COMMONWEALTH OF MASSACHUSETTS
THE APPEALS COURT

NO. 2017-P-0102

HOMEOWNERS REHAB, INC. and MEMORIAL DRIVE HOUSING, INC.,
Plaintiffs-Appellees

v.

RELATED CORPORATE V SPECIAL LIMITED PARTNER, L.P. and CENTERLINE CORPORATE PARTNER V, L.P.
Defendants-Appellants

Appeal from a Judgment of the
Suffolk Superior Court, Civil Action No. 14-3807

BRIEF OF CITIZENS' HOUSING AND PLANNING ASSOCIATION *ET AL.*

AMICI CURIAE

Citizens' Housing and Planning Association, Greater Boston Real Estate Board, and Massachusetts Association of Community Development Corporations

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STATEMENT OF INTEREST OF THE AMICI CURIAE

This brief is submitted by the Citizens' Housing and Planning Association ("CHAPA"), Greater Boston Real Estate Board ("GBREB"), and Massachusetts Association of Community Development Corporations ("MACDC") in support of the position of appellees Homeowner's Rehab, Inc. ("HRI") and Memorial Drive Housing, Inc. ("Memorial Drive") in the above captioned appeal.

CHAPA is a Massachusetts charitable organization devoted to affordable housing and community development in the Commonwealth of Massachusetts (the "Commonwealth" or "Massachusetts"). CHAPA's 5,000 members include nonprofit and for-profit developers, local housing providers and advocates, municipal officials, lenders, property managers, architects, consultants, homeowners, tenants, local planners, and others.

Since 1967, CHAPA's mission has been:

> [T]o encourage the production and preservation of housing that is affordable to low and moderate income families and individuals and to foster diverse and sustainable communities through planning and community development.

Citizens' Housing and Planning Association, Mission, http://www.chapa.org/about-chapa/mission (last visited May 8, 2017).

GBREB was established pursuant to an 1889 act of the Massachusetts legislature to "prepare and collect . . . statistics and other records relating to real estate and subjects connected therewith; and do and perform such other matters as relate to real estate interests and dealings therein." St. 1889, ch. 153. As set forth in its bylaws, the focus of GBREB is to provide advocacy and education for real estate professionals, as well as working to safeguard private property rights of land owners. Among the divisions included within GBREB is the Rental Housing Association, which is comprised of some of the largest multifamily housing developers, managers, and owners in the nation. Creating housing, especially affordable housing, and all aspects affiliated with financing that housing has been, and will continue to be, a core mission of many of GBREB's members.

MACDC is an association of mission-driven community development organizations dedicated to working together and with others to create places of opportunity where people of diverse incomes and

backgrounds access housing that is affordable, benefit from economic opportunities, and fully participate in the civic life of their community. MACDC achieves this by building and sustaining a high performing and adaptive community development sector that is supported by private and public investment and sound public policies.

MACDC and its members have a long standing commitment to the production and preservation of affordable housing for low and moderate income households. Our members currently own and manage over 18,000 homes, the majority of which were developed or preserved using the Federal Low-Income Housing Tax Credit ("LIHTC") program. MACDC and its members also work together to advance public policies that support affordable housing.

The dispute between HRI and Memorial Drive and appellants Related Corporate V Special Limited Partner, L.P. ("Related") and Centerline Corporate Partner V, L.P. ("Centerline" and together with Related, the "Limited Partners") is focused on HRI's contract right to acquire the mixed-income affordable rental development known as 808 Memorial Drive (the "Property") under a right of first refusal. That

right, as set forth in the parties' Right of First Refusal and Option Agreement (the "Option Agreement"), and acknowledged in their limited partnership agreement (the "Partnership Agreement"), effectuates a comprehensive statutory scheme aimed at preserving existing affordable housing financed through the Federal LIHTC program. The arguments urged by the Limited Partners in this appeal would, if adopted by the Court, undermine the statutory objectives of the LIHTC statute and comparable policies of the Commonwealth aimed at preserving the long-term affordability of LIHTC rental housing. Consequently, CHAPA, GBREB, and MACDC (collectively, "the Amici") are deeply interested in the outcome of the appeal.

SUMMARY OF THE ARGUMENT

This brief urges the Court to uphold the summary judgment decision of the Suffolk Superior Court ("Superior Court" or "Trial Court"). It begins with a description of the affordable housing crisis facing low-income residents of Massachusetts, a crisis that is exacerbated by the potential loss of existing affordable rental housing through the sale of rent and income restricted developments such as the Property. In this context, the brief also discusses the

Commonwealth's affordable housing preservation policies. See 12-18, infra. In Part II, the brief describes the general features of the LIHTC program that place a priority on preservation of affordable housing through long-term nonprofit control and the mechanisms that deliver extensive tax benefits to LIHTC investors in lieu of the profits from operations or long-term appreciation usually available in real estate investments. See 18-26, infra. Part III points out that the right of first refusal in the Option Agreement (and specifically referred to in the Partnership Agreement) reflects a procedure and a purchase price that is codified in the LIHTC statute. See 26-36, infra. As such, it is part of a deliberate policy of promoting preservation of affordable housing through a below-market purchase price for a nonprofit organization such as HRI. The brief concludes in Part IV by analyzing specific components of the Limited Partners' arguments on appeal through the lens of the preservation purposes of the LIHTC program. See 36-45, infra.

In submitting this brief, the Amici adopt the facts as determined by the Superior Court. The Amici agree with and support the arguments of HRI and

Memorial Drive with respect to appropriateness of deciding the dispute by summary judgment, the Superior Court's reading of the Partnership Agreement and the Option Agreement, and its rulings concerning Memorial Drive's fiduciary obligations. Except as such matters may bear on the Amici's interest in preserving affordable rental housing, the brief does not repeat those arguments.

ARGUMENT

I. THERE IS A CRUCIAL UNMET NEED FOR AFFORDABLE HOUSING IN MASSACHUSETTS, BEING ADDRESSED IN PART THROUGH POLICIES THAT PRESERVE EXISTING AFFORDABLE HOUSING.

The Commonwealth's courts have long recognized the "acute shortage of decent, safe, low and moderate cost housing throughout the commonwealth" and the corresponding need to provide affordable housing through state and federal programs that assure that dwelling units are decent, safe, and affordable over the long-term. Zoning Bd. v. Hous. Appeals Comm., 464 Mass. 38, 45 (2013), quoting Bd. of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 351 (1973).

According to Consolidated Plan/CHAS Data compiled by the U.S. Department of Housing and Urban Development ("HUD"), statewide, 425,890 renter

households are rent burdened, meaning that they pay more than thirty percent of family income for housing. See Massachusetts Renter Households Cost Burdens, Appendix A.[1] Most of these families, seventy-seven percent of all rent-burdened households, subsist on incomes that are less than or equal to fifty percent of area median income. Id. Forty-six percent of these "extremely low-income" and "very low-income" families suffer severe rent burdens, meaning that they pay more than half of household income for rent. Id. Between 13,000 and 14,000 additional Massachusetts households are homeless or live in unstable housing situations. Number of Families in EA Shelters and Hotels/Motels, Massachusetts Department of Housing and Community Development, January 25, 2017, http://www.mass.gov/hed/docs/dhcd/hs/ea/

[1] CHAS Data is compiled by HUD from custom tabulations of American Community Survey data from the U.S. Census Bureau. Jurisdictions receiving funds from HUD's Office of Community Planning and Development are required to utilize CHAS Data in connection with submission of five-year Consolidated Plans. See 24 C.F.R. § 91.205(b)(ii) (2016) (housing and homeless needs assessment to include a summary of housing cost burden). Appendix A provides a summary of cost burden data for Massachusetts.

homelessnumberchart.pdf (last visited May 8, 2017). These families include over 21,000 school age children, whose numbers have increased by thirty-eight percent in the last five years. Homeless Student Program Data 2015-16, Massachusetts Department of Elementary and Secondary Education, January 13, 2017,https://www.mahomeless.org/images/Homeless_ed_data_collection_report_2015-16.pdf (last visited May 8, 2017).

Based on a review of records from the Massachusetts Department of Housing and Community Development ("DHCD"), CHAPA estimates that statewide only 200,300 rent restricted rental units are available to meet this deep need for affordable housing. Verrilli, A., Housing Needs in Massachusetts (CHAPA, April 2017) (unpublished memorandum) (on file with CHAPA). Of these, nearly 17,000 units are currently at risk of losing their affordable rents through the end of 2020 due to expiration of restrictive covenants, termination of rental subsidy agreements, the expense of carrying out needed repairs, and other similar events. Achtenberg, Maturing Subsidized Mortgages: The Next Frontier of the Expiring Use Crisis, University of Massachusetts

Boston Center for Social Policy, Working Paper 2009-8, April 28, 2009, http://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1018&context=csp_pubs (last visited May 8, 2017). In addition, the Community Economic Development Assistance Corporation ("CEDAC") estimates that more than 8,600 assisted rental units were lost and not replaced in Massachusetts between 2000 and the end of 2016. See CEDAC Expiring Use Inventory Dec 2016, Community Economic Development Assistance Corporation, https://cedac.org/wp-content/uploads/2016/06/ExpiringUseInventoryDec2016.pdf (last visited May 8, 2017).[2]

One of the Commonwealth's highest housing priorities is to ameliorate the continuing crisis in affordable housing through preservation of existing affordable units. The State's preservation policies are effectuated in part through Chapter 40T of the General Laws of Massachusetts ("Chapter 40T"). Chapter 40T's purpose is to preserve the affordability of "publicly-assisted housing" receiving assistance

[2] CEDAC is an instrumentality of the Commonwealth created to "preserve and develop housing affordable to low and moderate income persons." G. L. c. 40H, § 1.

from any one of sixteen separate programs, including developments such as the Property at 808 Memorial Drive that are financed with LIHTC. See G. L. c. 40T, § 1 (definition of "publicly-assisted housing"). The statute establishes a "right of first offer" pursuant to which publicly-assisted housing must be offered to DHCD (or its designee) whenever an owner intends to sell without preserving affordability, as well as a subsequent DHCD "right of first refusal." See id. § 3 (right of first offer); id. § 4 (right of first refusal). See also Achtenberg, Chapter 40T at 5: A Retrospective Assessment of Massachusetts' Expiring Use Preservation Law, Community Economic Development Assistance Corporation and Massachusetts Housing Finance Agency 8, May 1, 2015, https://cedac.org/wp-content/uploads/2016/06/Chapter-40T-at-5-6.2.15-1.pdf (last visited May 8, 2017)(distinguishing between right of first offer and right of first refusal).[3]

[3] Certain transactions that propose to "preserve affordability" are exempt from the Chapter 40T right of first offer and right of first refusal. Such transactions include acquisitions by affiliates of the current owner and conveyances to unaffiliated third party buyers where existing affordability restrictions are continued or enhanced. G. L. c. 40T, § 6. The offer received by Memorial Drive from Madison Park Development Corporation ("Madison Park"), R. App. at 557, and HRI's subsequent exercise of the right of

Preservation policies are also carried out through the Commonwealth's administration of the LIHTC program, under which there is a set-aside of credits for preservation of affordable units in existing properties. See Low-Income Housing Tax Credit Program, 2016 Qualified Allocation Plan, Commonwealth of Massachusetts Department of Housing and Community Development 17, April 22, 2016, http://www.mass.gov/hed/docs/dhcd/hd/lihtc/2016qap.pdf (last visited May 8, 2017).[4] As discussed in subsequent sections of this brief, the contractual right of first refusal at issue in this appeal is based on provisions of Section 42 that are similar to and complement the rights of first offer and first refusal in Chapter 40T. Consequently, the Commonwealth's efforts to address a chronic shortage

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first refusal through issuance of a purchase notice, R. App. at 577, if consummated, would both represent transactions exempt from the Chapter 40T right of first offer and right of first refusal because they propose to preserve affordability.

[4] Under the LIHTC statute, housing credits are allocated to individual projects through state housing credit agencies pursuant to a "qualified allocation plan" ("QAP") "which sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions." 26 U.S.C. § 42(m)(1)(B)(i) (2012). In Massachusetts, DHCD is the state credit agency.

of affordable housing through preservation initiatives are directly linked to the LIHTC program. If the Limited Partners' arguments about HRI's contractual right of first refusal were to prevail, it would weaken that connection and the efforts to ameliorate the affordable housing shortage.

II. A CRUCIAL PURPOSE OF THE LOW-INCOME HOUSING TAX CREDIT PROGRAM IS TO PRESERVE EXISTING AFFORDABLE HOUSING THROUGH LONG-TERM NONPROFIT CONTROL. THE PROGRAM ATTRACTS INVESTMENTS OF PRIVATE CAPITAL BY OFFERING TAX CREDITS AND LOSSES WITH SIGNIFICANT VALUE IN LIEU OF PROFITS FROM OPERATIONS OR LONG-TERM APPRECIATION.

The Low-Income Housing Tax Credit statute is codified at Section 42 of the Internal Revenue Code of 1986, as amended (the "Code"), 26 U.S.C. § 42 (2012) ("Section 42"). The program provides a general business credit against federal income taxes as an incentive to "encourage private-equity investment in low-income housing." Low-Income Housing Tax Credit: The Role of Syndicators, U.S. Government Accountability Office, GAO-17-285R, February 16, 2017 (http://www.gao.gov/assets/690/682890.pdf) (last visited May 8, 2017) (hereinafter The Role of Syndicators). See also 26 U.S.C. § 38(b)(5) (2012);

id. § 42(a).[5] Section 42 is the single most significant source of financing for affordable housing in Massachusetts. Data compiled by CHAPA from HUD's National Low-Income Housing Tax Credit Database indicates that from the time of the LIHTC program's inception in 1986 until 2014, LIHTC financing has produced 878 affordable rental developments in the Commonwealth, consisting of 72,000 dwelling units, of which an estimated 62,000 are restricted to occupancy by low-income families at affordable rents. See National Low Income Housing Tax Credit (LIHTC) Database: Projects Placed in Service through 2014, HUD, Office of Policy Development and Research, May 2016,

[5] Tax credits for a "qualified low-income project" are available for a fifteen year "compliance period." 26 U.S.C. § 42(i)(1) (2012). However, credits may be claimed on an accelerated ten-year schedule during a "credit period." Id. § 42(f)(1). In general, a rental development is a "qualified low-income project" if at least forty percent of the dwelling units are rented at restricted rents to households with incomes no greater than sixty percent of area median income, or, alternatively, if no less than twenty percent of the units are rented at restricted rents to households with incomes no greater than fifty percent of area median income. See id. § 42(g) (qualified low-income housing project, low-income set-aside, income and rent restrictions).

https://www.huduser.gov/portal/datasets/lihtc.html#codebook (last visited May 22, 2017).

Several features of Section 42 are specifically relevant to the issues involved in this appeal, and in particular, the contractual right of first refusal provisions of the Option Agreement and those of the Partnership Agreement that support it.

First, in addition to new production, Section 42 is targeted at long-term preservation of existing affordable housing through both incentives and disincentives. The costs of acquiring an existing building may qualify for LIHTC, and rehabilitation costs expended on existing housing qualify as costs for "new buildings" for purposes of receiving a greater volume of LIHTC. 26 U.S.C. § 42(e) (2012). LIHTC are subject to recapture from the investor if a property is disposed of prior to the end of the initial fifteen-year compliance period, unless affordability is preserved. Id. § 42(j)(6). No credit is allowed to any building unless it is subject to an "extended low-income housing commitment" that guarantees the continued affordability of the property for fifteen years beyond the initial recapture period, for thirty years in total. Id. § 42(h)(6). The

thirty-year extended use period may be terminated after the end of a fifteen-year compliance period if an owner elects to sell a LIHTC property, but only after the state credit agency first has a one-year opportunity to find a buyer who agrees to purchase the property for a "qualified contract" price and agrees to continue to operate it as low-income housing. See id. § 42(h)(6)(E)–(K).

