PT 19-01
TAX TYPE: PROPERTY TAX
TAX ISSUE: EXEMPTION FROM TAX (CHARITABLE OR OTHER EXEMPT TYPES)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

IN RE: APPLICATION FOR NON-HOMESTEAD PROPERTY TAX EXEMPTION OF THE HOUSING AUTHORITY OF CchampaIGN COUNTY	Docket # 17-PT-005 Tax Year 2016 Dept. Docket # 16-10-52

RECOMMENDATION FOR DISPOSITION

Appearances: Robin Gill, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Eric P. Hanson and Jean A. Kenol of Mahoney, Silverman & Cross, LLC for the Housing Authority of Champaign County; Frederic M. Grosser, Attorney at Law, for the Township of Cunningham

Synopsis:

The Housing Authority of Champaign County ("applicant") filed an application for a property tax exemption for the year 2016 for a parcel of property located in Champaign County. The applicant seeks an exemption pursuant to section 15-95 of the Property Tax Code ("Code") (35 ILCS 200/1-1 *et seq.*) which concerns property owned by housing authorities. The Champaign County Board of Review recommended that the exemption be denied because the applicant leases the property to a for-profit entity. The

Department disagreed with the Board's determination and found that the request for an exemption should be granted. The Township of Cunningham ("intervenor") timely protested the Department's decision. An evidentiary hearing was held during which the parties presented stipulated facts, testimony from a witness, and exhibits. All parties filed briefs in support of their positions. After reviewing the record, it is recommended that this matter be resolved in favor of the applicant and the Department.

FINDINGS OF FACT:

1. The Town of Cunningham, also known as Cunningham Township, is a taxing district and a unit of local government within Champaign County, Illinois. (Stip. #1)
2. The subject land is wholly within the boundaries of the Town of Cunningham. (Stip. #2)
3. The Housing Authority of Champaign County, applicant, is a municipal corporation of Illinois. (Stip. #3)
4. A PTAX-300 form was filed in the name of the applicant and sought exemption for the land and improvements under the Property Tax Code, 35 ILCS 200/15-95. (Stip. #4)
5. The applicant is the record title holder of the subject land. (Stip. #5)
6. The applicant entered into a ground lease of the subject land with an Illinois limited partnership named TBG Hamilton on the Park, LP (hereinafter the LP). (Ground Lease, section 1.1) (Stip. #6)
7. The LP is a for-profit entity. (Stip. #7)

8. The LP is the owner of the improvements on the subject property. (Ground Lease, section 5.2) (Stip. #8)
9. TBG Hamilton on the Park, GP, LLC (hereinafter LLC) is the general partner of the LP. (Certificate of Limited Partnership of TBG Hamilton on the Park, LP) (Stip. #9)
10. Oak Grove Development Corporation is a member of the LLC. (Operating Agreement for the TBG Hamilton on the Park GP, LLC) (Stip. #10)
11. Oak Grove Development Corporation is a wholly owned subsidiary corporation of the applicant. (Articles of Incorporation of Oak Grove Development Corporation) (Stip. #11)
12. Oak Grove Development Corporation assigned 100% of its interest in TBG Hamilton on the Park GP, LLC to the entity Oak Grove I, LLC, whose Manager is Oak Grove Development Corporation. (Articles of Organization of Oak Grove I, LLC) (Stip. #12)
13. The lease to the LP is a 99-year ground lease. (Section 1.3) (Stip. #13)
14. The LP made a one-time lease payment to the applicant in the amount of $240,000 made within five days after the closing of the transaction. (Ground Lease, section 1.4, 4.1) (Stip. #14)
15. Under the terms of the lease, the LP is responsible for the payment of any real estate taxes that shall or may be during the time of the lease charged or levied on the subject property. (Ground Lease, section 4.2) (Stip. #15)

16. Under the terms of the lease, all expenses for the operation of the improvements on the subject land are the obligation of the LP. (Ground Lease, section 4.6) (Stip. #16)
17. The LP constructed town houses on the subject land comprising 36 units of low income residential housing. (Ground Lease, sections 1.8, 5.1) (Stip. #17)
18. The LP has legal and beneficial title to the buildings and all other improvements on the subject land. (Ground Lease, section 5.2) (Stip. #18)
19. Under the terms of the lease, the LP receives the Low Income Housing Tax Credits and all tax benefits and deductions on the improvements. (Ground Lease, section 5.2) (Stip. #19)
20. Under the terms of the lease, the lease is to be recorded against title of the applicant. (Ground Lease, section 25.17) (Stip. #20)
21. The property is operated by the LP under the name Hamilton on the Park. The name of the property is Hamilton on the Park, and its physical address is 1205 Brookstone Court, Urbana, Illinois. (Stip. #21)
22. Under the terms of the lease, the Development Plans for the project must be "satisfactory" to the applicant and "approved" by the applicant, and the applicant "shall not unreasonably withhold, condition or delay its approval of any revisions" to the Development Plans. (Ground Lease, sections 1.6, 3.2)
23. Under the terms of the lease, upon the expiration or earlier termination of the lease, all of the LP's right, title and interest in the premises and improvements shall automatically vest in the applicant, and the LP shall surrender the premises. (Ground Lease, section 5.2)

