes on Missouri citizens and businesses. These reforms should be implemented in a revenue neutral manner and any new monies generated by them should be returned to the taxpayers by coupling said reforms with broad based tax cuts, to the maximum extent possible. As the State moves forward, the Committee believes that an in-depth review of Missouri's overall tax code would lead to recommendations to make Missouri a best-in-class State for families and businesses alike, while ensuring Missouri's taxes are simple, fair, and low for the average Missourian.

In public service, one should not make the perfect the enemy of the good. With any topic this complicated, the details matter tremendously and it would be impossible to reach unanimity on every individual recommendation without more study. Accordingly, each member has signed this report to publicly re-iterate their support for broad-based tax reform and our agreement with a strong majority of the recommendations contained herein. The Committee members look forward to working with each other, fellow legislators, and the Governor's office to help make Missouri best-in-class for tax policy.

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<sup>137</sup> The Committee notes that ESAs present an interesting approach to funding educational needs in the state and recommends that the General Assembly further develop the policy in the coming session.

<sup>138</sup> RSMo. § 144.011.2

## **APPENDIX**

### **RECOMMENDATIONS**

#### ***Tax Credits (General Reforms Applicable to All Tax Credits)***

1. **Recommendation:** Allow Denial of any Tax Credit Application that Fails to Meet a Public Purpose
2. **Recommendation:** Allow Denial of a Tax Credit Application if the Activity Would Occur Without State Incentives
3. **Recommendation:** For Economic Development Tax Credits, Allow Denial of Applications that Fail to Demonstrate a Positive Fiscal Return to the State
4. **Recommendation:** Allow DED to Deny Applications for Failure to Show Technical or Financial Ability to Perform
5. **Recommendation:** Annually Appropriation the Amount of Tax Credits for Each Program and Allow for Gubernatorial Withholding
6. **Recommendation:** Enact a General False Claims Act to Rein in Fraud, Waste, and Abuse

#### ***Tax Credit Stabilization FUND***

7. **Recommendation:** The General Assembly should create a Tax Credit Stabilization Fund (“TCSF”) to pre-pay for new tax credit authorizations.

#### ***Low Income Housing Tax Credits***

8. **Recommendation:** Convert the state LIHTC program to a low- or no-interest loan program (the “LIH Loan Program”) for affordable housing construction, as demonstrated in Figure 1.3 in the Report.
  - Switching to the LIH Loan Program would eliminate most of the inefficiencies of the current tax credit program, including third-party syndication fees. 100% of State LIH Loans would go toward housing construction, a vast improvement from the current LIHTC’s 42% efficacy.
  - MHDC has an AA+ bond rating and could effectively transition from issuing LIHTCs to LIH Loans.
  - MHDC’s enabling statute currently permits MHDC to form a nonprofit corporation to be called the Missouri Equity Fund Support Corporation (“MEFSC”) in order to syndicate credits. The existing statute could be amended to give MEFSC the authority to issue LIH Loans to developers and separately issue new certificated tax credits to investors via auction.
  - Proceeds from certificated tax credit sales could be allocated directly to LIH Loans. In the interim, sale proceeds could build interest in a trust fund, which could provide additional affordable housing support through LIH Loans.
    - Alternatively, proceeds from tax credit sales could be remitted to the State’s general revenue and the General Assembly could appropriate funds for the LIH Loan Program.
9. **Recommendation:** Repurchase outstanding LIHTCs through MHDC’s nonprofit entity and exchange them for bonds, saving the State 15-20% of its outstanding LIHTC liabilities in the process.
  - Under a certificated tax credit model, MHDC would issue certificates that investors could purchase to reduce their Missouri tax liability. Unlike the current state LIHTCs, certificated tax

credits could be transferred to persons outside of the ownership group, expanding the pool of potential investors.<sup>139</sup> This would increase the credits' marketability.

- MEFSC could be authorized to issue bonds necessary to pay current state LIHTC holders for their outstanding credits, which would be cancelled by the State (the "LIHTC Repurchase Program").
- According to Stifel, for every dollar of outstanding LIHTCs repurchased, the State would save approximately 15-20% of its associated liability.

10. **Recommendation:** Subject the LIH Loan Program to the overall Tax Credit Stabilization Fund authorization cap (discussed above) and subject the LIHTC Repurchase Program to appropriations.

- The TCSF would place a cap on the overall amount of LIH Loans issued in a given year, and the LIH Loan Program would be subject to appropriation for the General Assembly to adjust the program's budget allocation as needed.
- Affordable housing is important, but in a world of limited resources, the LIH Loan Program must be evaluated along with other critical budget needs, like schools and mental health funding.
- Under appropriations, the General Assembly could decide the amount of outstanding state LIHTCs to be repurchased each year, saving the State 15-20% for every dollar of credit repurchased.

11. **Recommendation:** Include a 5-year sunset provision for the LIH Loan Program and LIHTC Repurchase Program.

