



614 Grand Avenue, Suite 320
Oakland, California 94610
Telephone: 510-251-9400
Fax: 510-451-2300
nhlp@nhlp.org

MEMORANDUM

TO: Barbara Thompson, Executive Director, National Council of State Housing Agencies

FROM: James R. Grow, National Housing Law Project, and Mark Schwartz, Regional Housing Legal Services, on behalf of the Housing Justice Network

RE: Implementation of IRS Revenue Ruling 2004-82 (July 30, 2004)

DATE: September 23, 2004

Pursuant to our phone conversation, this memo summarizes our recommendations to NCSHA members concerning implementation of Revenue Ruling 2004-82 (July 30, 2004). Our goals in doing so are to achieve full and expeditious compliance with both the Ruling and the LIHTC statute, and to provide the tenant protection intended by Congress, while minimizing the administrative burdens placed upon state agencies to make determinations and secure compliance. Because members of the Housing Justice Network represent many low-income LIHTC tenants nationwide, we also believe that taking these steps will also reduce the exposure of state agencies and owners to litigation seeking enforcement of the LIHTC statute.

Background and Context. The Revenue Ruling adopts the position that numerous state agencies and several state appellate courts have already determined -- that the LIHTC statute itself requires that every LIHTC property have a recorded "extended low-income housing commitment" ("ELIHC") which, among other things, prohibits evictions or terminations of tenancy other than for good cause. This obligation exists throughout the extended use period, which begins when the building first becomes part of an LIHTC-qualified property. This is not a new obligation -- the statute has contained this language since 1990, and the IRS has now confirmed the interpretation that others have already reached.

To implement this legal requirement, the Ruling mandates each state credit allocator to review, by December 31, 2004, all existing ELIHCs in its jurisdiction to determine whether they contain an explicit "no cause eviction protection." If any ELIHC lacks such a provision, the state agency must make a determination that the ELIHC is invalid and the property is not in compliance, and presumably then notify the owner. Under the Ruling, absent a prompt cure, a noncompliance determination jeopardizes the owners' ability to claim the credit, which could affect prior, current and future tax years.

We understand that the method used by state agencies to implement the statute's ELIHC requirements may vary. Some states may use just a single document, such as Regulatory or Use Agreement, which is also recorded as a restrictive covenant. Others may use two documents, seeking to reconcile

Washington Office

Section 42's dual requirements that the ELIHC be both an agreement between the owner and the state agency and be recorded as a restrictive covenant, with state law requirements for such covenants. These jurisdictions may require an unrecorded Use Agreement between the owner and state agency, which in turn incorporates by reference a separate Declaration of Restrictive Covenants. The language contained in our recommendation for either case is practically identical, but we have set it out separately. However, those agencies using single documents may have to go through additional steps to obtain both owner and state agency signatures on these amendments. In contrast, those agencies that have executed a separate bilateral Regulatory or Use Agreement may be able to simply require the owner to execute and record the form Amended Restrictive Covenant, because the Agreement typically requires the owner to take any steps determined necessary by the state agency to comply with Section 42 and all IRS administrative requirements.

Recommendation. We believe that each state agency can comply with its obligations under the Ruling and reduce its burden of determining actual compliance for each project by taking the following steps. First, the agency should review the various form ELIHCs used over the life of its LIHTC program. This will determine subsets of properties in probable noncompliance. Second, where any form ELIHCs lack the required language concerning good cause, each state agency should send a letter (suggested letter text in Attachment A) requiring each affected LIHTC owner to:

- record a form Amendment to the already recorded ELIHC (or whatever it is called in the jurisdiction), unless it can demonstrate to the agency that its existing ELIHC already contains similar language.
- annually certify compliance with all requirements of the LIHTC statute and regulations, including the good cause eviction requirement and rent restrictions. This could be done by amending the state's existing certification form (per Attachment C).
- revise tenant leases to state the good cause requirement for terminations of tenancy.

The amendment to the ELIHC should specifically set forth the duties required by the LIHTC statute, including the prohibition on eviction without good cause. (Suggested language is on Attachment B-1 or B-2).

The tenant Lease Addendum should be based upon that required for the HOME program, since that is familiar to state agencies (suggested language is on Attachment D). While the Lease Addendum is not explicitly required by the Ruling, amending the leases to state the requirement is the best way to effectuate Congress' intent in establishing the good cause requirement, and avoid unnecessary litigation between tenants, owners and state agencies seeking third-party enforcement of the ELIHC as permitted by the LIHTC statute, or concerning the scope of the requirement.

We believe that this recommendation would fulfill the agencies' duties to determine compliance and ensure that the tenants' rights are protected, as intended by both Congress and the Ruling, while reducing an agency's burden of reviewing each property file. Owners that follow the letter's directive by a date certain, e.g., November 15, 2004, will be in compliance. Of course, where an agency is unable to determine whether it has required specific form ELIHCs for particular years, or to determine which properties have used which forms, it may be difficult to accurately determine subsets of noncomplying properties. In that case, the agency's burden of making determinations could nevertheless be simplified by sending the recommended letter to all owners, requesting that they demonstrate compliance in order to avoid the revisions required by the proffered forms. Again, owners that follow the letter's directive could then bring themselves into

compliance. Note that the fact that the property also has HOME funds or other funds which have separately required good cause for eviction may not completely resolve the need to secure the ELIHC Amendment, as the good cause eviction requirements may not be separately and specifically specified in the ELIHC.

Similar language can be used for addressing future compliance issues for properties currently in an agency's approval pipeline.