24. Under the terms of the lease, the LP shall use the premises only for low income housing and shall not use the premises for any other purpose "without the prior written consent" of the applicant. (Ground Lease, section 6.1)
25. Under the terms of the lease, the LP is responsible for repairs or maintenance for the premises. (Ground Lease, sections 8.1, 8.2)
26. Under the terms of the lease, the LP shall not make alterations to the premises that exceed $XXXXX "without the prior written approval" of the applicant, and "such approval shall not be unreasonably withheld, conditioned or delayed." The applicant may impose conditions to the consent that the applicant, in its sole discretion, deems necessary. (Ground Lease, section 9.1)
27. Under the terms of the lease, the LP shall not permit any construction liens to be filed against the premises. (Ground Lease, section 9.3)
28. Under the terms of the lease, the LP is required to purchase property, liability, and workers' compensation insurance and include the applicant as an additional insured. The LP is required to indemnify to applicant. (Ground Lease, sections 10.1 through 10.5)
29. Under the terms of the lease, subject to use restrictions required by HUD, the LP shall not assign its interest in the lease "without the prior written consent of [the applicant], which shall not be unreasonably withheld, conditioned, or delayed." (Ground Lease, section 14.1)
30. Under the terms of the lease, the applicant shall not transfer all or any portion of its interest in the premises without the prior written consent of HUD, if required,

the LP and any mortgagee of record of the premises then in existence. (Ground Lease, section 17.2)

31. The construction of the low-income housing on the property qualified for Low-Income Housing Tax Credits, which essentially work as follows. The federal government allocates credits to each state based on population. Each state has a Qualified Allocation Plan, which guides the allocation of the low-income housing tax credits to specific projects. Anyone who wants to develop low-income housing (*e.g.*, a developer, a housing authority, or a nonprofit) must apply to the state under the criteria in the Qualified Allocation Plan. Once the entity has been allocated the credits, they must find an equity provider (*i.e.*, an investor) who wants to purchase the credits in order to raise the cash equity to build the low-income housing. (Tr. pp. 19-20)
32. As a result of selling the tax credits, the projects are required to have a long-term restriction on the amount of rent that can be charged, and the income level of the people who can live there is limited to no more than 60% of the area median income. (Tr. pp. 20-21)

CONCLUSIONS OF LAW:

It is well-established under Illinois law that taxation is the rule, and tax exemption is the exception. Eden Retirement Center, Inc. v. Department of Revenue, 213 Ill. 2d 273, 285 (2004). "[A]ll property is subject to taxation, unless exempt by statute, in conformity with the constitutional provisions relating thereto." *Id*. Statutes granting tax exemptions must be strictly construed in favor of taxation. *Id*. at 288; Chicago Patrolmen's Association v. Department of Revenue, 171 Ill. 2d 263, 271 (1996); People

ex rel. County Collector v. Hopedale Medical Foundation, 46 Ill. 2d 450, 462 (1970). All facts are to be construed and all debatable questions resolved in favor of taxation. Eden Retirement Center, Inc., at 289. Every presumption is against the intention of the State to exempt the property from taxation. Oasis, Midwest Center for Human Potential v. Rosewell, 55 Ill. App. 3d 851, 856 (1st Dist. 1977). Whenever doubt arises, it must be resolved in favor of requiring the tax to be paid. Quad Cities Open, Inc. v. City of Silvis, 208 Ill. 2d 498, 508 (2004).

The burden of proof is on the party who seeks to qualify its property for an exemption. Eden Retirement Center, Inc., *supra*; Chicago Patrolmen's Association, *supra*. "The burden is a very heavy one." Provena Covenant Medical Center v. Department of Revenue, 236 Ill. 2d 368, 388 (2010); see also Oasis, Midwest Center for Human Potential, *supra*. The party claiming the exemption bears the burden of proving by clear and convincing evidence that the property in question falls within both the constitutional authorization and the terms of the statute under which the exemption is claimed. Eden Retirement Center, Inc., *supra*; Board of Certified Safety Professionals of the Americas, Inc. v. Johnson, 112 Ill. 2d 542, 547 (1986) (citing Coyne Electrical School v. Paschen, 12 Ill. 2d 387, 390 (1957)).