Section 42 also creates a special role for nonprofit sponsors of LIHTC housing such as HRI.[6] To facilitate the flow of credits to for-profit equity investors, virtually all LIHTC investments are implemented through a purchase by an investor of the majority interest in a partnership or similar tax "pass-through" entity that owns the tax credit property and is controlled by a sponsor general

[6] For example, each state-qualified allocation plan must set aside a portion of the annual credit ceiling for "qualified nonprofit organizations" with ownership interests in LIHTC partnerships. 26 U.S.C. § 42(h)(5)(B)–(D) (2012). Rules designed to prevent "churning" of LIHTC properties through short-term sales do not apply to acquisitions by "any governmental unit or nonprofit organization," or to "any federally- or State-assisted building." See id. § 42(d)(2)(B)(ii) (ten-year anti-churning rule); id. § 42(d)(2)(D)(i)(III) (governmental units and nonprofit organizations); id. § 42(d)(6)(A), (C) (assisted building).

partner, including a nonprofit owning controlling shares in a single purpose general partner such as Memorial Drive. The Role of Syndicators, at 1. The Low Income Housing Tax Credit Program at Year 25: An Expanded Look at Its Performance, CohnReznick LLP 67, December 2012, https://www.cohnreznick.com/sites/default/files/2012lihtc/cohnreznick-lihtc-2012-fullreport.pdf (last visited May 8, 2017).

Within this framework, yet another crucial feature of Section 42 is the deliberate policy choice to replace expectations of customary cash returns on an investor's real estate investment, generally realized through "cash flow, appreciation at the time of disposition and" lesser tax benefits, with a comparable or better return "almost solely derived from tax benefits." Kaye, Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit, 38 Villanova L. Rev. 871, 898 (1993) (hereinafter Sheltering Social Policy). Indeed, the LIHTC "industry has evolved to the point that benefits offered to investors now often include little or no residual value or return of capital." Khadduri et al., What Happens to Low-Income Housing Tax Credit

Properties at Year 15 and Beyond?, U.S. Department of Housing and Urban Development, Office of Policy Development and Research 76, August 2012, https://www.huduser.gov/publications/pdf/what_happens_lihtc_v2.pdf (last visited May 8, 2017) (hereinafter Tax Credit Properties at Year 15).

For syndicators and investors like the Limited Partners, the value of Section 42's tax benefits is substantial. The value includes the LIHTC allocated to the project by the housing credit agency. Benefits also include tax deductions, which are available because the project generates losses, including accelerated depreciation under Section 168(c) of the Code, interest on amortizing first mortgage debt and non-amortizing secured and unsecured subordinate debt under Section 163 of the Code, and real estate and other taxes under Section 164 of the Code. See 26 U.S.C. §§ 168(c), 163, 164 (2012).

Section 42 amplifies these benefits to further enhance an investor's return on an investment in affordable housing. For example, unlike some other federal tax credits, LIHTC may be used to reduce the alternative minimum tax. Id. § 38(c)(4)(B)(ii). LIHTC do not reduce the basis in property that determines

the amount of available accelerated depreciation. See id. § 42(d)(4)(D) (exempting LIHTC from provisions of Section 1016(a)(1) and (2)). Consequently, the LIHTC and other enhanced tax benefits made available to investors in Section 42 housing ensure "that tax incentives, not economic cash flow or appreciation" provide the return on an investor's capital contribution. Sheltering Social Policy, at 898.

The Partnership Agreement between Memorial Drive and the Limited Partners reflects the statutory intent to provide a benefit to the investors in the form of enhanced tax benefits, as opposed to a more traditional cash return. The agreement requires the allocation of 99.98 percent of profit, losses, and LIHTC to Centerline and .01 percent of profit, losses, and credits each to Related and the HRI-sponsored Memorial Drive. See Partnership Agreement at 46–47, R. App. at 73–74. The financial projections associated with Centerline's investment also indicate that no party to the transaction anticipated profits from cash flow or appreciation. See Projections included in correspondence from Reznick Fedder & Silverman to Memorial Drive and Centerline, May 21, 1997 at 7, 9, R. App. at 589, 591 (hereinafter

Projections from Reznick). The projections and other exhibits in the summary judgment record led the Superior Court to conclude that Centerline realized "$7.5 million in tax credits and $24 million in tax losses" on an investment of $6.9 million. Mem. of Decision and Order on Pls.' Mot. for Summ. J. ("Mem. of Decision"), R. App. at 753–754.[7]

These tax benefits enjoyed by Centerline — not profits from the sale of the Property — reflect the intent of Section 42 and the customary expectations of parties entering into LIHTC transactions. Given these expectations, the contractual right of first refusal is a crucial element of the business arrangement. As explained in the next section of this brief, like

[7] The projections also indicate that the tax credit investment in the Partnership was through a syndication fund comprised of one or more corporate "upper tier" investors. See correspondence from Reznick Fedder & Silverman, R. App. at 582 (projections are for use "in analyzing the potential value of the syndication of this project with a corporate investor"). See also Deposition of Brian Townsend, 14-19, R. App. at 657-658. In addition to the tax benefits that flow through the syndication structure to an investor, syndicators like Centerline usually receive an acquisition fee equal to a percent of total LIHTC equity, and they are paid an annual asset management fee while they participate in the owner partnership. See The Role of Syndicators, at 8. See also Partnership Agreement at 41, R. App. at 407 (Annual Local Administrative Fee).

other elements of the arrangement, the right of first refusal is an explicit feature of Section 42.

III. THE STATUTORY RIGHT OF FIRST REFUSAL IN THE LOW-INCOME HOUSING TAX CREDIT PROGRAM IS DESIGNED TO PROTECT THE VALUE OF INVESTOR TAX BENEFITS. IT FURTHERS FEDERAL AND STATE POLICIES FAVORING NONPROFIT PRESERVATION OF AFFORDABLE HOUSING. A RIGHT OF FIRST REFUSAL AT THE STATUTORY PRICE IS A CUSTOMARY FEATURE OF LOW-INCOME HOUSING TAX CREDIT TRANSACTIONS.

A transfer of ownership of a LIHTC property to a nonprofit sponsor "is most likely" to take place at the end of the fifteen-year compliance period "because it is in the interest" of investors "to end their ownership role quickly after the compliance period ends." Tax Credit Properties at Year 15, at 29. The expectation of a nonprofit purchase is for "the properties to remain with the nonprofit owners in perpetuity and to continue to be operated as affordable housing." Id. A year fifteen transfer to a nonprofit also facilitates recapitalization of a LIHTC property to address capital needs that accrue over the compliance period. Id. at 46.

The right of first refusal provisions of the Option Agreement are firmly embedded in a Section 42 framework that is aimed at preservation through long-term, nonprofit involvement on the one hand and

allowing an investor return derived solely from tax benefits on the other. The statutory right of first refusal is codified as follows:

> **(A) In general**
> No Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified low-income building merely by reason of a right of 1st refusal held by the tenants . . . or by a qualified nonprofit organization . . . or government agency to purchase the property after the close of the compliance period for a price which is not less than the minimum purchase price determined under subparagraph (B).
>
> **(B) Minimum purchase price**
> For purposes of subparagraph (A), the minimum purchase price under this subparagraph is an amount equal to the sum of—
>
> (i) the principal amount of outstanding indebtedness secured by the building (other than indebtedness incurred within the 5-year period ending on the date of the sale to the tenants), and
>
> (ii) all Federal, State, and local taxes attributable to such sale.

26 U.S.C. § 42(i)(7) (2012).

The Section 42 right of first refusal was enacted as part of a series of 1989 and 1990 amendments to the Code made to improve the LIHTC program. As one among many recommendations of the Mitchell-Danforth Task Force on the Low-Income Housing Tax Credit ("Task Force"), it was first proposed as a tenant, nonprofit, and governmental option to purchase at less than fair

market value instead of a right of first refusal. See Report of Mitchell-Danforth Task Force on the Low-Income Housing Tax Credit 19, January, 1989, (hereinafter the Mitchell-Danforth Report). See also Low-Income Housing Credit Act of 1989, S. 980, 101st Cong. (1989). The objective of the proposal was to facilitate "longer-term low-income occupancy . . . through purchase of Credit projects by non-profit organizations and tenant cooperatives." Mitchell-Danforth Report, at 19. To achieve this goal, the Task Force recommended changes to Section 42 to allow "nonprofit organizations, at the outset of the development process, to structure an agreement with a for-profit owner whereby the property would be inexpensively transferred to non-profit ownership at the end of the compliance period." Id.

The concept of a below-market option proved difficult to implement under basic tax principles. Because the "right to appreciation has been an important incident of ownership for purposes of determining the tax owner of property . . . there was congressional concern that the grant of a below-market option" would put an investor's "true ownership" in question and as a consequence, deprive the investor of

the tax benefits associated with participation in a LIHTC project. Sheltering Social Policy, at 892-893.[8] In order to balance preservation priorities against a desire to protect the ability of investors to claim tax credits and losses, Congress provided instead for the below-market, nonprofit right of first refusal set forth in Section 42(i)(7). See Pub. L. No. 101-239, § 7108(q), 103 Stat. 2321 (Dec. 19, 1989); Pub. L. No. 101-508, § 11401(b)(1), 104 Stat. 1388-474 (Nov. 5, 1990). Thus, the statutory right of first refusal is consistent with the overall structure of Section 42. That is, it substitutes significant investor tax benefits for customary returns from appreciation of real property. By doing so, it helps assure the long-term affordability of LIHTC housing through nonprofit control. The objective of this provision, as described by the IRS, is to "promote housing for low-income individuals beyond the compliance period . . . ." Rev. Rul. 95-49, 1995-2 C.B. 7.

[8] The "true ownership" standard requires that a business arrangement have an "economic substance" beyond the expectation of tax benefits. See 26 U.S.C. § 7701(o) (2012) (clarification of economic substance doctrine).

The statutory right of first refusal is not mandated by Section 42.[9] However, it provides a framework for a sponsor and an investor "to structure an agreement at the outset of the development process" that permits an inexpensive transfer to nonprofit control "at the end of the compliance period." Mitchell-Danforth Report, at 19. Investors like Centerline and sponsors such as HRI typically negotiate the terms of a LIHTC investment with particular attention not only to the investor's expectations for tax benefits, but also to a year fifteen transaction that promotes continued affordability at a below-market price using the vehicle of a right of first refusal informed by Section 42(i)(7). "Over time, as more syndicators and

[9] Although the Code does not require a nonprofit right of first refusal in LIHTC properties, the IRS takes the view that a nonprofit participating in the ownership of a Section 42 project "must secure a right of first refusal to acquire the project at the end of the LIHTC compliance period" at a "purchase price [that] is reasonable and consistent" with the "charitable purposes [of] providing decent, safe, sanitary and affordable housing for low income persons and families." Memorandum from Robert Choi, Director, Exempt Organizations, U.S. Dep't of the Treasury Internal Revenue Service to Manager, Exempt Organizations Determinations, U.S. Dep't of the Treasury Internal Revenue Service (July 30, 2007) (on file with CHAPA) (hereinafter IRS Memorandum).

investors have worked on more nonprofit sponsored deals," the right of first refusal "has been more commonly included in their initial partnership agreements." Tax Credit Properties at Year 15, at n. 20. Indeed, an investor's offer to invest in a nonprofit-sponsored LIHTC development will not be competitive if the investor does not agree to a right of first refusal at the Section 42 minimum purchase price. Id.

The tax credit "alone cannot make projects feasible." Mitchell-Danforth Report, at 14. Rather, additional subsidies of some form generally are necessary. Id. That need for further subsidy can arise again at the end of the compliance period, when LIHTC properties often face challenges to "long-term affordability and viability" stemming "from the cost of" necessary physical improvements. Preserving Affordable Rental Housing: A Snapshot of Growing Need, Current Threats, and Innovative Solutions, HUD, Evidence Matters, Summer 2013, https://www.huduser.gov/portal/periodicals/em/summer13/highlight1.html#title (last visited May 8, 2017). Because it helps reduce the price of these

preservation and recapitalization transactions after the compliance period, a right of first refusal negotiated at the statutory below-market purchase price is not an isolated business term in a LIHTC transaction. It is part of a careful financial structure combining all of the preservation tools made available through Section 42 with other resources in order to enable both the development and the long-term preservation of affordable housing.

The 1997 acquisition and tax credit financing of the Property by 808 Memorial Drive Housing Limited Partnership (the "Partnership") proves this point. The appellate record indicates, for example, that the acquisition of the Property by the Partnership was itself a complex preservation transaction. As part of the effort, HRI secured a $14.8 million Capital Grant from HUD, which HRI then loaned to the Partnership to carry out much needed rehabilitation of the Property.[10]

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[10] The Capital Grant was made available to HRI as a nonprofit "priority purchaser" under the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub. L. No. 101-625, Title VI, Subtitle A, 104 Stat. 4249 (Nov. 28, 1990) ("LIHPRHA"). See Purchase and Sale Agreement between HRI and the Partner § 2.4, R. App. at 471. LIHPRHA provided certain rights of first offer and rights of first refusal to nonprofits and tenant groups in much the same way as Chapter 40T

Along with the HUD Capital Grant and almost $7 million of LIHTC Equity, HRI also secured more than $1.5 million of subsidy in the form of subordinate loans from the Commonwealth and from the city of Cambridge intended to help with the 1997 preservation transaction. See Transaction Closing Binder Table of Contents, 808-812 Memorial Drive, R. App. at 345 (transaction financing structure chart). Having assembled all of these public resources, and further assuming and increasing the size of the Property's existing first mortgage, HRI was successful in acquiring the Property and preserving its affordability in 1997. In short, twenty years ago over $20 million in public subsidy, including LIHTC

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secures similar rights to DHCD and its designees. See, e.g., 12 U.S.C. § 4101(b) (2012) (right of first offer); id. § 4101(c) (right of first refusal); compare, G. L. c. 40T, § 3 (right of first offer); id. § 4 (right of first refusal). See also 12 U.S.C. § 4121(a) (2012) (definition of "priority purchaser"). It is worth noting that LIHPRHA was enacted only weeks after Section 42 was amended to clarify that the right of first refusal was available to nonprofits and government agencies. Funding for LIHPRHA ended at the beginning of the 1997 federal fiscal year for projects not approved before that date. Pub. L. No. 104-204, Title II, 110 Stat. 2884 (Sept. 26, 1996). The Property's LIHPRHA transaction appears to have been approved by HUD in 1996. See Transaction Closing Binder Table of Contents, R. App. at 354 (referencing HUD approval letter dated December 23, 1996).

and other state and federal funds, was assembled to help HRI buy the Property from its previous for-profit owner, rehabilitate it, and preserve the Property as an affordable housing resource. The costs of acquisition and rehabilitation paid for with these public funds were part of the Partnership's basis in the Property, against which Centerline was able to claim both the tax credits available under Section 42 and the tax benefits associated with accelerated depreciation, the costs of mortgage loan interest, and other deductions.[11]

To maintain the financial and physical viability of the Property as affordable housing, and to effectuate the purpose of the statutory right of first refusal, it is essential to protect the ability to exercise a below-market purchase right that reduces cost. The arguments of Related and Centerline, if successful, will result in a claim to the much larger "Restricted Market Price" set forth in the Option

[11] The amount of LIHTC available to a project is a function of the percentage of construction and acquisition cost attributable to the income and rent restricted units in each building of the project. See 26 U.S.C. § 42(a) (2012) (amount of credit); id. § 42(c)–(d) (qualified and eligible basis); id. § 42(g) (qualified low-income housing project, low-income set-aside, income and rent restrictions).

Agreement. In doing so, the Limited Partners will be empowered to extract a price far in excess of the Section 42(i)(7) price captured in the Option Agreement and customarily negotiated in LIHTC projects.