We look forward to discussing these recommendations further with you or your staff, or NCSHA members. Please contact Mark Schwartz (<schwartz@rhls.org>, or (215) 572-7300 x17) or Jim Grow (jgrow@nhlp.org>, or (510) 251-9400 x104) to arrange a meeting at your convenience. Thank you for considering this recommendation.

cc: Garth Reiman, NCSHA

Attachment A
Sample Letter from State Agency to Owners

Dear [LIHTC Owner]:

On July 30, 2004, the Internal Revenue Service issued Revenue Ruling 2004-82. Based on the language of the statute governing the Low-Income Housing Tax Credit program (I.R.C. Section 42), this Ruling requires that each extended low-income housing commitment clearly prohibit, during the entire “extended use period,” any eviction or termination of tenancy without good cause, and any gross rent increase not permitted by Section 42. *See* Rev. Rul. 2004-82, Question 5 and Answer 5. Owners of properties determined by this agency to be not in compliance by December 31, 2004, will not be able to claim the tax credit for this year 2004 unless this agency determines that they are in compliance within one year from our initial determination of noncompliance.

To expeditiously implement the requirements of the statute and this Ruling, we are requiring certain amendments to project documents, including form language attached to this letter. We also include other recommendations intended to make full compliance easier.

[Use following text for agencies using both an agreement and a recorded Covenant to comply with Section 42's ELIHC requirement] Accordingly, this letter is to notify you to execute and record an Amendment to the Declaration of Land Use Restrictive Covenants, using language in Attachment B-1. You must send to the [state agency] a copy of such recorded Amendment by November 15, 2004. Failure to comply with this notice may result in a determination that the [Extended Low-Income Housing Commitment, or other title used] for your property is not valid. *[Note: The November 15 deadline gives the state agency some time to undertake remedial steps with non-compliant owners before the December 31 deadline, where a noncompliance determination triggers the one-year cure period or possible jeopardy to the credits.]*

[Use following text for agencies using one recorded bilateral agreement to comply with Section 42's ELIHC requirement] Accordingly, this letter is to notify you to execute the attached Amendment to the [title of ELIHC document] [here, “Attachment B-2”]. You must send to the [state agency] an original executed by you by November 15, 2004, for execution by the agency and recordation. Failure to comply with this notice may result in a determination that the [Extended Low-Income Housing Commitment, or other title used] for your property is not valid. *[Note: The November 15 deadline gives the state agency some time to complete execution and recording procedures, or to undertake other remedial steps with non-compliant owners before the December 31 deadline, where a noncompliance determination triggers the one-year cure period or possible jeopardy to the credits.]*

We have also amended the annual certification form which you file with this agency to reflect compliance with this Ruling. The revised Certification Form is attached as [Attachment C].

In order to ensure that tenants receive the eviction protection that Congress intended, we are also requiring that tenant leases be amended to reflect this requirement. In this way, owners, managers, tenants and local eviction courts will have before them a contract which clearly establishes the requirement, thus minimizing confusion about whether the requirement exists. The language to be used as a form addendum to tenant leases is attached as [“Attachment D”].

Thank you for your anticipated cooperation. Please call [*insert name of responsible agency staff*] if you have any questions concerning the foregoing.

Washington Office

1012 Fourteenth Street, NW, Suite 610 • Washington, DC 20005 • Telephone: 202-347-8775 • Fax: 202-347-8776 • nhlp@nhlp.org • www.nhlp.org

[Signature block for appropriate state agency official]

Washington Office

1012 Fourteenth Street, NW, Suite 610 • Washington, DC 20005 • Telephone: 202-347-8775 • Fax: 202-347-8776 • nhlp@nhlp.org • www.nhlp.org

Attachment B-1
Amendment to Recorded Restrictive Covenant

[*Note*: intended for state agencies using a bilateral agreement incorporating by reference a unilateral Restrictive Covenant]

“Owner covenants that, during the term of the Extended Use Period established by IRC § 42, Owner will not terminate the tenancy of or evict any Tenant of a low-income unit without good cause to do so, or increase the gross rent with respect to a low-income unit in violation of section 42. Owner further covenants to include in the lease of each Tenant of a low-income unit a provision prohibiting eviction or termination of tenancy without good cause to do so.”

Attachment B-2
Amendment to Use or Regulatory Agreement

[*Note*: intended for agencies using a single recorded bilateral Agreement, without a separate Restrictive Covenant]

“Owner agrees that, during the term of the Extended Use Period established by IRC § 42, Owner will not terminate the tenancy of or evict any Tenant of a low-income unit without good cause to do so, or increase the gross rent with respect to a low-income unit in violation of section 42. Owner further agrees to include in the lease of each Tenant of a low-income unit a provision prohibiting eviction or termination of tenancy without good cause to do so.”

Attachment C
Revised State Agency Annual Certification Form

[Add the following sample language to State Agency's existing Annual Certification Form:]

"I certify that I have included in each tenant's lease a provision prohibiting the termination of tenancy or eviction of the tenant of a Low-Income Housing unit without good cause."

[*Note:* Presumably the amended Certification would be used for Calendar Year 2005, in order to permit some owners sufficient time to change each tenant's lease.]

Attachment D
Required Lease Addendum

The following supercedes any language in the Lease dated *[insert date of most recent Lease]* between Owner and Tenant purporting to permit terminations of tenancy without cause:

‘The owner may not terminate the tenancy or refuse to renew the lease of a tenant of a Low-Income Housing unit except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause. To terminate or refuse to renew tenancy, the owner must serve written notice upon the tenant specifying the grounds for the action at least *[insert whatever period is required by state law for terminations for breach of lease]* days before the termination of tenancy.’

[*Note: this language is taken from the federal regulations for the HOME program, 24 C.F.R. § 92.253 (2004).*]

Owner: _____

Date: _____

Tenant: _____

Date: _____