- A sunset provision would require the General Assembly to conduct an in-depth review of the LIH Loan Program and LIHTC Repurchase Program to determine whether the programs are achieving their intended purposes, and if not, how to address any shortcomings in future years.
- A sunset provision has been widely recommended in recent years,<sup>140</sup> and there is no reason why the LIH Loan Program or LIHTC Repurchase Program should be exempt from regular review.

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<sup>139</sup> See 2014 LIHTC AUDIT, *supra* note 49, at 14.

<sup>140</sup> See, e.g., 2014 LIHTC AUDIT, *supra* note 49, at 15; 2017 TAX CREDIT AUDIT, *supra* note 17, at 17-18.

## ***Historic Preservation Tax Credits***

12. **Recommendation:** Consolidate the HPTC and Brownfield remediation tax credit into one Redevelopment Tax Credit program (the “RTC”).

- HPTCs and Brownfield remediation tax credits are often stacked on individual redevelopment projects. Consolidating them into one program would make sure that taxpayers don’t pay twice for the same development.

13. **Recommendation:** Subject the RTC to the overall Tax Credit Stability Fund authorization cap (discussed in the Report above), not to exceed \$50 million per year.

- The current HPTC authorization cap is \$140 million per year, and there is no cap to the amount of Brownfield remediation tax credits authorized. Apart from the HPTC authorization cap, the State has no certainty as to how many credits will be authorized, issued, or redeemed in any given year. The Tax Credit Stability Fund would place a cap on the overall amount of tax credits authorized in a given year, and the RTC program would be subject to appropriations for the General Assembly to properly allocate resources based on the program’s viability to the State.
- The appropriations process would pre-fund tax credits and make it clear how much is allocated to each program. This would simplify reporting and make it easier for taxpayers to see how the State is investing their tax dollars. Additionally, this would increase predictability of State revenues allocated to specific tax credit programs and would help mitigate unforeseen budget shortfalls due to excessive tax credit redemptions in a given year.
- Capping total appropriations to \$50 million per year is justifiable given the HPTC program’s poor economic returns to the State. Additionally, this cap would give the State a degree of certainty regarding the HPTCs’ future impact on Missouri’s budget.

14. **Recommendation:** Institute a per-project cap of \$2 million to ensure equitable funding opportunities for RTC projects in large and small cities.

- Large projects in urban centers tend to use much higher amounts of HPTCs and Brownfield remediation tax credits than do modest-sized projects in rural areas of the State. A per-project cap would ensure that a handful of large RTC projects don’t deplete the Tax Credit Stability Fund at the expense of projects that require only a fraction of the credits.

15. **Recommendation:** Institute a per-square footage value cap to prevent RTCs from subsidizing unnecessary expenses.

- Unnecessary expenditures that raise the value per square footage (e.g. marble counters, premium flooring) provide additional benefit to developers, but not to the public.

16. **Recommendation:** Include a 5-year sunset provision for the RTC program.

- A sunset provision would require the General Assembly to conduct an in-depth review of the RTC program and determine whether the program is achieving its intended purpose, and if not, how to address any shortcomings going in future years. A sunset provision has been widely

recommended in recent years, and there is no reason why the RTC program should be exempt from regular review.

17. **Recommendation:** Exclude private residences from RTC eligibility.

- Private residences do not provide a public benefit and should not receive public funding.

18. **Recommendation:** Eliminate the HPTC carry-back period and shorten the HPTC carry-forward period to 3 years.

- These steps would make the credits' revenue impact on the State more predictable and stable, which would help mitigate unforeseen budget shortfalls due to excessive tax credit redemption.

### ***Missouri Works Program***

19. **Recommendation:** Subject Missouri Works' withholding tax retention benefit to DED's discretionary approval, pursuant to the same guidelines applicable to the Missouri Works tax credits.

- Currently, businesses can qualify for withholding tax retention regardless of whether such benefit affects their decision to locate to Missouri. As long as a Missouri Works applicant meets its job creation, wage, and health insurance goals, it is entitled to the benefit.
- Shifting the withholding tax retention benefit to a discretionary award would allow DED to properly allocate the benefit to companies who would not locate to or expand in Missouri without it.

20. **Recommendation:** Update the Missouri Works Training Program to allow job training programs for new jobs, retained jobs, or any combination thereof.

- According to DED, it is administratively difficult to distinguish between training programs for new jobs and retained jobs, particularly as retained jobs evolve due to automation and technological advancement. A minor statutory amendment would make it simpler for DED to allocate the Missouri Works Job Development Fund to worthy training programs.



THIS REPORT WAS TRULY AGREED UPON BY ALL COMMITTEE MEMBERS ON JUNE 30, 2017.

Daniel J. Hegeman





Joel Walters

Andrew Kaening

Will Kraus

Will Schopf



Jay Ban

John Yarns