The additional cost associated with the Restricted Market Price, if paid to Centerline, will impede HRI's ability to refinance and recapitalize the Property and make necessary capital improvements and repairs for the benefit of its residents. More public subsidy will be required to allow HRI to regain full control of the Property from investors that have received the full benefit of the LIHTC program – and none of that added subsidy will benefit the Property or its residents. If the added subsidy is available, it will only be as a result of diverting funds from capital repairs at the Property or from efforts to develop or preserve affordable housing elsewhere in the Commonwealth. If, on the other hand, the funding is not available, the Limited Partners will be empowered to block recapitalization and refinance efforts by insisting upon a higher price in order to leave the Partnership. In a world of scarce public resources and overwhelming demand, any of these

scenarios would be damaging for the residents of the Property and for the broader goals of preserving affordable housing.

IV. THE TRIAL COURT'S DECISION IN FAVOR OF HOMEOWNER'S REHAB, INC. AND MEMORIAL DRIVE HOUSING, INC. PROPERLY CONSTRUED THE AGREEMENTS IN LIGHT OF THE PURPOSES OF THE LIHTC PROGRAM AND STANDARD BUSINESS PRACTICES THAT FURTHER THOSE PURPOSES.

In their appeal, the Limited Partners assert that the absence of a *bona fide* purchase offer from Madison Park somehow deprived Memorial Drive of the ability to exercise the right of first refusal set forth in the Option Agreement and referred to in the Partnership Agreement. They also argue that Memorial Drive's actions in seeking a purchase offer from Madison Park contravene the Partnership Agreement and thus violate Memorial Drive's fiduciary responsibilities. The Amici disagree with those assertions and support both the analysis of the Superior Court and the position of HRI and Memorial Drive in rejecting the arguments of the Limited Partners. This section of the brief augments the views of the Superior Court, HRI, and Memorial Drive with several points.

First, the Superior Court correctly rejected the claim of Centerline and Related that in their capacity

as limited partners of the Partnership, only they "held the power . . . to decide whether and when to sell" the Property "or not." Appellants' Br. 14. As the Superior Court noted, plainly read, the Partnership Agreement grants Related consent authority only with respect to "*the terms* of any such sale," and not with respect to efforts by Memorial Drive to market the property. Partnership Agreement at § 5.4(A), R. App. at 399 (emphasis added). See also Mem. of Decision at 15, R. App at 287.

Under customary business arrangements in LIHTC transactions, such limitations on consent rights are consistent with limited partner protection from liability for Partnership activities under the Massachusetts Uniform Limited Partnership Act. See G. L. c. 109, § 19(a). See also Partnership Agreement at § 3.8, R. App. at 389 (limitation on Limited Partner liability). Moreover, in order for a tax-exempt nonprofit such as HRI to participate in a Section 42 partnership, the IRS requires that the nonprofit retain consent rights relating to circumstances where actions "would likely be inconsistent with preserving the housing as a low-income housing project." IRS Memorandum, at 4. In seeking a "preservation" offer

from Madison Park, HRI and Memorial Drive were pursuing precisely the path the IRS requires.

The Amici agree with the decision of the Superior Court and the related arguments of HRI and Memorial Drive that the Madison Park purchase offer did in fact constitute an enforceable offer, entitling HRI to exercise the Option Agreement's right of first refusal. Madison Park's offer qualified as enforceable: "That is enough." Mem. of Decision at 19, R. App. at 767.

As a statutory matter, it is important to recognize that Section 42 does not require a *bona fide* offer in order for a nonprofit organization to exercise the statutory right of first refusal. Indeed, there is nothing in the Code that suggests that the tax benefits available to an investor because of the provisions of Section 42(i)(7) are in any way jeopardized by the absence of a *bona fide* offer. To the contrary, the phrase *bona fide* applies in the LIHTC context only to a "qualified contract" that could allow a LIHTC owner to cut off the extended

thirty-year affordability period. 26 U.S.C. § 42(h)(6)(F) (2012).[12]

As a contractual matter, the Option Agreement does not specify that the triggering offer giving rise to a Disposition Notice must be "bona fide" or "genuine," nor does it provide for scrutiny of the terms, capacities, or motivations of the offeror. We do not suggest that the Madison Park offer would fail to meet any of these standards, but emphasize that they are not required by the relevant agreements, laws, or policies. The court should not favor the investors by importing additional or heightened tests that neutralize the result of their negotiated terms or statutory provisions. See Uno Rests., Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 388 (2004)

[12] It is worth noting that in issuing rules to implement the qualified contract provisions of Section 42, the IRS declined to adopt a national standard for what constitutes a "*bona fide*" contract that might trigger an early termination of LIHTC affordability restrictions. In light of variations among state law standards, the IRS instead deferred to state credit agency discretion to establish the standards under which to determine if a sales contract is *bona fide.* See 77 Fed. Reg. 26175, 26178 (May 3, 2012). Because Chapter 40T is the exclusive framework for determining the conditions under which an owner may terminate LIHTC affordability restrictions in Massachusetts, there is no concept of a qualified contract in DHCD's LIHTC program.

("The purpose of the covenant of good faith and fair dealing is not to supply contractual terms that the parties are free to negotiate.")

Common law standards regarding rights of first refusal further support the effectiveness of the Madison Park offer. Again, we defer to the more detailed arguments of HRI and Memorial Drive on this point, but wish to emphasize the importance of the context of these agreements in affirming "enforceability" as the proper standard for reviewing the offer. In Glick v. Chocorura Forestlands Ltd. P'ship, 157 N.H. 240 (2008), the court explained, ". . . we do not believe that adoption of a rigid rule that applies to all tracts that contain the phrase 'right of first refusal' is sound.". Glick, 157 N.H. at 247. The Glick court went on to quote Corbin on Contracts, stating:

> Although the [r]ight that it creates may be described by divers[e] terms ("First Right to Buy," "Right of Pre-emption," . . . and so on), in no case are the legal relations [between the parties contracting for a right of first refusal] determinable from the name alone. In all cases, interpretation requires knowledge of the entire context, context of facts as well as context of words.

(alterations in Glick) Id., quoting 3 E. Holmes, Corbin on Contracts § 11.3, at 481 (rev. ed. 1996).

A Section 42(i)(7) right of first refusal creates a unique commercial context of restricted marketability that is materially different from that of a traditional right of first refusal. The heightened standards for scrutiny asserted by Related and Centerline are derived from decisions premised upon a traditional right of first refusal in which the third party offeror will "dictate the price." Uno Rests., Inc., 441 Mass. at 384. A traditional right of first refusal "necessarily requires that the holder be bound by the exact price set and offered by the third party because without such a rule the holder could impede the marketability of the property." Id. at n.4, citing Miller v. LeSea Broadcasting, Inc., 87 F.3d 224, 226 (7th Cir. 1996).

The Section 42(i)(7) right of first refusal is different. By its nature, it is an opportunity for the holder to match a third party offer with an enforceable counter-offer that is designed to be below the price offered by the third party. All prospective third party purchasers of LIHTC properties will be aware of this reality. Regardless of the price they offer and the amount of effort they invest in conducting due diligence, it is likely that the

nonprofit sponsor that developed the property and controls the general partner of the seller can defeat their offer simply by offering to pay a below-market "debt and taxes" price. This market reality will affect the behavior of any potential third party bidder in a manner that is directly relevant to the question of whether or how to scrutinize the "*bona fide*" nature of any resulting offer. Tax Credit Properties at Year 15, at 76.

Despite this reality, the Limited Partners suggest that Madison Park's offer was not "*bona fide*" and not sufficient to trigger HRI's right of first refusal because "Madison Park knew that the offer would not be accepted, and that HRI would exercise the ROFR upon receipt of the offer to 'walk away with the Property.'" Appellants' Br. 47. To the contrary, any third party offeror in the LIHTC context would be aware of the existence of the Section 42 right of first refusal. If this knowledge disqualifies an offer from triggering the right of first refusal, then the entire Section 42(i)(7) statutory construct would be rendered meaningless. The court should reject the investor's invitation to scrutinize the "origin" or the "purpose" of the offer, the level of diligence

requested, or whether Madison Park's interest was "genuine." Id. at 46-47. To apply this scrutiny in the Section 42 policy and contractual context "...contradicts the practical application of the right of first refusal." Uno Rests., Inc., 441 Mass. at 384.

With their assertions that a *bona fide* offer is required in connection with the exercise of contractual rights pursuant to Section 42(i)(7), and the further claim that the Madison Park offer was inadequate to meet this standard because it was made with the knowledge of the below-market right of first refusal held by HRI, Centerline and Related seek to enlist the Court in grafting heightened standards on a business arrangement that cannot be justified by the plain text of the relevant agreements. Their argument also cannot be justified by the preservation objectives of the LIHTC program, against whose backdrop the agreements were negotiated. Superior Court Mem. and Decision at 11, R. App. at 759. If the Court allows Centerline and Related to raise the bar for exercising these rights it will chill the ability of HRI and other nonprofit organizations to use the

right of first refusal for its intended purpose as a preservation tool.

CONCLUSION

For the foregoing reasons, the Amici urge the Court to UPHOLD the decision of the Superior Court below.

Respectfully Submitted,

Citizens' Housing and Planning Association, Greater Boston Real Estate Board, and Massachusetts Association of Community Development Corporations

By their attorneys,

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APPENDIX A:
Massachusetts Renter Households
Cost Burdens

Income Level	Number of Renters	Percent of All Renters	Number Cost Burden	Percent Cost Burden	Number Severe Cost Burden	Percent Severe Cost Burden
Extremely Low-Income	299,840	32%	209,640	70%	162,360	54%
Very Low-Income	161,115	17%	116,525	72%	49,050	30%
Low-Income	144,600	15%	65,335	45%	10,095	7%
Less than Median	87,875	9%	20,325	23%	1,925	2%
Median or More	251,460	27%	14,065	6%	795	0.3%
Total	944,890	100%	425,890	45%	224,225	24%

Source: U.S. Department of Housing and Urban Development, Consolidated Planning/CHAS Data (2006-2017) https://www.huduser.gov/portal/datasets/cp.html (last visited, May 16, 2017)

Notes:

Extremely Low-Income:
Below 30% of area median income (AMI)

Very Low-Income:
More than 30% AMI, less than or equal to 50% AMI

Low-Income:
More than 50% AMI, less than or equal to 80% AMI

Less than Median:
More than 80% AMI, less than or equal to 100% AMI

Median or More:
Greater than 100% AMI

Cost Burden:
Housing cost is greater than 30% of family income.

Severe Cost Burden:
Housing cost is greater than 50% of family income.

ADDENDUM

G. L. c. 40T, § 1 . Definitions

Section 1. As used in this chapter, the following words shall, unless the context clearly requires otherwise, have the following meanings:

“Affected municipality”, a city or town in which publicly-assisted housing is located.

“Affiliate”, an entity owned or controlled by an owner or under common control with the owner.

“Affordability restriction”, a limit on rents that an owner may charge for occupancy of a rental unit in a publicly-assisted housing development or a limit on tenant income for persons or families seeking to qualify for admission to such housing.

“CEDAC”, the Community Economic Development Assistance Corporation established in chapter 40H.

“Chief executive officer”, the mayor, city manager or city council in a city or the board of selectmen in a town unless otherwise designated by a municipal charter.

“Department”, the department of housing and community development or its designee as set forth in this chapter.

“Designee”, a municipality, local or regional housing authority, nonprofit or for-profit corporation or other entity qualified to do business in the commonwealth which is selected by the department to operate publicly-assisted housing that is decent, safe and sanitary affordable housing under subsection (b) of section 3.

“Enhanced section 8 vouchers”, vouchers provided under 42 U.S.C. 1437f (t) or other substantially equivalent assistance.

“Extremely low income”, a household income of not more than 30 per cent of the area median income, adjusted for household size, as periodically determined by the United States Department of Housing and Urban Development.

“Government program”, a program that provides government assistance under a program set forth in the definition of publicly-assisted housing.

“Low income”, a household income of not more than 80 per cent of the area median income, adjusted for household size, as periodically determined by the United States Department of Housing and Urban Development.

“Owner”, a person, firm, partnership, corporation, trust, organization, limited liability company or other entity, or its successors or assigns, that holds title to publicly-assisted housing.

“Prepayment”, (a) the payment in full or the refinancing of a governmental-insured or government-held mortgage loan indebtedness prior to its original maturity date; (b) the voluntary cancellation of mortgage insurance on a publicly assisted housing development; or (c) the payment in full of a government contract, any of which would have the effect of removing either: (i) the affordability restrictions applicable to publicly-assisted housing; or (ii) a requirement to renew any such affordability restrictions.

“Preserve affordability”, with respect to publicly-assisted housing, to undertake reasonable and diligent actions to retain, renew or secure subsidies affecting publicly-assisted housing in order to maintain at least the same number of units affordable to low, very low and extremely low-income households, respectively, as are currently occupied by such households, and to maintain as affordable to such households generally all units that are currently vacant, to the extent of available subsidies and taking into account the need to ensure that the publicly-assisted housing provides quality housing to its tenants. To the extent that the department determines that existing affordability does not provide quality housing to the tenants, the department shall consider affordability to a range of incomes for such units not to exceed 80 per cent of area median income as defined by United States Department of Housing and Urban Development; provided, however, that no tenant shall be displaced pursuant to the determination; and provided further, that units affordable to low, very low and extremely low-income

households that are not retained, renewed or secured at the publicly-assisted housing shall be replaced with comparable deed-restricted publicly-assisted housing units at an alternative site to the extent of available subsidies and to the extent feasible.

“Protected low-income tenant”, a low-income tenant residing in publicly-assisted housing on the date of termination of the government program and whose rent was restricted by that government program.

“Publicly-assisted housing”, a housing unit or development that receives government assistance under any of the following programs: (i) section 8 of the United States Housing Act of 1937, 42 U.S.C. section 1437f, as it applies to new construction, substantial rehabilitation, moderate rehabilitation, property disposition and loan management set-aside programs or any other program providing project-based rental assistance; (ii) the federal Low-Income Housing Tax Credit Program, 26 U.S.C. section 42; (iii) section 101 of the Housing and Urban Development Act of 1965, 12 U.S.C. section 1701s, as it applies to programs for rent supplement assistance thereunder; (iv) section 202 of the Housing Act of 1959, 12 U.S.C. section 1701q; (v) the below market interest rate program codified at section 221(d)(3) of the National Housing Act, 12 U.S.C. section 1715 (d)(3) and (5); (vi) section 221(d)(4) of the National Housing Act, 12 U.S.C. section 17151 (d)(4), to the extent the project's rents are restricted pursuant to a government agreement; (vii) section 236 of the National Housing Act, 12 U.S.C. section 1715z?l; (viii) section 515 of the Housing Act of 1949, 42 U.S.C. section 1485; (ix) section 521 of the Housing Act of 1949, 42 U.S.C. section 1490a; (x) the Urban Development Action Grant, 42 U.S.C. section 5318, to the extent that the affordability of dwelling units subject to such program are restricted pursuant to a government agreement; (xi) the Housing Development Action Grant, 42 U.S.C. section 1437, to the extent the project's rents are restricted pursuant to a government agreement; (xii) section 13A of chapter 708 of the acts of 1966; (xiii) the voucher program provided for annually in item 7004?9024 of section 2 of the general appropriation act as that program applies to project-based rental assistance; (xiv) the Massachusetts low income housing tax credit program

established in section 6I of chapter 62; (xv) the State Housing Assistance for Rental Production, established pursuant to chapter 574 of the acts of 1983; or (xvi) chapter 121A to the extent that the affordability of dwelling units are restricted pursuant to a written agreement with the affected municipality.

“Purchase contract”, a binding written agreement whereby an owner agrees to sell publicly-assisted housing including, without limitation, a purchase and sale agreement, contract of sale, purchase option or other similar instrument.