Authority to grant property tax exemptions emanates from article IX, section 6 of the Illinois Constitution of 1970. Section 6 authorizes the General Assembly to exempt certain property from taxes and provides, in part, as follows:

> The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes. Ill. Const. 1970, art. IX, §6.

The constitution does not require the legislature to exempt property from taxation; an exemption exists only when the legislature chooses to create one by enacting a law. Eden Retirement Center, Inc., at 290. "The legislature cannot add to or broaden the exemptions that section 6 of article IX specifies." *Id*. at 286. By enacting an exemption statute, the legislature may place restrictions, limitations, and conditions on an exemption, but the legislature cannot make the exemption broader than the provisions of the constitution. *Id*. at 291.

Pursuant to this constitutional authority, the General Assembly enacted section 15-95 of the Property Tax Code (35 ILCS 200/1-1 *et seq.*), which allows exemptions for property owned by housing authorities and provides as follows:

> (a) All property of housing authorities created under the Housing Authorities Act is exempt, if the property and improvements are used for low rent housing and related uses. However, property or portions thereof intended or used for stores or other commercial purposes are not exempt. Nothing herein shall exempt property of housing authorities or any part thereof from special assessments or special taxation for local improvements. Nothing contained in this Section shall be construed as limiting the power of any political subdivision of this State to sell or furnish a housing authority with water, electricity, gas, or other services and facilities under the same basis that those services and facilities are rendered to others under similar circumstances.
>
> (b) Property otherwise qualifying for an exemption under this Section shall not lose its exemption because the legal title is held by either: (i) an entity that is organized as a partnership or limited liability company, in which the housing authority, or an affiliate or subsidiary of the housing authority, is a general partner of the partnership or managing member of the limited liability company; or (ii) an entity that is organized as a partnership or limited liability company, in which the housing authority, or an affiliate or subsidiary of the housing authority, is a general partner of the partnership or managing member of the limited liability company, for the purposes of owning and operating a residential rental property that has received an allocation of Low Income Housing Tax Credits for 100% of the

> dwelling units under Section 42 of the Internal Revenue Code of 1986, as amended. 35 ILCS 200/15-95.

The applicant argues, and the Department agrees, that the property qualifies for an exemption under both subsections (a) and (b) of section 15-95. The applicant contends that it is undisputed that it is a housing authority that is the fee title owner of the property, and the property and its improvements are used for low rent housing. In addition, the improvements were funded through an allocation of Low Income Housing Tax Credits.

The applicant claims that the ground lease did not divest the applicant of ownership of the property because the applicant retains significant control over the property. Although the LP maintains the property, the LP does not have the ability to fully alienate the property. According to the applicant, the ground lease requires the LP to secure approval and permission from the applicant for several things including the following: (1) the development plan; (2) the construction of the improvements; (3) the permitted use of the property; (4) any alterations to the property; and (5) any assignment of its leasehold right. The applicant points out that the ground lease prohibits the LP from allowing liens to be filed against the property and requires the LP to indemnify the applicant and provide insurance coverage for the applicant. Furthermore, at the conclusion or early termination of the ground lease, all rights, title and interest in and to the property and improvements vests to the applicant, and the tenant does not have the right to purchase the property. The applicant, therefore, contends that the incidents of ownership remain with the applicant.

The intervenor first argues that the property does not qualify for the exemption because although the applicant has record title to the land, the LP has legal and beneficial title to the buildings and all other improvements. The intervenor states that section 15-

95(a) might provide a tax exemption if the applicant were the owner of the buildings, but the applicant has no ownership interest in the buildings. The intervenor contends that because the applicant does not own the buildings, it does not qualify for the exemption for that part of the property under section 15-95(a).

The intervenor states that the LP gets the tax credits, which can be sold, and under the lease, the LP is responsible for paying the property taxes. The intervenor, therefore, claims that although the applicant is seeking the exemption, the applicant will not benefit from the exemption. The entity that will benefit from the exemption is the for-profit LP.

