

IRS Finally Clarifies Good Cause Eviction Protection for Tax Credit Tenants

More than a decade following Congress' passage of amendments to improve tenant protections, the Internal Revenue Service (IRS) has finally issued a formal Revenue Ruling requiring all owners of Low-Income Housing Tax Credit (LIHTC) properties to place good cause eviction requirements in the property's recorded restrictions. IRS Rev. Rul. 2004-82, Q&A 5 (2004). The IRS thus joins a handful of state appellate courts that have held that the tax credit statute¹ requires good cause for all terminations of tenancy.² As it does with almost all other federal housing programs with the exception of vouchers, the good cause eviction requirement applies to all terminations of tenancy in the LIHTC program, whether during the term of the lease or at the end of the term.³ Because the ruling requires state agency tax credit allocators to review their LIHTC inventory to determine the extent of noncompliance and require certain curative actions in order for owners to continue to claim the credits, advocates should become informed about their state's activities and simultaneously take action to protect tenants' rights during this process.⁴

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.⁵ This obligation exists throughout and for three years beyond the "extended use period," which begins when the building

first becomes part of a tax-credit-qualified property, and ends on the later of the date specified by the state agency in the ELIHC (which varies from state to state), or thirty years.⁶ The statute has contained this clarifying language since 1990.⁷

This means that, aside from its impact on the owner's ability to legally claim the tax credit, advocates and tenants can use the statute and the IRS interpretation immediately to defend evictions without cause. In addition, advocates can use the statute to immediately seek negotiations or judicial relief requiring the good cause protection to be expressed in the tenant's lease. The LIHTC statute itself not only requires the language to be included in the project's ELIHC, but also provides the tenant an express right to enforce the prohibition on no-cause evictions.⁸

This means that, aside from its impact on the owner's ability to legally claim the tax credit, advocates and tenants can use the statute and the IRS interpretation immediately to defend evictions without cause.

Under the ruling, by December 31, 2004, each state credit allocator must review all existing ELIHCs in its jurisdiction to determine whether they contain an explicit "no cause eviction protection."⁹ 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 to include such good cause language in the project's ELIHC, a noncompliance determination jeopardizes the owner's ability to claim the credit, which could affect prior, current and future tax years.¹⁰ Hopefully this substantial financial risk

¹26 U.S.C.A. § 42 (West 2002).

²*Cimarron Village Townhomes, Ltd. v. Washington*, No. C5-98-15671, 1999 Minn. App. LEXIS 890, 1999 WL 538110 (July 27, 1999) (LIHTC tenants may be evicted only for good cause), *on appeal after remand*, 659 N.W.2d 811 (Minn. App. 2003) (upholding finding that good cause existed); *Bowling Green Manor Ltd. Partnership v. Kirk*, No. 94CVG01059, 1995 Ohio App. LEXIS 2707, 1995 WL 386476 (Ohio App. June 30, 1995) (finding sufficient state action to require good cause for termination of LIHTC and Section 8 tenancy); *Bowling Green Manor Ltd. Partnership v. LaChance*, 1995 Ohio App. LEXIS 2767, 1995 WL 386496 (Ohio App., June 30, 1995) (same); *Carter v. Maryland Mgmt. Co.*, 2003 WL 22533198, 2003 Md. LEXIS 740 (Md. Ct. App. Nov. 10, 2003) (good cause required for termination of LIHTC/Voucher tenancy, but good cause found). See also Marc Jolin, *Good Cause Eviction and the Low Income Housing Tax Credit*, 67 U. CHI. L. REV. 521 (2000). A number of state agencies have previously recognized the requirement.

³26 U.S.C.A. § 42 (h)(6)(E)(ii)(I) (West 2002) ("eviction or termination of tenancy (other than for good cause)").

⁴LIHTC projects local jurisdictions can be located through a HUD Web site at <http://www.huduser.org/datasets/lihtc.html#data>.

⁵26 U.S.C.A. § 42 (h)(6)(B)(i) (West 2002).

⁶Under the statute, the "extended use period" is fifteen years after the close of the compliance period, which is itself fifteen years, for a total of thirty years. 26 U.S.C.A. § 42 (h)(6)(D) (West 2002), which refers to the definition of "compliance period" in § 42(i)(1). The statute also requires the good cause protection to last for three years beyond the termination of the extended low-income housing commitment, which is usually the determinant of the extended use period, as it is often longer than thirty years. 26 U.S.C.A. § 42 (h)(6)(E)(ii) (West 2002).

⁷Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, § 11701(a)(7), 104 Stat. 1388-506 (1990).