“Regulatory agreement”, an affordable housing restriction that establishes an owner's obligations created pursuant to the efforts of the department or its designee to preserve affordability and which is consistent with section 31 of chapter 184; provided, however, that in any project that is eligible for participation in the United States Department of Housing and Urban Development's Mark Up to Market Program, the restriction, insofar as it relates to the limiting of the level of rents, shall not apply to units covered by a section 8 housing assistance payment contract so long as such contract is effective.

“Sale”, an act by which an owner conveys, transfers or disposes of property by deed or otherwise, whether through a single transaction or a series of transactions, within a 2 year period; provided, however, that a disposition of publicly-assisted housing by an owner to an affiliate of such owner shall not constitute a sale.

“Subsidy”, public financial assistance including, but not limited to, grants, loans, rental assistance, tax credits, tax abatements, mortgage financing, mortgage insurance, assistance pursuant to any government program or any other form of assistance intended to make housing affordable to low, very low and extremely low-income households.

“Tenant”, a person entitled to possession or occupancy of a rental unit within publicly-assisted housing, including a subtenant, lessee and sublessee.

“Tenant organization”, an organization established by the tenants of publicly-assisted housing for the purpose of addressing issues related to their living environment and which meets regularly, operates democratically, is representative of all residents in the development, is completely independent of owners, management and their representatives and which has filed a notice of its existence with CEDAC; provided, however, that no owner or other third party shall be required to ascertain the organization's compliance with this definition.

“Termination”, the cessation, discharge or removal of an affordability restriction affecting publicly-assisted housing in the absence of a simultaneous replacement of that restriction with an equivalent affordability restriction including, but not limited to: (i) nonrenewal or termination, in whole or in part, of a government program contract; (ii) expiration, in whole or in part, of an affordability restriction under a government program or the requirement to renew the restriction; (iii) payment in full of a government program mortgage loan; or (iv) prepayment of a government program mortgage loan.

“Time for performance”, the date for delivery of the deed or other document evidencing a sale pursuant to a purchase contract or any extension thereof.

“Very low income”, having a household income of not more than 60 per cent of the area median income, adjusted for household size, as periodically determined by the United States Department of Housing and Urban Development.

G. L. c. 40T, § 3 . Purchase option for publicly-assisted housing by department

Section 3. (a) An owner shall offer the department an opportunity to purchase publicly-assisted housing prior to entering into an agreement to sell such property pursuant to the time periods contained in this section, but no owner shall be under any obligation to enter into an agreement to sell such property to the department.

(b) The department may select a designee to act on its behalf as purchaser of the publicly-assisted housing and shall give the owner and CEDAC written notice of its selection. The department shall promptly consult with the affected municipality before selecting a designee and shall immediately designate the affected municipality as its designee upon written request of the affected municipality, unless the department determines that such request is not feasible for reasons set forth in the department's regulations. The department shall enter into a written agreement with its selected designee providing that the designee, and any of its successors or assigns, agree to preserve the affordability of the publicly assisted housing. Once such an agreement is executed, the designee shall assume all rights and responsibilities attributable to the department as a prospective purchaser under this section and section 4. At any time prior to a sale under this section or section 4, the department may revoke its designation and assume the designee's rights and responsibilities, either in its own capacity or by selecting a new designee; provided, however, that no change in a designation shall operate to extend or alter any time periods for performance set forth in this chapter or in any purchase contract entered into pursuant to this chapter.

(c) The department may, within 90 days after it receives notice pursuant to subsection (c) of section 2 of the owner's intention to sell, submit an offer to the owner to purchase the publicly-assisted housing. Failure by the department to submit a timely offer shall constitute an irrevocable waiver of the department's rights under this section and the owner may sell the publicly-assisted housing subject to section 4. If the owner accepts the department's initial or any revised offer, the owner and the department shall enter into such other agreements as are necessary and appropriate to complete the sale. If the owner and the department have not entered into an agreement to sell the property to the department within 90 days after receipt of the notice pursuant to subsection (c) of section 2, the owner may enter into an agreement to sell the property to a purchaser of the owner's choice, subject to section 4.

(d) At any time after the notice in section 2 has been provided and within 10 days of receiving a request,

the owner shall make documents available to the department for review and photocopying during normal business hours at the owner's principal place of business or at a commercial photocopying facility. Such documents shall include, but not be limited to: (1) any existing architectural plans and specifications of the development; (2) itemized lists of monthly operating expenses and capital expenditures in each of the 2 preceding calendar years; (3) any capital needs studies or market studies that have been submitted to a federal, state or local agency in the preceding 3 years; (4) utility consumption rates for the preceding year; (5) copies of the last 2 audited annual financial statements and physical inspection reports filed with federal, state or local agencies; (6) the most recent rent roll showing then current vacancies and rent arrearages; and (7) a statement of the approximate annualized vacancy rate at the development for each of the 2 preceding calendar years. Documents obtained pursuant to a request under subsections (c) and (d) shall not be considered public records, as defined in clause 26 of section 7 of chapter 4, and the department shall not make such documents available to the public without the written consent of the owner or pursuant to a court order; provided, however, that disclosure may be made to potential funding sources, regulatory agencies or agents or consultants of the department in connection with the transaction, subject to appropriate confidentiality agreements. Upon request and with appropriate notice, the owner shall permit reasonable inspections of the dwelling units, building systems, common areas and common grounds by agents, consultants and representatives of the department or its designee including, but not limited to, inspections related to environmental, engineering, structural or zoning matters; provided, however, that the owner and agents, consultants or representatives of the department or its designee shall execute an access and confidentiality agreement, in a form approved by the department, with respect to such matters as insurance to be carried by the investigators, indemnities of the owner, restrictions on invasive testing, restoration requirements, the timing of such inspections and the requirement to keep all matters discovered confidential.

(e) Not later than 30 days after the department submits an offer to purchase the publicly-assisted housing pursuant to subsection (c), the department shall notify tenants in the housing development of its plans.

G. L. c. 40T, § 4 . Sale of publicly assisted housing to third party by purchase contract; submission to department; contents; time for completion of sale

Section 4. (a) Upon the expiration of the 90 day offer period in subsection (c) of section 3, but not later than 2 years after the date notice was provided to the department in subsection (c) of said section 2, the owner may execute a purchase contract with a third party to sell the publicly-assisted housing pursuant to this section. Thereafter, the owner again shall be subject to the notice provision of said subsection (c) of said section 2.

(b) Upon execution of a third party purchase contract, the owner shall, within 7 days, submit a copy of the contract to the department and CEDAC, along with a proposed purchase contract for execution by the department. If the department elects to purchase the publicly-assisted housing, the department shall, within 30 days after receipt of the third party purchase contract and the proposed purchase contract, execute the proposed purchase contract or such other agreement as is acceptable to the owner and the department. The time periods set forth in this subsection may be extended by agreement between the owner and the department. The proposed purchase contract shall contain the same terms and conditions as the executed third party purchase contract, except that the proposed purchase contract shall provide at least the following terms: (i) the earnest money deposit shall not exceed the lesser of: (1) the deposit in the third party purchase contract; (2) 2 per cent of the sale price; or (3) $250,000; provided, however, that the owner and the department may agree to modify the terms of the earnest money deposit; and provided further, that the earnest money deposit shall be held under commercially-reasonable terms by an escrow agent selected jointly by the owner and the department; (ii) the earnest money deposit shall be

refundable for not less than 90 days from the date of execution of the purchase contract or such greater period as provided for in the third party purchase contract; provided, however, that if the owner unreasonably delays the buyer's ability to conduct due diligence during the 90 day period, the earnest money deposit shall continue to be refundable for a period greater than 90 days; and (iii) the time for performance shall be not less than 240 days from the date of the execution of the purchase contract, or such greater period as provided for in the third party purchase contract.

(c) If the department fails to execute the proposed purchase contract within 30 days or such other period as provided in subsection (b), the owner shall have 2 years from the last day on which the department was entitled to execute the proposed purchase contract in which to complete a sale of the owner's publicly-assisted housing to a third party, except as provided in subsection (e). Upon the expiration of the 2-year period, the owner shall be subject again to subsection (c) of section 2, section 3 and this section.

(d) If the department executes the proposed purchase contract as provided in subsection (b) but fails to perform as provided in the executed purchase contract, then the owner shall have 2 years from the date on which the executed purchase contract terminated in which to complete a sale of the owner's publicly-assisted housing to a third party. Upon the expiration of the 2-year period, the owner shall be subject again to all of subsection (c) of section 2, section 3 and this section.

(e) After receipt of the third party purchase contract provided for in subsection (b), the department may, within the 30?day time period prescribed in said subsection (b), make a counteroffer by executing and submitting to the owner an amended proposed purchase contract. Failure by the department to execute the purchase contract or submit a counteroffer within the 30-day period referenced in subsection (b) shall constitute a waiver of the department's right to purchase under this section. If the department submits a counteroffer, the owner shall have 30 days from the date it receives the amended proposed purchase contract to execute the amended proposed purchase

contract or reject, in writing, the counteroffer. If the owner rejects the counteroffer, the owner shall have 2 years from the date on which the owner rejects the department's counteroffer to complete a sale of the publicly-assisted housing to a third party; provided, however, that if such sale is upon economic terms and conditions that are the same as or materially more favorable to the proposed purchaser than the economic terms and conditions in the proposed purchase contract offered by the department in its counteroffer, the owner shall provide a copy of the new third party purchase contract, along with a proposed purchase contract for execution by the department which shall contain the same terms and conditions as the executed third party purchase contract; provided that the department shall have 30 days from the date it receives the third party purchase contract and the proposed purchase contract to execute the proposed purchase contract or such other agreement as is acceptable to the owner and the department.

(f) The owner shall, not later than 7 days after the execution of a purchase contract with a third party, provide the department with a copy of any new or amended purchase contract executed with respect to the property during the 2 year period set forth in subsections (c) to (e), inclusive, and shall not later than 7 days after the recording or filing of the deed or other document with the registry of deeds or the registry district of the land court of the county in which the affected real property is located, provide the department with a copy of any such deed or other document transferring the owner's interest in the publicly-assisted housing.

(g) Any third party purchase contract, amended third party purchase contract, deed or any other document transferring the owner's interest in publicly-assisted housing shall include a certification by the owner that the document is accurate and complete and there are no other agreements between the owner and the third party buyer, or an affiliate of either, with respect to the sale of the publicly-assisted housing.

G. L. c. 40T, § 6 . Exemptions; requests

Section 6. (a) Sections 3 and 4 shall not apply to the following: (i) a government taking by eminent domain or a negotiated purchase in lieu of eminent domain; (ii) a forced sale pursuant to a foreclosure; (iii) a deed-in-lieu-of foreclosure; (iv) a proposed sale to a purchaser pursuant to terms and conditions that preserve affordability, as determined by the department; (v) a proposed sale of publicly-assisted housing that the department has determined, as of the effective date of this act, was neither receiving government assistance nor was subject to regulation by any of the programs listed in the definition of publicly-assisted housing other than project-based section 8 and the buyer has agreed, in a regulatory agreement, to renew in whole, all project-based section 8 assistance contracts, or any successor program thereto; provided, however, that at the time of such renewal, such assistance is available to the owner on economic terms and conditions that are comparable to the existing project-based rental assistance contract; (vi) a proposed sale of publicly-assisted housing to an affiliate of the owner that is not a termination as determined by the department; (vii) a proposed sale of publicly-assisted housing which has more than 15 years from the date of the sale until the date of the publicly-assisted housing's first scheduled termination; or (viii) a bona fide proposed sale pursuant to a purchase contract on the effective date of this chapter.

(b) An owner seeking an exemption under clause (iv), (v) or (vi) of subsection (a) shall include the name and address of any tenant organization in the request and shall provide a copy of its request to the chief executive officer of the affected municipality, CEDAC, the local legal services organization as designated by the department and the tenant organization, if any, at the time it files its exemption request with the department. The department shall provide a copy of its written determination under said clause (iv), (v) or (vi) of said subsection (a) to the owner, CEDAC, the local legal services organization and the tenant organization.

26 U.S.C. § 42 (2012) . Low-income housing credit

(a) In general

For purposes of section 38, the amount of the low-income housing credit determined under this section for any taxable year in the credit period shall be an amount equal to-

(1) the applicable percentage of

(2) the qualified basis of each qualified low-income building.

(b) Applicable percentage: 70 percent present value credit for certain new buildings; 30 percent present value credit for certain other buildings

(1) Determination of applicable percentage

For purposes of this section-

(A) In general

The term "applicable percentage" means, with respect to any building, the appropriate percentage prescribed by the Secretary for the earlier of-

(i) the month in which such building is placed in service, or

(ii) at the election of the taxpayer-

(I) the month in which the taxpayer and the housing credit agency enter into an agreement with respect to such building (which is binding on such agency, the taxpayer, and all successors in interest) as to the housing credit dollar amount to be allocated to such building, or

(II) in the case of any building to which subsection (h)(4)(B) applies, the month in which the tax-exempt obligations are issued.

A month may be elected under clause (ii) only if the election is made not later than the 5th day after the close of such month. Such an election, once made, shall be irrevocable.

(B) Method of prescribing percentages

The percentages prescribed by the Secretary for any month shall be percentages which will yield over a 10-year period amounts of credit under subsection (a) which have a present value equal to-

(i) 70 percent of the qualified basis of a new building which is not federally subsidized for the taxable year, and

(ii) 30 percent of the qualified basis of a building not described in clause (i).

(C) Method of discounting

The present value under subparagraph (B) shall be determined-

(i) as of the last day of the 1st year of the 10-year period referred to in subparagraph (B),

(ii) by using a discount rate equal to 72 percent of the average of the annual Federal mid-term rate and the annual Federal long-term rate applicable under section 1274(d)(1) to the month applicable under clause (i) or (ii) of subparagraph (A) and compounded annually, and

(iii) by assuming that the credit allowable under this section for any year is received on the last day of such year.

(2) Minimum credit rate for non-federally subsidized new buildings

In the case of any new building-

(A) which is placed in service by the taxpayer after the date of the enactment of this paragraph, and

(B) which is not federally subsidized for the taxable year,

the applicable percentage shall not be less than 9 percent.

(3) Cross references

(A) For treatment of certain rehabilitation expenditures as separate new buildings, see subsection (e).

(B) For determination of applicable percentage for increases in qualified basis after the 1st year of the credit period, see subsection (f)(3).

(C) For authority of housing credit agency to limit applicable percentage and qualified basis which may be taken into account under this section with respect to any building, see subsection (h)(7).

(c) Qualified basis; qualified low-income building

For purposes of this section-

(1) Qualified basis

(A) Determination

The qualified basis of any qualified low-income building for any taxable year is an amount equal to-

(i) the applicable fraction (determined as of the close of such taxable year) of

(ii) the eligible basis of such building (determined under subsection (d)(5)).

(B) Applicable fraction

For purposes of subparagraph (A), the term "applicable fraction" means the smaller of the unit fraction or the floor space fraction.

(C) Unit fraction

For purposes of subparagraph (B), the term "unit fraction" means the fraction-

(i) the numerator of which is the number of low-income units in the building, and

(ii) the denominator of which is the number of residential rental units (whether or not occupied) in such building.

(D) Floor space fraction

For purposes of subparagraph (B), the term "floor space fraction" means the fraction-

(i) the numerator of which is the total floor space of the low-income units in such building, and

(ii) the denominator of which is the total floor space of the residential rental units (whether or not occupied) in such building.

(E) Qualified basis to include portion of building used to provide supportive services for homeless

In the case of a qualified low-income building described in subsection (i)(3)(B)(iii), the qualified basis of such building for any taxable year shall be increased by the lesser of-

(i) so much of the eligible basis of such building as is used throughout the year to provide supportive services designed to assist tenants in locating and retaining permanent housing, or

(ii) 20 percent of the qualified basis of such building (determined without regard to this subparagraph).