The intervenor also argues that the property does not qualify for the exemption because the applicant no longer owns the property; the intervenor believes that the applicant sold the property to the LP, which would not qualify for an exemption because it is not a housing authority or charity. The intervenor believes that the lease has all the characteristics of a sale and none of the features of a lease because the applicant does not have control over the property. After the initial payment, the applicant does not receive income from the lease, and the LP gets the tax credits and the benefit of any property tax exemption. The intervenor contends that according to the terms of the lease, the LP is in control of everything. Sections 3.2 and 14.1 indicate that the applicant shall not unreasonably withhold its approval of the Development Plan and the LP's right to assign or transfer the lease. The intervenor indicates that the language that states that "consent shall not be unreasonably withheld" is repeated throughout the lease. The intervenor argues that this language indicates that the applicant cannot act arbitrarily and must act in good faith. See Chanslor-Western Oil and Development Co. v. Metropolitan Sanitary District of Greater Chicago, 131 Ill. App. 2d 527 (1st Dist. 1970). The intervenor believes

that this language in the lease actually demonstrates that the applicant has relinquished control of the property to the LP. In addition, if it is a lease and not a sale, at the end of 99 years the applicant will get back land with buildings almost 100 years old, and the cost of demolition will likely exceed the value of the land. The intervenor, therefore, believes that the applicant sold the property.

The intervenor also argues that with regard to section 15-95(b), the applicant's actual interest in the LP is remote and tenuous at best. The general partner of the LP is TBG Hamilton on the Park GP, LLC ("GP"), which has a .01% interest in the LP. The applicant has 100% ownership of Oak Grove Development Corporation, which is a not-for-profit entity. Oak Grove Development Corporation was designated a 30% member of the GP, and Oak Grove Development Corporation assigned 100% of its interest in the GP to Oak Grove I, LLC, which is a for-profit entity. In other words, the applicant owns a corporation (Oak Grove Development) that owns a for-profit LLC (Oak Grove I) that is a 30% partner in another for-profit entity (the GP) that is the general partner in another for-profit entity (the LP) that leases the land.

In addition, the intervenor contends that the lease implicates section 9-195 of the Code, which provides, in relevant part, as follows:

> Except as provided in Sections 15-35, 15-55, 15-60, 15-100, 15-103, and 15-185, when property which is exempt from taxation is leased to another whose property is not exempt, and the leasing of which does not make the property taxable, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his or her assignee. Taxes on that property shall be collected in the same manner as on property that is not exempt, and the lessee shall be liable for those taxes. However, no tax lien shall attach to the exempt real estate. . . . 35 ILCS 200/9-195(a).

The intervenor claims that under this section, the assessor is authorized to tax a lessee's leasehold interest in tax-exempt property in certain circumstances.

The last argument raised by the applicant is that section 15-95(b) is facially unconstitutional. As previously stated, section 6 of article IX of the Illinois Constitution authorizes the General Assembly to exempt the following property from taxes:

> … property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes. Ill. Const. 1970, art. IX, §6.

The intervenor contends that the legislature does not have the authority to create an exemption for partnerships or limited liability companies just because they are owned by or partnered with an otherwise exempt entity. The intervenor believes that the exemption in section 15-95(b) is not created for an entity that is specified in the constitution; instead, it is created for a separate, non-government entity. The intervenor, therefore, believes that section 15-95(b) is facially unconstitutional.

In response, the applicant argues that the statute simply requires that the land be owned by a housing authority and the improvements be used for low income housing, which are the facts in this case. The applicant believes that there was no sale of the property, and the ground lease is a mechanism upon which to develop and manage the low-income housing. The applicant also contends that it is entitled to the exemption under section 15-95(b) because an affiliate of the applicant is the general partner of the LP.

When determining ownership of property for exemption purposes, legal title alone is not the decisive factor. City of Chicago v. Department of Revenue, 147 Ill. 2d 484, 504-505 (1992). The concern is with the realities of ownership rather than legal title, although legal title is one factor to consider. *Id.*; Chicago Patrolmen's Association v. Department of Revenue, 171 Ill. 2d 263, 273 (1996). The single most significant incident

of ownership is the right to choose when and if the property may be transferred. Henderson County Retirement Center, Inc. v. Department of Revenue, 237 Ill. App. 3d 522, 527 (3rd Dist. 1992). "The primary incidents of ownership include the right to possession, use and enjoyment of the property, the right to change or improve the property, and the right to alienate the property at will." Wheaton College v. Department of Revenue, 155 Ill. App. 3d 945, 946 (2nd Dist. 1987). The right to sublease the property is considered an incident of ownership. *Id*. at 947. Contractual responsibility for real estate taxes is also an incident of ownership, as well as "a substantial monetary interest in the property." Christian Action Ministry v. Department of Local Government Affairs, 74 Ill. 2d 51, 61-62 (1978).