⁸26 U.S.C.A. § 42 (h)(6)(B) (i) (establishing the rent limitations and good cause eviction protections) and (ii) (authorizing state court enforcement) (West 2002).

⁹Rev. Rul. 2004-82, at A-5.

¹⁰26 U.S.C.A. § 42 (h)(6)(J) (West 2002). The ruling allows owners one year from the date of any state agency determination of noncompliance to bring the property into compliance, and preserve the ability to claim the credit for tax year 2004, and all subsequent and prior years. Rev. Rul. 2004-82, at A-5, ¶ 2.

will encourage faster compliance by those owners whose ELIHCs are currently lacking the required language.

Because the method used by various state agencies to implement the statute's ELIHC requirements may vary, agencies are likely to proceed in different fashions to implement the Ruling for any noncomplying properties in their jurisdictions. Hopefully, the task of identifying noncomplying properties can be simplified by an agency's review of any form ELIHCs that it has used over the years for its LIHTC inventory. This would allow an agency to quickly determine any subsets of noncomplying properties.

Because the method used by various state agencies to implement the statute's ELIHC requirements may vary, agencies are likely to proceed in different fashions to implement the Ruling for any noncomplying properties in their jurisdictions.

Those agencies whose ELIHCs are a single bilateral agreement between the agency and the owner, recorded as a binding restriction on the property, may have to execute a revised ELIHC with the owner, whereas those whose existing agreements expressly require an owner to comply with the LIHTC statute may be able to simply require the owner to execute and record a form unilateral amendment to the ELIHC or other restrictive covenant.

In all cases, it will also be important to obtain amendments to the leases used by project owners, as this is the primary reference point for tenants, managers and local eviction court judges for determining the applicable rules, certainly not the recorded ELIHC. Also important will be more detailed definition of the good cause protection, and what procedural protections, such as the length and content of any prior notice, will be required.¹¹

Working with other advocates, NHLP has prepared simple form amendments to project ELIHCs and leases which could be readily adapted to the specific circumstances of any particular jurisdiction or property. Contact Jim Grow at NHLP for more information. ■

¹¹See NHLP, HUD HOUSING PROGRAMS: TENANTS' RIGHTS ch. 14 (3d ed. 2004) (statutes, regulations and cases exploring these issues in other federal housing programs).

New Jersey Responds to Federal Voucher Funding Cuts

On September 9, 2004, the state of New Jersey adopted a "permanent" rental assistance program designed to address the crisis caused in the state by federal cuts to the Section 8 Housing Choice Voucher program. The state's Department of Community Affairs (DCA) will administer this new program, which is patterned after the voucher program. DCA already administers a temporary rental assistance program. The bill enacting the program also provided a \$10 million appropriation, of which \$3 million is set aside for seniors age sixty-five and over.¹

Assistance will be available for those low-income families who meet the federal program requirements, but for lack of funding or other reasons are not holders of Section 8 rental assistance vouchers. Payments are to be terminated once the individual or household receives a Housing Choice voucher. The DCA is to draft regulations implementing the legislation.

The Fiscal Year 2005 budget proposed by the Department of Housing and Urban Development cuts an estimated 7,777 New Jersey families from the voucher program.² Exacerbating the cuts and lack of access to affordable housing is the fact that the rich, literally, keep getting richer and the poor keep getting poorer in New Jersey, as income disparities increase and the poor lose ground.³

In a March 2004 letter, New Jersey Governor James E. McGreevey had urged the President to reconsider cuts to affordable housing programs in the 2005 budget. The governor discussed the dire need in his state, citing as an example the city of Paterson, where "more than 12,900 people applied for one of the 50 available Section 8 vouchers."⁴ ■

¹2004 N.J. Laws ch. 140 (2004).

²CENTER ON BUDGET AND POLICY PRIORITIES, LOCAL EFFECTS OF PROPOSED CUTS IN FEDERAL HOUSING ASSISTANCE DETAILED: NEW JERSEY, at <http://www.cbpp.org/states/3-17-04hous-nj.pdf> (March, 2004).

³ECONOMIC POLICY INSTITUTE & CENTER ON BUDGET AND POLICY PRIORITIES, INCOME INEQUALITY AMONG FAMILIES IN NEW JERSEY HAS INCREASED SINCE THE 1970s, at <http://www.cbpp.org/1-18-00sfp-nj.pdf> (undated).

⁴Press Release, Governor James E. McGreevey, McGreevey Urges President Bush to Protect Affordable Housing Programs, at <http://www.politicsnj.com/mcgreevey030804.htm> (March 8, 2004).