(2) Qualified low-income building

The term "qualified low-income building" means any building-

(A) which is part of a qualified low-income housing project at all times during the period-

(i) beginning on the 1st day in the compliance period on which such building is part of such a project, and

(ii) ending on the last day of the compliance period with respect to such building, and

(B) to which the amendments made by section 201(a) of the Tax Reform Act of 1986 apply.

(d) Eligible basis

For purposes of this section-

(1) New buildings

The eligible basis of a new building is its adjusted basis as of the close of the 1st taxable year of the credit period.

(2) Existing buildings

(A) In general

The eligible basis of an existing building is-

(i) in the case of a building which meets the requirements of subparagraph (B), its adjusted basis as of the close of the 1st taxable year of the credit period, and

(ii) zero in any other case.

(B) Requirements

A building meets the requirements of this subparagraph if-

(i) the building is acquired by purchase (as defined in section 179(d)(2)),

(ii) there is a period of at least 10 years between the date of its acquisition by the taxpayer and the date the building was last placed in service,

(iii) the building was not previously placed in service by the taxpayer or by any person who was a related person with respect to the taxpayer as of the time previously placed in service, and

(iv) except as provided in subsection (f)(5), a credit is allowable under subsection (a) by reason of subsection (e) with respect to the building.

(C) Adjusted basis

For purposes of subparagraph (A), the adjusted basis of any building shall not include so much of the basis of such building as is determined by reference to the basis of other property held at any time by the person acquiring the building.

(D) Special rules for subparagraph (B)

(i) Special rules for certain transfers

For purposes of determining under subparagraph (B)(ii) when a building was last placed in service, there shall not be taken into account any placement in service-

(I) in connection with the acquisition of the building in a transaction in which the basis of the building in the hands of the person acquiring it is determined in whole or in part by reference to the adjusted basis of such building in the hands of the person from whom acquired,

(II) by a person whose basis in such building is determined under section 1014(a) (relating to property acquired from a decedent),

(III) by any governmental unit or qualified nonprofit organization (as defined in subsection (h)(5)) if the requirements of subparagraph (B)(ii) are met with respect to the placement in service by such unit or organization and all the income from such property is exempt from Federal income taxation,

(IV) by any person who acquired such building by foreclosure (or by instrument in lieu of foreclosure) of any purchase-money security interest held by such person if the requirements of subparagraph (B)(ii) are met with respect to the placement in service by such person and such building is resold within 12 months after the date such building is placed in service by such person after such foreclosure, or

(V) of a single-family residence by any individual who owned and used such residence for no other purpose than as his principal residence.

(ii) Related person

For purposes of subparagraph (B)(iii), a person (hereinafter in this subclause referred to as the "related person") is related to any person if the related person bears a relationship to such person specified in section 267(b) or 707(b)(1), or the related person and such person are engaged in trades or businesses under common control (within the meaning of subsections (a) and (b) of section 52).

(3) Eligible basis reduced where disproportionate standards for units

(A) In general

Except as provided in subparagraph (B), the eligible basis of any building shall be reduced by an amount equal to the portion of the adjusted basis of the building which is attributable to residential rental units in the building which are not low-income units and which are above the average quality standard of the low-income units in the building.

(B) Exception where taxpayer elects to exclude excess costs

(i) In general

Subparagraph (A) shall not apply with respect to a residential rental unit in a building which is not a low-income unit if-

(I) the excess described in clause (ii) with respect to such unit is not greater than 15 percent of the cost described in clause (ii)(II), and

(II) the taxpayer elects to exclude from the eligible basis of such building the excess described in clause (ii) with respect to such unit.

(ii) Excess

The excess described in this clause with respect to any unit is the excess of-

(I) the cost of such unit, over

(II) the amount which would be the cost of such unit if the average cost per square foot of low-income units in the building were substituted for the cost per square foot of such unit.

The Secretary may by regulation provide for the determination of the excess under this clause on a basis other than square foot costs.

(4) Special rules relating to determination of adjusted basis

For purposes of this subsection-

(A) In general

Except as provided in subparagraphs (B) and (C), the adjusted basis of any building shall be determined without regard to the adjusted basis of any property which is not residential rental property.

(B) Basis of property in common areas, etc., included

The adjusted basis of any building shall be determined by taking into account the adjusted basis of property (of a character subject to the allowance for depreciation) used in common areas or provided as comparable amenities to all residential rental units in such building.

(C) Inclusion of basis of property used to provide services for certain nontenants

(i) In general

The adjusted basis of any building located in a qualified census tract (as defined in paragraph (5)(C)) shall be determined by taking into account the adjusted basis of property (of a character subject to the allowance for depreciation and not otherwise taken into account) used throughout the taxable year in providing any community service facility.

(ii) Limitation

The increase in the adjusted basis of any building which is taken into account by reason of clause (i) shall not exceed the sum of-

(I) 25 percent of so much of the eligible basis of the qualified low-income housing project of which it is a part as does not exceed $15,000,000, plus

(II) 10 percent of so much of the eligible basis of such project as is not taken into account under subclause (I).

For purposes of the preceding sentence, all community service facilities which are part of the same qualified low-income housing project shall be treated as one facility.

(iii) Community service facility

For purposes of this subparagraph, the term "community service facility" means any facility designed to serve primarily individuals whose income is 60 percent or less of area median income (within the meaning of subsection (g)(1)(B)).

(D) No reduction for depreciation

The adjusted basis of any building shall be determined without regard to paragraphs (2) and (3) of section 1016(a).

(5) Special rules for determining eligible basis

(A) Federal grants not taken into account in determining eligible basis

The eligible basis of a building shall not include any costs financed with the proceeds of a federally funded grant.

(B) Increase in credit for buildings in high cost areas

(i) In general

In the case of any building located in a qualified census tract or difficult development area which is designated for purposes of this subparagraph-

(I) in the case of a new building, the eligible basis of such building shall be 130 percent of such basis determined without regard to this subparagraph, and

(II) in the case of an existing building, the rehabilitation expenditures taken into account under subsection (e) shall be 130 percent of such expenditures determined without regard to this subparagraph.

(ii) Qualified census tract

(I) In general

The term "qualified census tract" means any census tract which is designated by the Secretary of Housing and Urban Development and, for the most recent year for which census data are available on household income in such tract, either in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for

such year or which has a poverty rate of at least 25 percent. If the Secretary of Housing and Urban Development determines that sufficient data for any period are not available to apply this clause on the basis of census tracts, such Secretary shall apply this clause for such period on the basis of enumeration districts.

(II) Limit on MSA's designated

The portion of a metropolitan statistical area which may be designated for purposes of this subparagraph shall not exceed an area having 20 percent of the population of such metropolitan statistical area.

(III) Determination of areas

For purposes of this clause, each metropolitan statistical area shall be treated as a separate area and all nonmetropolitan areas in a State shall be treated as 1 area.

(iii) Difficult development areas

(I) In general

The term "difficult development areas" means any area designated by the Secretary of Housing and Urban Development as an area which has high construction, land, and utility costs relative to area median gross income.

(II) Limit on areas designated

The portions of metropolitan statistical areas which may be designated for purposes of this subparagraph shall not exceed an aggregate area having 20 percent of the population of such metropolitan statistical areas. A comparable rule shall apply to nonmetropolitan areas.

(iv) Special rules and definitions

For purposes of this subparagraph-

(I) population shall be determined on the basis of the most recent decennial census for which data are available,

(II) area median gross income shall be determined in accordance with subsection (g)(4),

(III) the term "metropolitan statistical area" has the same meaning as when used in section 143(k)(2)(B), and

(IV) the term "nonmetropolitan area" means any county (or portion thereof) which is not within a metropolitan statistical area.

(v) Buildings designated by State housing credit agency

Any building which is designated by the State housing credit agency as requiring the increase in credit under this subparagraph in order for such building to be financially feasible as part of a qualified low-income housing project shall be treated for purposes of this subparagraph as located in a difficult development area which is designated for purposes of this subparagraph. The preceding sentence shall not apply to any building if paragraph (1) of subsection (h) does not apply to any portion of the eligible basis of such building by reason of paragraph (4) of such subsection.

(6) Credit allowable for certain buildings acquired during 10-year period described in paragraph (2)(B)(ii)

(A) In general

Paragraph (2)(B)(ii) shall not apply to any federally-or State-assisted building.

(B) Buildings acquired from insured depository institutions in default

On application by the taxpayer, the Secretary may waive paragraph (2)(B)(ii) with respect to any building acquired from an insured depository institution in default (as defined in section 3 of the Federal Deposit Insurance Act) or from a receiver or conservator of such an institution.

(C) Federally- or State-assisted building

For purposes of this paragraph-

(i) Federally-assisted building

The term "federally-assisted building" means any building which is substantially assisted, financed, or

operated under section 8 of the United States Housing Act of 1937, section 221(d)(3), 221(d)(4), or 236 of the National Housing Act, section 515 of the Housing Act of 1949, or any other housing program administered by the Department of Housing and Urban Development or by the Rural Housing Service of the Department of Agriculture.

(ii) State-assisted building

The term "State-assisted building" means any building which is substantially assisted, financed, or operated under any State law similar in purposes to any of the laws referred to in clause (i).

(7) Acquisition of building before end of prior compliance period

(A) In general

Under regulations prescribed by the Secretary, in the case of a building described in subparagraph (B) (or interest therein) which is acquired by the taxpayer-

(i) paragraph (2)(B) shall not apply, but

(ii) the credit allowable by reason of subsection (a) to the taxpayer for any period after such acquisition shall be equal to the amount of credit which would have been allowable under subsection (a) for such period to the prior owner referred to in subparagraph (B) had such owner not disposed of the building.

(B) Description of building

A building is described in this subparagraph if-

(i) a credit was allowed by reason of subsection (a) to any prior owner of such building, and

(ii) the taxpayer acquired such building before the end of the compliance period for such building with respect to such prior owner (determined without regard to any disposition by such prior owner).

(e) Rehabilitation expenditures treated as separate new building

(1) In general

Rehabilitation expenditures paid or incurred by the taxpayer with respect to any building shall be treated for purposes of this section as a separate new building.

(2) Rehabilitation expenditures

For purposes of paragraph (1)-

(A) In general

The term "rehabilitation expenditures" means amounts chargeable to capital account and incurred for property (or additions or improvements to property) of a character subject to the allowance for depreciation in connection with the rehabilitation of a building.

(B) Cost of acquisition, etc,1 not included

Such term does not include the cost of acquiring any building (or interest therein) or any amount not permitted to be taken into account under paragraph (3) or (4) of subsection (d).

(3) Minimum expenditures to qualify

(A) In general

Paragraph (1) shall apply to rehabilitation expenditures with respect to any building only if-

(i) the expenditures are allocable to 1 or more low-income units or substantially benefit such units, and

(ii) the amount of such expenditures during any 24-month period meets the requirements of whichever of the following subclauses requires the greater amount of such expenditures:

(I) The requirement of this subclause is met if such amount is not less than 20 percent of the adjusted basis of the building (determined as of the 1st day of such period and without regard to paragraphs (2) and (3) of section 1016(a)).

(II) The requirement of this subclause is met if the qualified basis attributable to such amount, when divided by the number of low-income units in the building, is $6,000 or more.

(B) Exception from 10 percent rehabilitation

In the case of a building acquired by the taxpayer from a governmental unit, at the election of the taxpayer, subparagraph (A)(ii)(I) shall not apply and the credit under this section for such rehabilitation expenditures shall be determined using the percentage applicable under subsection (b)(2)(B)(ii).

(C) Date of determination

The determination under subparagraph (A) shall be made as of the close of the 1st taxable year in the credit period with respect to such expenditures.

(D) Inflation adjustment

In the case of any expenditures which are treated under paragraph (4) as placed in service during any calendar year after 2009, the $6,000 amount in subparagraph (A)(ii)(II) shall be increased by an amount equal to-

(i) such dollar amount, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for such calendar year by substituting "calendar year 2008" for "calendar year 1992" in subparagraph (B) thereof.

Any increase under the preceding sentence which is not a multiple of $100 shall be rounded to the nearest multiple of $100.

(4) Special rules

For purposes of applying this section with respect to expenditures which are treated as a separate building by reason of this subsection-

(A) such expenditures shall be treated as placed in service at the close of the 24-month period referred to in paragraph (3)(A), and

(B) the applicable fraction under subsection (c)(1) shall be the applicable fraction for the building (without regard to paragraph (1)) with respect to which the expenditures were incurred.

Nothing in subsection (d)(2) shall prevent a credit from being allowed by reason of this subsection.

(5) No double counting

Rehabilitation expenditures may, at the election of the taxpayer, be taken into account under this subsection or subsection (d)(2)(A)(i) but not under both such subsections.

(6) Regulations to apply subsection with respect to group of units in building

The Secretary may prescribe regulations, consistent with the purposes of this subsection, treating a group of units with respect to which rehabilitation expenditures are incurred as a separate new building.

(f) Definition and special rules relating to credit period

(1) Credit period defined

For purposes of this section, the term "credit period" means, with respect to any building, the period of 10 taxable years beginning with-

(A) the taxable year in which the building is placed in service, or

(B) at the election of the taxpayer, the succeeding taxable year,

but only if the building is a qualified low-income building as of the close of the 1st year of such period. The election under subparagraph (B), once made, shall be irrevocable.

(2) Special rule for 1st year of credit period

(A) In general

The credit allowable under subsection (a) with respect to any building for the 1st taxable year of the credit period shall be determined by substituting for the applicable fraction under subsection (c)(1) the fraction-

(i) the numerator of which is the sum of the applicable fractions determined under subsection (c)(1) as of the close of each full month of such year during which such building was in service, and

(ii) the denominator of which is 12.

(B) Disallowed 1st year credit allowed in 11th year

Any reduction by reason of subparagraph (A) in the credit allowable (without regard to subparagraph (A)) for the 1st taxable year of the credit period shall be allowable under subsection (a) for the 1st taxable year following the credit period.

(3) Determination of applicable percentage with respect to increases in qualified basis after 1st year of credit period

(A) In general

In the case of any building which was a qualified low-income building as of the close of the 1st year of the credit period, if-

(i) as of the close of any taxable year in the compliance period (after the 1st year of the credit period) the qualified basis of such building exceeds

(ii) the qualified basis of such building as of the close of the 1st year of the credit period,

the applicable percentage which shall apply under subsection (a) for the taxable year to such excess shall be the percentage equal to 2/3 of the applicable percentage which (after the application of subsection (h)) would but for this paragraph apply to such basis.

(B) 1st year computation applies

A rule similar to the rule of paragraph (2)(A) shall apply to any increase in qualified basis to which subparagraph (A) applies for the 1st year of such increase.

(4) Dispositions of property

If a building (or an interest therein) is disposed of during any year for which credit is allowable under

subsection (a), such credit shall be allocated between the parties on the basis of the number of days during such year the building (or interest) was held by each. In any such case, proper adjustments shall be made in the application of subsection (j).

(5) Credit period for existing buildings not to begin before rehabilitation credit allowed

(A) In general

The credit period for an existing building shall not begin before the 1st taxable year of the credit period for rehabilitation expenditures with respect to the building.

(B) Acquisition credit allowed for certain buildings not allowed a rehabilitation credit

(i) In general

In the case of a building described in clause (ii)-

(I) subsection (d)(2)(B)(iv) shall not apply, and

(II) the credit period for such building shall not begin before the taxable year which would be the 1st taxable year of the credit period for rehabilitation expenditures with respect to the building under the modifications described in clause (ii)(II).

(ii) Building described

A building is described in this clause if-

(I) a waiver is granted under subsection (d)(6)(C) with respect to the acquisition of the building, and

(II) a credit would be allowed for rehabilitation expenditures with respect to such building if subsection (e)(3)(A)(ii)(I) did not apply and if the dollar amount in effect under subsection (e)(3)(A)(ii)(II) were two-thirds of such amount.