Under the facts of this case, the incidents of ownership indicate that the applicant remains the owner of the real property. Although the lease gives the LP some incidents of ownership, such as possession and the contractual responsibility for real estate taxes, the applicant continues to hold the legal title, and upon the expiration or termination of the lease, all of the LP's right, title and interest in the premises and improvements shall vest in the applicant. At that time, the LP shall surrender the premises. The applicant, therefore, will not only reacquire full possession of the land, it will acquire legal title to the improvements. The applicant is not obligated to sell the property to the LP. The LP does not have power to force the sale of the property, and it does not have the right to purchase the property.

The applicant's written consent is required before the LP is allowed to do several things under the lease including assigning the LP's interest in the lease. Written consent is required to use the property for a purpose other than low-income housing, and prior

written approval is necessary for the LP to make alterations to the premises that exceed $XXXXX. Although some of the provisions state that the consent "shall not be unreasonably withheld, conditioned, or delayed," this language does not change the fact that consent is still required, and it does not demonstrate that the applicant has relinquished control of the property. The incidents of ownership indicate that the applicant remains the owner of the property.

The intervenor's argument that section 15-95(a) might provide a tax exemption if the applicant were the owner of the buildings disregards section 15-95(b), which provides as follows:

> (b) Property otherwise qualifying for an exemption under this Section shall not lose its exemption because the legal title is held by either: (i) an entity that is organized as a partnership or limited liability company, in which the housing authority, or an affiliate or subsidiary of the housing authority, is a general partner of the partnership or managing member of the limited liability company; or (ii) an entity that is organized as a partnership or limited liability company, in which the housing authority, or an affiliate or subsidiary of the housing authority, is a general partner of the partnership or managing member of the limited liability company, for the purposes of owning and operating a residential rental property that has received an allocation of Low Income Housing Tax Credits for 100% of the dwelling units under Section 42 of the Internal Revenue Code of 1986, as amended. 35 ILCS 200/15-95(b).

The LP is a limited partnership that is the owner of the improvements on the property, and its general partner is a subsidiary of the applicant. The LP was organized for the purposes of owning and operating low-income housing that received Low Income Housing Tax Credits. Although the intervenor claims that the applicant's actual interest in the LP is remote and tenuous at best, the applicant's interest in the LP still meets the requirements of section 15-95(b). Under this section, the property qualifies for an exemption.

With respect to the intervenor's argument that section 15-95(b) is facially unconstitutional, this issue has been properly raised, but this tribunal lacks the authority to declare that section invalid. An administrative agency has no inherent or common law powers; any authority that the agency claims must find its source within the provisions of the statute by which it was created. Department of Revenue v. Illinois Civil Service Commission, 357 Ill. App. 3d 352, 363 (1st Dist. 2005); Parliament Insurance Company v. Department of Revenue, 50 Ill. App. 3d 341, 347 (1st Dist. 1977). An administrative agency lacks the authority to declare a statute unconstitutional or even to question its validity. Home Interiors and Gifts, Inc. v. Department of Revenue, 318 Ill. App. 3d 205, 210 (1st Dist. 2000) *citing* Texaco-Cities Service Pipeline Co. v. McGaw, 182 Ill. 2d 262, 278 (1998); see also Arvia v. Madigan, 209 Ill. 2d 520, 526 (2004). The constitutional issue, however, should be raised at the administrative level in order to preserve the issue for appeal. Texaco-Cities, at 278-279.

Section 15-95(b) is presumed to be valid, and the property is exempt pursuant to this section. This tribunal does not have authority to rule upon the intervenor's constitutional issue. Nevertheless, because the issue has been raised, it is preserved in the event the intervenor would like to raise it on administrative review.

Finally, the intervenor has also referred to section 9-195 of the Code and states that under this section, the assessor is authorized to tax a lessee's leasehold interest in tax-exempt property under certain circumstances. This section allows exactly that, but the assessor has not created a leasehold assessment in this case. Whether or not the assessor should grant a leasehold assessment is not an issue in this case. This current proceeding was filed pursuant to section 8-35(b) of the Code, which concerns a review of

the Department's decision to grant an exemption. The issue in this case is whether the property qualifies for an exemption under section 15-95, and the evidence supports a finding that it does.

Recommendation:

For the foregoing reasons, it is recommended that the property is entitled to an exemption for the year 2016.

Linda Olivero
Administrative Law Judge

Enter: January 2, 2019