(g) Qualified low-income housing project

For purposes of this section-

(1) In general

The term "qualified low-income housing project" means any project for residential rental property if the project meets the requirements of subparagraph (A) or (B) whichever is elected by the taxpayer:

(A) 20–50 test

The project meets the requirements of this subparagraph if 20 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 50 percent or less of area median gross income.

(B) 40–60 test

The project meets the requirements of this subparagraph if 40 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income.

Any election under this paragraph, once made, shall be irrevocable. For purposes of this paragraph, any property shall not be treated as failing to be residential rental property merely because part of the building in which such property is located is used for purposes other than residential rental purposes.

(2) Rent-restricted units

(A) In general

For purposes of paragraph (1), a residential unit is rent-restricted if the gross rent with respect to such unit does not exceed 30 percent of the imputed income limitation applicable to such unit. For purposes of the preceding sentence, the amount of the income limitation under paragraph (1) applicable for any period shall not be less than such limitation applicable for the earliest period the building (which contains the unit) was included in the determination of whether the project is a qualified low-income housing project.

(B) Gross rent

For purposes of subparagraph (A), gross rent-

(i) does not include any payment under section 8 of the United States Housing Act of 1937 or any comparable rental assistance program (with respect to such unit or occupants thereof),

(ii) includes any utility allowance determined by the Secretary after taking into account such determinations under section 8 of the United States Housing Act of 1937,

(iii) does not include any fee for a supportive service which is paid to the owner of the unit (on the basis of the low-income status of the tenant of the unit) by any governmental program of assistance (or by an organization described in section 501(c)(3) and exempt from tax under section 501(a)) if such program (or organization) provides assistance for rent and the amount of assistance provided for rent is not separable from the amount of assistance provided for supportive services, and

(iv) does not include any rental payment to the owner of the unit to the extent such owner pays an equivalent amount to the Farmers' Home Administration under section 515 of the Housing Act of 1949.

For purposes of clause (iii), the term "supportive service" means any service provided under a planned program of services designed to enable residents of a residential rental property to remain independent and avoid placement in a hospital, nursing home, or intermediate care facility for the mentally or physically handicapped. In the case of a single-room occupancy unit or a building described in subsection (i)(3)(B)(iii), such term includes any service provided to assist tenants in locating and retaining permanent housing.

(C) Imputed income limitation applicable to unit

For purposes of this paragraph, the imputed income limitation applicable to a unit is the income limitation which would apply under paragraph (1) to individuals occupying the unit if the number of individuals occupying the unit were as follows:

(i) In the case of a unit which does not have a separate bedroom, 1 individual.

(ii) In the case of a unit which has 1 or more separate bedrooms, 1.5 individuals for each separate bedroom.

In the case of a project with respect to which a credit is allowable by reason of this section and for which financing is provided by a bond described in section 142(a)(7), the imputed income limitation shall apply in lieu of the otherwise applicable income limitation for purposes of applying section 142(d)(4)(B)(ii).

(D) Treatment of units occupied by individuals whose incomes rise above limit

(i) In general

Except as provided in clause (ii), notwithstanding an increase in the income of the occupants of a low-income unit above the income limitation applicable under paragraph (1), such unit shall continue to be treated as a low-income unit if the income of such occupants initially met such income limitation and such unit continues to be rent-restricted.

(ii) Next available unit must be rented to low-income tenant if income rises above 140 percent of income limit

If the income of the occupants of the unit increases above 140 percent of the income limitation applicable under paragraph (1), clause (i) shall cease to apply to such unit if any residential rental unit in the building (of a size comparable to, or smaller than, such unit) is occupied by a new resident whose income exceeds such income limitation. In the case of a project described in section 142(d)(4)(B), the preceding sentence shall be applied by substituting "170 percent" for "140 percent" and by substituting "any low-income unit in the building is occupied by a new resident whose income exceeds 40 percent of area median gross income" for "any residential unit in the building (of a size comparable to, or smaller than,

such unit) is occupied by a new resident whose income exceeds such income limitation".

(E) Units where Federal rental assistance is reduced as tenant's income increases

If the gross rent with respect to a residential unit exceeds the limitation under subparagraph (A) by reason of the fact that the income of the occupants thereof exceeds the income limitation applicable under paragraph (1), such unit shall, nevertheless, be treated as a rent-restricted unit for purposes of paragraph (1) if-

(i) a Federal rental assistance payment described in subparagraph (B)(i) is made with respect to such unit or its occupants, and

(ii) the sum of such payment and the gross rent with respect to such unit does not exceed the sum of the amount of such payment which would be made and the gross rent which would be payable with respect to such unit if-

(I) the income of the occupants thereof did not exceed the income limitation applicable under paragraph (1), and

(II) such units were rent-restricted within the meaning of subparagraph (A).

The preceding sentence shall apply to any unit only if the result described in clause (ii) is required by Federal statute as of the date of the enactment of this subparagraph and as of the date the Federal rental assistance payment is made.

(3) Date for meeting requirements

(A) In general

Except as otherwise provided in this paragraph, a building shall be treated as a qualified low-income building only if the project (of which such building is a part) meets the requirements of paragraph (1) not later than the close of the 1st year of the credit period for such building.

(B) Buildings which rely on later buildings for qualification

(i) In general

In determining whether a building (hereinafter in this subparagraph referred to as the "prior building") is a qualified low-income building, the taxpayer may take into account 1 or more additional buildings placed in service during the 12-month period described in subparagraph (A) with respect to the prior building only if the taxpayer elects to apply clause (ii) with respect to each additional building taken into account.

(ii) Treatment of elected buildings

In the case of a building which the taxpayer elects to take into account under clause (i), the period under subparagraph (A) for such building shall end at the close of the 12-month period applicable to the prior building.

(iii) Date prior building is treated as placed in service

For purposes of determining the credit period and the compliance period for the prior building, the prior building shall be treated for purposes of this section as placed in service on the most recent date any additional building elected by the taxpayer (with respect to such prior building) was placed in service.

(C) Special rule

A building-

(i) other than the 1st building placed in service as part of a project, and

(ii) other than a building which is placed in service during the 12-month period described in subparagraph (A) with respect to a prior building which becomes a qualified low-income building,

shall in no event be treated as a qualified low-income building unless the project is a qualified low-income

housing project (without regard to such building) on the date such building is placed in service.

(D) Projects with more than 1 building must be identified

For purposes of this section, a project shall be treated as consisting of only 1 building unless, before the close of the 1st calendar year in the project period (as defined in subsection (h)(1)(F)(ii)), each building which is (or will be) part of such project is identified in such form and manner as the Secretary may provide.

(4) Certain rules made applicable

Paragraphs (2) (other than subparagraph (A) thereof), (3), (4), (5), (6), and (7) of section 142(d), and section 6652(j), shall apply for purposes of determining whether any project is a qualified low-income housing project and whether any unit is a low-income unit; except that, in applying such provisions for such purposes, the term "gross rent" shall have the meaning given such term by paragraph (2)(B) of this subsection.

(5) Election to treat building after compliance period as not part of a project

For purposes of this section, the taxpayer may elect to treat any building as not part of a qualified low-income housing project for any period beginning after the compliance period for such building.

(6) Special rule where de minimis equity contribution

Property shall not be treated as failing to be residential rental property for purposes of this section merely because the occupant of a residential unit in the project pays (on a voluntary basis) to the lessor a de minimis amount to be held toward the purchase by such occupant of a residential unit in such project if-

(A) all amounts so paid are refunded to the occupant on the cessation of his occupancy of a unit in the project, and

(B) the purchase of the unit is not permitted until after the close of the compliance period with respect to the building in which the unit is located.

Any amount paid to the lessor as described in the preceding sentence shall be included in gross rent under paragraph (2) for purposes of determining whether the unit is rent-restricted.

(7) Scattered site projects

Buildings which would (but for their lack of proximity) be treated as a project for purposes of this section shall be so treated if all of the dwelling units in each of the buildings are rent-restricted (within the meaning of paragraph (2)) residential rental units.

(8) Waiver of certain de minimis errors and recertifications

On application by the taxpayer, the Secretary may waive-

(A) any recapture under subsection (j) in the case of any de minimis error in complying with paragraph (1), or

(B) any annual recertification of tenant income for purposes of this subsection, if the entire building is occupied by low-income tenants.

(9) Clarification of general public use requirement

A project does not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants-

(A) with special needs,

(B) who are members of a specified group under a Federal program or State program or policy that supports housing for such a specified group, or

(C) who are involved in artistic or literary activities.

(h) Limitation on aggregate credit allowable with respect to projects located in a State

(1) Credit may not exceed credit amount allocated to building

(A) In general

The amount of the credit determined under this section for any taxable year with respect to any building shall not exceed the housing credit dollar amount allocated to such building under this subsection.

(B) Time for making allocation

Except in the case of an allocation which meets the requirements of subparagraph (C), (D), (E), or (F), an allocation shall be taken into account under subparagraph (A) only if it is made not later than the close of the calendar year in which the building is placed in service.

(C) Exception where binding commitment

An allocation meets the requirements of this subparagraph if there is a binding commitment (not later than the close of the calendar year in which the building is placed in service) by the housing credit agency to allocate a specified housing credit dollar amount to such building beginning in a specified later taxable year.

(D) Exception where increase in qualified basis

(i) In general

An allocation meets the requirements of this subparagraph if such allocation is made not later than the close of the calendar year in which ends the taxable year to which it will 1st apply but only to the extent the amount of such allocation does not exceed the limitation under clause (ii).

(ii) Limitation

The limitation under this clause is the amount of credit allowable under this section (without regard to this subsection) for a taxable year with respect to an increase in the qualified basis of the building equal to the excess of-

(I) the qualified basis of such building as of the close of the 1st taxable year to which such allocation will apply, over

(II) the qualified basis of such building as of the close of the 1st taxable year to which the most recent prior housing credit allocation with respect to such building applied.

(iii) Housing credit dollar amount reduced by full allocation

Notwithstanding clause (i), the full amount of the allocation shall be taken into account under paragraph (2).

(E) Exception where 10 percent of cost incurred

(i) In general

An allocation meets the requirements of this subparagraph if such allocation is made with respect to a qualified building which is placed in service not later than the close of the second calendar year following the calendar year in which the allocation is made.

(ii) Qualified building

For purposes of clause (i), the term "qualified building" means any building which is part of a project if the taxpayer's basis in such project (as of the date which is 1 year after the date that the allocation was made) is more than 10 percent of the taxpayer's reasonably expected basis in such project (as of the close of the second calendar year referred to in clause (i)). Such term does not include any existing building unless a credit is allowable under subsection (e) for rehabilitation expenditures paid or incurred by the taxpayer with respect to such building for a taxable year ending during the second calendar year referred to in clause (i) or the prior taxable year.

(F) Allocation of credit on a project basis

(i) In general

In the case of a project which includes (or will include) more than 1 building, an allocation meets the requirements of this subparagraph if-

(I) the allocation is made to the project for a calendar year during the project period,

(II) the allocation only applies to buildings placed in service during or after the calendar year for which the allocation is made, and

(III) the portion of such allocation which is allocated to any building in such project is specified not later than the close of the calendar year in which the building is placed in service.

(ii) Project period

For purposes of clause (i), the term "project period" means the period-

(I) beginning with the 1st calendar year for which an allocation may be made for the 1st building placed in service as part of such project, and

(II) ending with the calendar year the last building is placed in service as part of such project.

(2) Allocated credit amount to apply to all taxable years ending during or after credit allocation year

Any housing credit dollar amount allocated to any building for any calendar year-

(A) shall apply to such building for all taxable years in the compliance period ending during or after such calendar year, and

(B) shall reduce the aggregate housing credit dollar amount of the allocating agency only for such calendar year.

(3) Housing credit dollar amount for agencies

(A) In general

The aggregate housing credit dollar amount which a housing credit agency may allocate for any calendar year is the portion of the State housing credit ceiling allocated under this paragraph for such calendar year to such agency.

(B) State ceiling initially allocated to State housing credit agencies

Except as provided in subparagraphs (D) and (E), the State housing credit ceiling for each calendar year shall be allocated to the housing credit agency of such State. If there is more than 1 housing credit agency of a State, all such agencies shall be treated as a single agency.

(C) State housing credit ceiling

The State housing credit ceiling applicable to any State for any calendar year shall be an amount equal to the sum of-

(i) the unused State housing credit ceiling (if any) of such State for the preceding calendar year,

(ii) the greater of-

(I) $1.75 multiplied by the State population, or

(II) $2,000,000,

(iii) the amount of State housing credit ceiling returned in the calendar year, plus

(iv) the amount (if any) allocated under subparagraph (D) to such State by the Secretary.

For purposes of clause (i), the unused State housing credit ceiling for any calendar year is the excess (if any) of the sum of the amounts described in clauses (ii) through (iv) over the aggregate housing credit dollar amount allocated for such year. For purposes of clause (iii), the amount of State housing credit ceiling returned in the calendar year equals the housing credit dollar amount previously allocated within the State to any project which fails to meet the 10 percent test under paragraph (1)(E)(ii) on a date after the close of the calendar year in which the allocation was made or which does not become a qualified low-income housing project within the period required by this section or the terms of the allocation or to any project with respect to which an

allocation is cancelled by mutual consent of the housing credit agency and the allocation recipient.

(D) Unused housing credit carryovers allocated among certain States

(i) In general

The unused housing credit carryover of a State for any calendar year shall be assigned to the Secretary for allocation among qualified States for the succeeding calendar year.

(ii) Unused housing credit carryover

For purposes of this subparagraph, the unused housing credit carryover of a State for any calendar year is the excess (if any) of-

(I) the unused State housing credit ceiling for the year preceding such year, over

(II) the aggregate housing credit dollar amount allocated for such year.

(iii) Formula for allocation of unused housing credit carryovers among qualified States

The amount allocated under this subparagraph to a qualified State for any calendar year shall be the amount determined by the Secretary to bear the same ratio to the aggregate unused housing credit carryovers of all States for the preceding calendar year as such State's population for the calendar year bears to the population of all qualified States for the calendar year. For purposes of the preceding sentence, population shall be determined in accordance with section 146(j).

(iv) Qualified State

For purposes of this subparagraph, the term "qualified State" means, with respect to a calendar year, any State-

(I) which allocated its entire State housing credit ceiling for the preceding calendar year, and

(II) for which a request is made (not later than May 1 of the calendar year) to receive an allocation under clause (iii).

(E) Special rule for States with constitutional home rule cities

For purposes of this subsection-

(i) In general

The aggregate housing credit dollar amount for any constitutional home rule city for any calendar year shall be an amount which bears the same ratio to the State housing credit ceiling for such calendar year as-

(I) the population of such city, bears to

(II) the population of the entire State.

(ii) Coordination with other allocations

In the case of any State which contains 1 or more constitutional home rule cities, for purposes of applying this paragraph with respect to housing credit agencies in such State other than constitutional home rule cities, the State housing credit ceiling for any calendar year shall be reduced by the aggregate housing credit dollar amounts determined for such year for all constitutional home rule cities in such State.

(iii) Constitutional home rule city

For purposes of this paragraph, the term "constitutional home rule city" has the meaning given such term by section 146(d)(3)(C).

(F) State may provide for different allocation

Rules similar to the rules of section 146(e) (other than paragraph (2)(B) thereof) shall apply for purposes of this paragraph.

(G) Population

For purposes of this paragraph, population shall be determined in accordance with section 146(j).

(H) Cost-of-living adjustment

(i) In general

In the case of a calendar year after 2002, the $2,000,000 and $1.75 amounts in subparagraph (C) shall each be increased by an amount equal to-

(I) such dollar amount, multiplied by

(II) the cost-of-living adjustment determined under section 1(f)(3) for such calendar year by substituting "calendar year 2001" for "calendar year 1992" in subparagraph (B) thereof.

(ii) Rounding

(I) In the case of the $2,000,000 amount, any increase under clause (i) which is not a multiple of $5,000 shall be rounded to the next lowest multiple of $5,000.

(II) In the case of the $1.75 amount, any increase under clause (i) which is not a multiple of 5 cents shall be rounded to the next lowest multiple of 5 cents.

(I) Increase in State housing credit ceiling for 2008 and 2009

In the case of calendar years 2008 and 2009-

(i) the dollar amount in effect under subparagraph (C)(ii)(I) for such calendar year (after any increase under subparagraph (H)) shall be increased by $0.20, and

(ii) the dollar amount in effect under subparagraph (C)(ii)(II) for such calendar year (after any increase under subparagraph (H)) shall be increased by an amount equal to 10 percent of such dollar amount (rounded to the next lowest multiple of $5,000).

(4) Credit for buildings financed by tax-exempt bonds subject to volume cap not taken into account

(A) In general

Paragraph (1) shall not apply to the portion of any credit allowable under subsection (a) which is attributable to eligible basis financed by any obligation the interest on which is exempt from tax under section 103 if-

(i) such obligation is taken into account under section 146, and

(ii) principal payments on such financing are applied within a reasonable period to redeem obligations the proceeds of which were used to provide such financing or such financing is refunded as described in section 146(i)(6).

(B) Special rule where 50 percent or more of building is financed with tax-exempt bonds subject to volume cap

For purposes of subparagraph (A), if 50 percent or more of the aggregate basis of any building and the land on which the building is located is financed by any obligation described in subparagraph (A), paragraph (1) shall not apply to any portion of the credit allowable under subsection (a) with respect to such building.

(5) Portion of State ceiling set-aside for certain projects involving qualified nonprofit organizations

(A) In general

Not more than 90 percent of the State housing credit ceiling for any State for any calendar year shall be allocated to projects other than qualified low-income housing projects described in subparagraph (B).

(B) Projects involving qualified nonprofit organizations

For purposes of subparagraph (A), a qualified low-income housing project is described in this subparagraph if a qualified nonprofit organization is to own an interest in the project (directly or through a partnership) and materially participate (within the meaning of section 469(h)) in the development and operation of the project throughout the compliance period.

(C) Qualified nonprofit organization

For purposes of this paragraph, the term "qualified nonprofit organization" means any organization if-

(i) such organization is described in paragraph (3) or (4) of section 501(c) and is exempt from tax under section 501(a),

(ii) such organization is determined by the State housing credit agency not to be affiliated with or controlled by a for-profit organization; 2 and

(iii) 1 of the exempt purposes of such organization includes the fostering of low-income housing.

(D) Treatment of certain subsidiaries

(i) In general

For purposes of this paragraph, a qualified nonprofit organization shall be treated as satisfying the ownership and material participation test of subparagraph (B) if any qualified corporation in which such organization holds stock satisfies such test.

(ii) Qualified corporation

For purposes of clause (i), the term "qualified corporation" means any corporation if 100 percent of the stock of such corporation is held by 1 or more qualified nonprofit organizations at all times during the period such corporation is in existence.

(E) State may not override set-aside

Nothing in subparagraph (F) of paragraph (3) shall be construed to permit a State not to comply with subparagraph (A) of this paragraph.

(6) Buildings eligible for credit only if minimum long-term commitment to low-income housing

(A) In general

No credit shall be allowed by reason of this section with respect to any building for the taxable year unless an extended low-income housing commitment is in effect as of the end of such taxable year.

(B) Extended low-income housing commitment

For purposes of this paragraph, the term "extended low-income housing commitment" means any agreement between the taxpayer and the housing credit agency-

(i) which requires that the applicable fraction (as defined in subsection (c)(1)) for the building for each taxable year in the extended use period will not be less than the applicable fraction specified in such agreement and which prohibits the actions described in subclauses (I) and (II) of subparagraph (E)(ii),

(ii) which allows individuals who meet the income limitation applicable to the building under subsection (g) (whether prospective, present, or former occupants of the building) the right to enforce in any State court the requirement and prohibitions of clause (i),

(iii) which prohibits the disposition to any person of any portion of the building to which such agreement applies unless all of the building to which such agreement applies is disposed of to such person,

(iv) which prohibits the refusal to lease to a holder of a voucher or certificate of eligibility under section 8 of the United States Housing Act of 1937 because of the status of the prospective tenant as such a holder,

(v) which is binding on all successors of the taxpayer, and

(vi) which, with respect to the property, is recorded pursuant to State law as a restrictive covenant.

(C) Allocation of credit may not exceed amount necessary to support commitment

(i) In general

The housing credit dollar amount allocated to any building may not exceed the amount necessary to support the applicable fraction specified in the extended low-income housing commitment for such building, including any increase in such fraction pursuant to the application of subsection (f)(3) if such increase is reflected in an amended low-income housing commitment.

(ii) Buildings financed by tax-exempt bonds

If paragraph (4) applies to any building the amount of credit allowed in any taxable year may not exceed the amount necessary to support the applicable fraction specified in the extended low-income housing

commitment for such building. Such commitment may be amended to increase such fraction.

(D) Extended use period

For purposes of this paragraph, the term "extended use period" means the period-

(i) beginning on the 1st day in the compliance period on which such building is part of a qualified low-income housing project, and

(ii) ending on the later of-

(I) the date specified by such agency in such agreement, or

(II) the date which is 15 years after the close of the compliance period.

(E) Exceptions if foreclosure or if no buyer willing to maintain low-income status

(i) In general

The extended use period for any building shall terminate-

(I) on the date the building is acquired by foreclosure (or instrument in lieu of foreclosure) unless the Secretary determines that such acquisition is part of an arrangement with the taxpayer a purpose of which is to terminate such period, or

(II) on the last day of the period specified in subparagraph (I) if the housing credit agency is unable to present during such period a qualified contract for the acquisition of the low-income portion of the building by any person who will continue to operate such portion as a qualified low-income building.

Subclause (II) shall not apply to the extent more stringent requirements are provided in the agreement or in State law.

(ii) Eviction, etc. of existing low-income tenants not permitted

The termination of an extended use period under clause (i) shall not be construed to permit before the close of the 3-year period following such termination-

(I) the eviction or the termination of tenancy (other than for good cause) of an existing tenant of any low-income unit, or

(II) any increase in the gross rent with respect to such unit not otherwise permitted under this section.

(F) Qualified contract

For purposes of subparagraph (E), the term "qualified contract" means a bona fide contract to acquire (within a reasonable period after the contract is entered into) the nonlow-income portion of the building for fair market value and the low-income portion of the building for an amount not less than the applicable fraction (specified in the extended low-income housing commitment) of-

(i) the sum of-

(I) the outstanding indebtedness secured by, or with respect to, the building,

(II) the adjusted investor equity in the building, plus

(III) other capital contributions not reflected in the amounts described in subclause (I) or (II), reduced by

(ii) cash distributions from (or available for distribution from) the project.

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out this paragraph, including regulations to prevent the manipulation of the amount determined under the preceding sentence.

(G) Adjusted investor equity

(i) In general

For purposes of subparagraph (E), the term "adjusted investor equity" means, with respect to any calendar year, the aggregate amount of cash taxpayers invested with respect to the project increased by the amount equal to-

(I) such amount, multiplied by

(II) the cost-of-living adjustment for such calendar year, determined under section 1(f)(3) by substituting the base calendar year for "calendar year 1987".

An amount shall be taken into account as an investment in the project only to the extent there was an obligation to invest such amount as of the beginning of the credit period and to the extent such amount is reflected in the adjusted basis of the project.

(ii) Cost-of-living increases in excess of 5 percent not taken into account

Under regulations prescribed by the Secretary, if the CPI for any calendar year (as defined in section 1(f)(4)) exceeds the CPI for the preceding calendar year by more than 5 percent, the CPI for the base calendar year shall be increased such that such excess shall never be taken into account under clause (i).

(iii) Base calendar year

For purposes of this subparagraph, the term "base calendar year" means the calendar year with or within which the 1st taxable year of the credit period ends.

(H) Low-income portion

For purposes of this paragraph, the low-income portion of a building is the portion of such building equal to the applicable fraction specified in the extended low-income housing commitment for the building.

(I) Period for finding buyer

The period referred to in this subparagraph is the 1-year period beginning on the date (after the 14th year of the compliance period) the taxpayer submits a written request to the housing credit agency to find a

person to acquire the taxpayer's interest in the low-income portion of the building.

(J) Effect of noncompliance

If, during a taxable year, there is a determination that an extended low-income housing agreement was not in effect as of the beginning of such year, such determination shall not apply to any period before such year and subparagraph (A) shall be applied without regard to such determination if the failure is corrected within 1 year from the date of the determination.

(K) Projects which consist of more than 1 building

The application of this paragraph to projects which consist of more than 1 building shall be made under regulations prescribed by the Secretary.

(7) Special rules

(A) Building must be located within jurisdiction of credit agency

A housing credit agency may allocate its aggregate housing credit dollar amount only to buildings located in the jurisdiction of the governmental unit of which such agency is a part.

(B) Agency allocations in excess of limit

If the aggregate housing credit dollar amounts allocated by a housing credit agency for any calendar year exceed the portion of the State housing credit ceiling allocated to such agency for such calendar year, the housing credit dollar amounts so allocated shall be reduced (to the extent of such excess) for buildings in the reverse of the order in which the allocations of such amounts were made.

(C) Credit reduced if allocated credit dollar amount is less than credit which would be allowable without regard to placed in service convention, etc.

(i) In general

The amount of the credit determined under this section with respect to any building shall not exceed the clause (ii) percentage of the amount of the credit

which would (but for this subparagraph) be determined under this section with respect to such building.

(ii) Determination of percentage

For purposes of clause (i), the clause (ii) percentage with respect to any building is the percentage which-

(I) the housing credit dollar amount allocated to such building bears to

(II) the credit amount determined in accordance with clause (iii).

(iii) Determination of credit amount

The credit amount determined in accordance with this clause is the amount of the credit which would (but for this subparagraph) be determined under this section with respect to the building if-

(I) this section were applied without regard to paragraphs (2)(A) and (3)(B) of subsection (f), and

(II) subsection (f)(3)(A) were applied without regard to "the percentage equal to 2/3 of".

(D) Housing credit agency to specify applicable percentage and maximum qualified basis

In allocating a housing credit dollar amount to any building, the housing credit agency shall specify the applicable percentage and the maximum qualified basis which may be taken into account under this section with respect to such building. The applicable percentage and maximum qualified basis so specified shall not exceed the applicable percentage and qualified basis determined under this section without regard to this subsection.

(8) Other definitions

For purposes of this subsection-

(A) Housing credit agency

The term "housing credit agency" means any agency authorized to carry out this subsection.

(B) Possessions treated as States

The term "State" includes a possession of the United States.

(i) Definitions and special rules

For purposes of this section-

(1) Compliance period

The term "compliance period" means, with respect to any building, the period of 15 taxable years beginning with the 1st taxable year of the credit period with respect thereto.

(2) Determination of whether building is federally subsidized

(A) In general

Except as otherwise provided in this paragraph, for purposes of subsection (b)(1), a new building shall be treated as federally subsidized for any taxable year if, at any time during such taxable year or any prior taxable year, there is or was outstanding any obligation the interest on which is exempt from tax under section 103 the proceeds of which 3 are or were used (directly or indirectly) with respect to such building or the operation thereof.

(B) Election to reduce eligible basis by proceeds of obligations

A tax-exempt obligation shall not be taken into account under subparagraph (A) if the taxpayer elects to exclude from the eligible basis of the building for purposes of subsection (d) the proceeds of such obligation.

(C) Special rule for subsidized construction financing

Subparagraph (A) shall not apply to any tax-exempt obligation used to provide construction financing for any building if-

(i) such obligation (when issued) identified the building for which the proceeds of such obligation would be used, and

(ii) such obligation is redeemed before such building is placed in service.

(3) Low-income unit

(A) In general

The term "low-income unit" means any unit in a building if-

(i) such unit is rent-restricted (as defined in subsection (g)(2)), and

(ii) the individuals occupying such unit meet the income limitation applicable under subsection (g)(1) to the project of which such building is a part.

(B) Exceptions

(i) In general

A unit shall not be treated as a low-income unit unless the unit is suitable for occupancy and used other than on a transient basis.

(ii) Suitability for occupancy

For purposes of clause (i), the suitability of a unit for occupancy shall be determined under regulations prescribed by the Secretary taking into account local health, safety, and building codes.

(iii) Transitional housing for homeless

For purposes of clause (i), a unit shall be considered to be used other than on a transient basis if the unit contains sleeping accommodations and kitchen and bathroom facilities and is located in a building-

(I) which is used exclusively to facilitate the transition of homeless individuals (within the meaning of section 103 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302), as in effect on the date of the enactment of this clause) to independent living within 24 months, and

(II) in which a governmental entity or qualified nonprofit organization (as defined in subsection (h)(5)) provides such individuals with temporary housing and supportive services designed to assist such individuals in locating and retaining permanent housing.

(iv) Single-room occupancy units

For purposes of clause (i), a single-room occupancy unit shall not be treated as used on a transient basis merely because it is rented on a month-by-month basis.

(C) Special rule for buildings having 4 or fewer units

In the case of any building which has 4 or fewer residential rental units, no unit in such building shall be treated as a low-income unit if the units in such building are owned by-

(i) any individual who occupies a residential unit in such building, or

(ii) any person who is related (as defined in subsection (d)(2)(D)(iii)) to such individual.

(D) Certain students not to disqualify unit

A unit shall not fail to be treated as a low-income unit merely because it is occupied-

(i) by an individual who is-

(I) a student and receiving assistance under title IV of the Social Security Act,

(II) a student who was previously under the care and placement responsibility of the State agency responsible for administering a plan under part B or part E of title IV of the Social Security Act, or

(III) enrolled in a job training program receiving assistance under the Job Training Partnership Act or under other similar Federal, State, or local laws, or

(ii) entirely by full-time students if such students are-

(I) single parents and their children and such parents are not dependents (as defined in section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof) of another individual and such children are not dependents (as so defined) of another individual other than a parent of such children, or.4

(II) married and file a joint return.

(E) Owner-occupied buildings having 4 or fewer units eligible for credit where development plan

(i) In general

Subparagraph (C) shall not apply to the acquisition or rehabilitation of a building pursuant to a development plan of action sponsored by a State or local government or a qualified nonprofit organization (as defined in subsection (h)(5)(C)).

(ii) Limitation on credit

In the case of a building to which clause (i) applies, the applicable fraction shall not exceed 80 percent of the unit fraction.

(iii) Certain unrented units treated as owner-occupied

In the case of a building to which clause (i) applies, any unit which is not rented for 90 days or more shall be treated as occupied by the owner of the building as of the 1st day it is not rented.

(4) New building

The term "new building" means a building the original use of which begins with the taxpayer.

(5) Existing building

The term "existing building" means any building which is not a new building.

(6) Application to estates and trusts

In the case of an estate or trust, the amount of the credit determined under subsection (a) and any increase in tax under subsection (j) shall be apportioned between the estate or trust and the beneficiaries on the basis of the income of the estate or trust allocable to each.

(7) Impact of tenant's right of 1st refusal to acquire property

(A) In general

No Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified low-income building merely by reason of a

right of 1st refusal held by the tenants (in cooperative form or otherwise) or resident management corporation of such building or by a qualified nonprofit organization (as defined in subsection (h)(5)(C)) or government agency to purchase the property after the close of the compliance period for a price which is not less than the minimum purchase price determined under subparagraph (B).

(B) Minimum purchase price

For purposes of subparagraph (A), the minimum purchase price under this subparagraph is an amount equal to the sum of-

(i) the principal amount of outstanding indebtedness secured by the building (other than indebtedness incurred within the 5-year period ending on the date of the sale to the tenants), and

(ii) all Federal, State, and local taxes attributable to such sale.

Except in the case of Federal income taxes, there shall not be taken into account under clause (ii) any additional tax attributable to the application of clause (ii).

(8) Treatment of rural projects

For purposes of this section, in the case of any project for residential rental property located in a rural area (as defined in section 520 of the Housing Act of 1949), any income limitation measured by reference to area median gross income shall be measured by reference to the greater of area median gross income or national non-metropolitan median income. The preceding sentence shall not apply with respect to any building if paragraph (1) of section 42(h) does not apply by reason of paragraph (4) thereof to any portion of the credit determined under this section with respect to such building.

(9) Coordination with low-income housing grants

(A) Reduction in State housing credit ceiling for low-income housing grants received in 2009

For purposes of this section, the amounts described in clauses (i) through (iv) of subsection (h)(3)(C) with respect to any State for 2009 shall each be reduced by so much of such amount as is taken into account in determining the amount of any grant to such State under section 1602 of the American Recovery and Reinvestment Tax Act of 2009.

(B) Special rule for basis

Basis of a qualified low-income building shall not be reduced by the amount of any grant described in subparagraph (A).

(j) Recapture of credit

(1) In general

If-

(A) as of the close of any taxable year in the compliance period, the amount of the qualified basis of any building with respect to the taxpayer is less than

(B) the amount of such basis as of the close of the preceding taxable year,

then the taxpayer's tax under this chapter for the taxable year shall be increased by the credit recapture amount.

(2) Credit recapture amount

For purposes of paragraph (1), the credit recapture amount is an amount equal to the sum of-

(A) the aggregate decrease in the credits allowed to the taxpayer under section 38 for all prior taxable years which would have resulted if the accelerated portion of the credit allowable by reason of this section were not allowed for all prior taxable years with respect to the excess of the amount described in paragraph (1)(B) over the amount described in paragraph (1)(A), plus

(B) interest at the overpayment rate established under section 6621 on the amount determined under subparagraph (A) for each prior taxable year for the

period beginning on the due date for filing the return for the prior taxable year involved.

No deduction shall be allowed under this chapter for interest described in subparagraph (B).

(3) Accelerated portion of credit

For purposes of paragraph (2), the accelerated portion of the credit for the prior taxable years with respect to any amount of basis is the excess of-

(A) the aggregate credit allowed by reason of this section (without regard to this subsection) for such years with respect to such basis, over

(B) the aggregate credit which would be allowable by reason of this section for such years with respect to such basis if the aggregate credit which would (but for this subsection) have been allowable for the entire compliance period were allowable ratably over 15 years.

(4) Special rules

(A) Tax benefit rule

The tax for the taxable year shall be increased under paragraph (1) only with respect to credits allowed by reason of this section which were used to reduce tax liability. In the case of credits not so used to reduce tax liability, the carryforwards and carrybacks under section 39 shall be appropriately adjusted.

(B) Only basis for which credit allowed taken into account

Qualified basis shall be taken into account under paragraph (1)(B) only to the extent such basis was taken into account in determining the credit under subsection (a) for the preceding taxable year referred to in such paragraph.

(C) No recapture of additional credit allowable by reason of subsection (f)(3)

Paragraph (1) shall apply to a decrease in qualified basis only to the extent such decrease exceeds the amount of qualified basis with respect to which a

credit was allowable for the taxable year referred to in paragraph (1)(B) by reason of subsection (f)(3).

(D) No credits against tax

Any increase in tax under this subsection shall not be treated as a tax imposed by this chapter for purposes of determining the amount of any credit under this chapter.

(E) No recapture by reason of casualty loss

The increase in tax under this subsection shall not apply to a reduction in qualified basis by reason of a casualty loss to the extent such loss is restored by reconstruction or replacement within a reasonable period established by the Secretary.

(F) No recapture where de minimis changes in floor space

The Secretary may provide that the increase in tax under this subsection shall not apply with respect to any building if-

(i) such increase results from a de minimis change in the floor space fraction under subsection (c)(1), and

(ii) the building is a qualified low-income building after such change.

(5) Certain partnerships treated as the taxpayer

(A) In general

For purposes of applying this subsection to a partnership to which this paragraph applies-

(i) such partnership shall be treated as the taxpayer to which the credit allowable under subsection (a) was allowed,

(ii) the amount of such credit allowed shall be treated as the amount which would have been allowed to the partnership were such credit allowable to such partnership,

(iii) paragraph (4)(A) shall not apply, and

(iv) the amount of the increase in tax under this subsection for any taxable year shall be allocated

among the partners of such partnership in the same manner as such partnership's taxable income for such year is allocated among such partners.

(B) Partnerships to which paragraph applies

This paragraph shall apply to any partnership which has 35 or more partners unless the partnership elects not to have this paragraph apply.

(C) Special rules

(i) Husband and wife treated as 1 partner

For purposes of subparagraph (B)(i), a husband and wife (and their estates) shall be treated as 1 partner.

(ii) Election irrevocable

Any election under subparagraph (B), once made, shall be irrevocable.

(6) No recapture on disposition of building which continues in qualified use

(A) In general

The increase in tax under this subsection shall not apply solely by reason of the disposition of a building (or an interest therein) if it is reasonably expected that such building will continue to be operated as a qualified low-income building for the remaining compliance period with respect to such building.

(B) Statute of limitations

If a building (or an interest therein) is disposed of during any taxable year and there is any reduction in the qualified basis of such building which results in an increase in tax under this subsection for such taxable or any subsequent taxable year, then-

(i) the statutory period for the assessment of any deficiency with respect to such increase in tax shall not expire before the expiration of 3 years from the date the Secretary is notified by the taxpayer (in such manner as the Secretary may prescribe) of such reduction in qualified basis, and

(ii) such deficiency may be assessed before the expiration of such 3-year period notwithstanding the provisions of any other law or rule of law which would otherwise prevent such assessment.

(k) Application of at-risk rules

For purposes of this section-

(1) In general

Except as otherwise provided in this subsection, rules similar to the rules of section 49(a)(1) (other than subparagraphs (D)(ii)(II) and (D)(iv)(I) thereof), section 49(a)(2), and section 49(b)(1) shall apply in determining the qualified basis of any building in the same manner as such sections apply in determining the credit base of property.

(2) Special rules for determining qualified person

For purposes of paragraph (1)-

(A) In general

If the requirements of subparagraphs (B), (C), and (D) are met with respect to any financing borrowed from a qualified nonprofit organization (as defined in subsection (h)(5)), the determination of whether such financing is qualified commercial financing with respect to any qualified low-income building shall be made without regard to whether such organization-

(i) is actively and regularly engaged in the business of lending money, or

(ii) is a person described in section 49(a)(1)(D)(iv)(II).

(B) Financing secured by property

The requirements of this subparagraph are met with respect to any financing if such financing is secured by the qualified low-income building, except that this subparagraph shall not apply in the case of a federally assisted building described in subsection (d)(6)(B) if-

(i) a security interest in such building is not permitted by a Federal agency holding or insuring the mortgage secured by such building, and

(ii) the proceeds from the financing (if any) are applied to acquire or improve such building..5

(C) Portion of building attributable to financing

The requirements of this subparagraph are met with respect to any financing for any taxable year in the compliance period if, as of the close of such taxable year, not more than 60 percent of the eligible basis of the qualified low-income building is attributable to such financing (reduced by the principal and interest of any governmental financing which is part of a wrap-around mortgage involving such financing).

(D) Repayment of principal and interest

The requirements of this subparagraph are met with respect to any financing if such financing is fully repaid on or before the earliest of-

(i) the date on which such financing matures,

(ii) the 90th day after the close of the compliance period with respect to the qualified low-income building, or

(iii) the date of its refinancing or the sale of the building to which such financing relates.

In the case of a qualified nonprofit organization which is not described in section 49(a)(1)(D)(iv)(II) with respect to a building, clause (ii) of this subparagraph shall be applied as if the date described therein were the 90th day after the earlier of the date the building ceases to be a qualified low-income building or the date which is 15 years after the close of a compliance period with respect thereto.

(3) Present value of financing

If the rate of interest on any financing described in paragraph (2)(A) is less than the rate which is 1 percentage point below the applicable Federal rate as of the time such financing is incurred, then the qualified basis (to which such financing relates) of the qualified low-income building shall be the present value of the amount of such financing, using as the discount rate such applicable Federal rate. For

purposes of the preceding sentence, the rate of interest on any financing shall be determined by treating interest to the extent of government subsidies as not payable.

(4) Failure to fully repay

(A) In general

To the extent that the requirements of paragraph (2)(D) are not met, then the taxpayer's tax under this chapter for the taxable year in which such failure occurs shall be increased by an amount equal to the applicable portion of the credit under this section with respect to such building, increased by an amount of interest for the period-

(i) beginning with the due date for the filing of the return of tax imposed by chapter 1 for the 1st taxable year for which such credit was allowable, and

(ii) ending with the due date for the taxable year in which such failure occurs,

determined by using the underpayment rate and method under section 6621.

(B) Applicable portion

For purposes of subparagraph (A), the term "applicable portion" means the aggregate decrease in the credits allowed to a taxpayer under section 38 for all prior taxable years which would have resulted if the eligible basis of the building were reduced by the amount of financing which does not meet requirements of paragraph (2)(D).

(C) Certain rules to apply

Rules similar to the rules of subparagraphs (A) and (D) of subsection (j)(4) shall apply for purposes of this subsection.

(l) Certifications and other reports to Secretary

(1) Certification with respect to 1st year of credit period

Following the close of the 1st taxable year in the credit period with respect to any qualified low-income building, the taxpayer shall certify to the Secretary (at such time and in such form and in such manner as the Secretary prescribes)-

(A) the taxable year, and calendar year, in which such building was placed in service,

(B) the adjusted basis and eligible basis of such building as of the close of the 1st year of the credit period,

(C) the maximum applicable percentage and qualified basis permitted to be taken into account by the appropriate housing credit agency under subsection (h),

(D) the election made under subsection (g) with respect to the qualified low-income housing project of which such building is a part, and

(E) such other information as the Secretary may require.

In the case of a failure to make the certification required by the preceding sentence on the date prescribed therefor, unless it is shown that such failure is due to reasonable cause and not to willful neglect, no credit shall be allowable by reason of subsection (a) with respect to such building for any taxable year ending before such certification is made.

(2) Annual reports to the Secretary

The Secretary may require taxpayers to submit an information return (at such time and in such form and manner as the Secretary prescribes) for each taxable year setting forth-

(A) the qualified basis for the taxable year of each qualified low-income building of the taxpayer,

(B) the information described in paragraph (1)(C) for the taxable year, and

(C) such other information as the Secretary may require.

The penalty under section 6652(j) shall apply to any failure to submit the return required by the Secretary under the preceding sentence on the date prescribed therefor.

(3) Annual reports from housing credit agencies

Each agency which allocates any housing credit amount to any building for any calendar year shall submit to the Secretary (at such time and in such manner as the Secretary shall prescribe) an annual report specifying-

(A) the amount of housing credit amount allocated to each building for such year,

(B) sufficient information to identify each such building and the taxpayer with respect thereto, and

(C) such other information as the Secretary may require.

The penalty under section 6652(j) shall apply to any failure to submit the report required by the preceding sentence on the date prescribed therefor.

(m) Responsibilities of housing credit agencies

(1) Plans for allocation of credit among projects

(A) In general

Notwithstanding any other provision of this section, the housing credit dollar amount with respect to any building shall be zero unless-

(i) such amount was allocated pursuant to a qualified allocation plan of the housing credit agency which is approved by the governmental unit (in accordance with rules similar to the rules of section 147(f)(2) (other than subparagraph (B)(ii) thereof)) of which such agency is a part,

(ii) such agency notifies the chief executive officer (or the equivalent) of the local jurisdiction within which the building is located of such project and

provides such individual a reasonable opportunity to comment on the project,

(iii) a comprehensive market study of the housing needs of low-income individuals in the area to be served by the project is conducted before the credit allocation is made and at the developer's expense by a disinterested party who is approved by such agency, and

(iv) a written explanation is available to the general public for any allocation of a housing credit dollar amount which is not made in accordance with established priorities and selection criteria of the housing credit agency.

(B) Qualified allocation plan

For purposes of this paragraph, the term "qualified allocation plan" means any plan-

(i) which sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions,

(ii) which also gives preference in allocating housing credit dollar amounts among selected projects to-

(I) projects serving the lowest income tenants,

(II) projects obligated to serve qualified tenants for the longest periods, and

(III) projects which are located in qualified census tracts (as defined in subsection (d)(5)(C)) and the development of which contributes to a concerted community revitalization plan, and

(iii) which provides a procedure that the agency (or an agent or other private contractor of such agency) will follow in monitoring for noncompliance with the provisions of this section and in notifying the Internal Revenue Service of such noncompliance which such agency becomes aware of and in monitoring for noncompliance with habitability standards through regular site visits.

(C) Certain selection criteria must be used

The selection criteria set forth in a qualified allocation plan must include

(i) project location,

(ii) housing needs characteristics,

(iii) project characteristics, including whether the project includes the use of existing housing as part of a community revitalization plan,

(iv) sponsor characteristics,

(v) tenant populations with special housing needs,

(vi) public housing waiting lists,

(vii) tenant populations of individuals with children,

(viii) projects intended for eventual tenant ownership,

(ix) the energy efficiency of the project, and

(x) the historic nature of the project.

(D) Application to bond financed projects

Subsection (h)(4) shall not apply to any project unless the project satisfies the requirements for allocation of a housing credit dollar amount under the qualified allocation plan applicable to the area in which the project is located.

(2) Credit allocated to building not to exceed amount necessary to assure project feasibility

(A) In general

The housing credit dollar amount allocated to a project shall not exceed the amount the housing credit agency determines is necessary for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the credit period.

(B) Agency evaluation

In making the determination under subparagraph (A), the housing credit agency shall consider-

(i) the sources and uses of funds and the total financing planned for the project,

(ii) any proceeds or receipts expected to be generated by reason of tax benefits,

(iii) the percentage of the housing credit dollar amount used for project costs other than the cost of intermediaries, and

(iv) the reasonableness of the developmental and operational costs of the project.

Clause (iii) shall not be applied so as to impede the development of projects in hard-to-develop areas. Such a determination shall not be construed to be a representation or warranty as to the feasibility or viability of the project.

(C) Determination made when credit amount applied for and when building placed in service

(i) In general

A determination under subparagraph (A) shall be made as of each of the following times:

(I) The application for the housing credit dollar amount.

(II) The allocation of the housing credit dollar amount.

(III) The date the building is placed in service.

(ii) Certification as to amount of other subsidies

Prior to each determination under clause (i), the taxpayer shall certify to the housing credit agency the full extent of all Federal, State, and local subsidies which apply (or which the taxpayer expects to apply) with respect to the building.

(D) Application to bond financed projects

Subsection (h)(4) shall not apply to any project unless the governmental unit which issued the bonds (or on behalf of which the bonds were issued) makes a

determination under rules similar to the rules of subparagraphs (A) and (B).

(n) Regulations

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section, including regulations-

(1) dealing with-

(A) projects which include more than 1 building or only a portion of a building,

(B) buildings which are placed in service in portions,

(2) providing for the application of this section to short taxable years,

(3) preventing the avoidance of the rules of this section, and

(4) providing the opportunity for housing credit agencies to correct administrative errors and omissions with respect to allocations and record keeping within a reasonable period after their discovery, taking into account the availability of regulations and other administrative guidance from the Secretary.

CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices.

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CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on June 14, 2017, I have made service of this Brief upon the attorney of record for each party, by Hand Delivery on:

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