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'Good Cause' Packet Mailed to LIHTC Owners, Managers in Washington

By Alex Ruiz, Staff Writer, Novogradac & Company LLP

The first state-level response to a provision in Internal Revenue Service (IRS) Revenue Ruling 2004-82 that clarified its position on the requirements for extended use agreements for low-income housing tax credit (LIHTC) properties has been reported in Washington. Question and Answer #5 in Revenue Ruling 2004-82 contradicted the universally understood requirements that have long been used by state housing finance agencies and LIHTC professionals and left some industry professionals concerned about its potential effects on state housing finance agency officials, LIHTC partnerships, lenders and other parties to existing extended use agreements, as well as, according to some, the possibility of total credit recapture for LIHTC investors.

Background

Internal Revenue Code (IRC) §42(h)(6)(D) defines the extended use period as a 30-year period, or a longer period if required by the state agency. IRC §42(h)(6)(E)(i) allows an early termination to the extended use period if there is a foreclosure or if there is no qualified contract to buy out the investor after the 15-year compliance period. IRC §42(h)(6)(E)(ii) describes a three-year period following such termination as a time during which two things are expressly prohibited; (1) the eviction or termination of tenancy (other than for good cause) of an existing tenant of any low-income unit and (2) any increase in the gross rent with respect to a low-income unit not otherwise permitted under §42. Until recently, LIHTC professionals thought these prohibitions were applicable only to the three-year period it described.

Revenue Ruling 2004-82

IRS Revenue Ruling 2004-82, issued July 29, 2004, addressed 12 points under §42 (for a complete summary of the ruling's 12 points, please see the related article in the September *Property Compliance Report*). Ten of the 12 points were compliance related and answered several long-standing questions. However, Question #5 — the IRS position on the requirements of extended use agreements — raised red flags for state housing agency officials and LIHTC

investors. In Rev. Rul. 2004-82, the IRS says an extended low-income housing commitment must prohibit evictions and increases in gross rent described in Internal Revenue Code (IRC) §42(h)(6)(E)(ii)(I) and (II) throughout the initial compliance period and the entire extended use period — not just for the three-year period described in IRC §42(h)(6)(E)(ii) — as had been commonly accepted by LIHTC professionals.

Upon the ruling's release, the National Council of State Housing Agencies (NSCHA) and others said the IRS's position "raised concerns."

"NCSHA is extremely concerned about the burden this ruling could place on state agencies," said NCSHA executive director Barbara Thompson.

Washington State Housing Finance Commission Mails 'Good Cause' Packet

A letter and several attachments, collectively labeled the Good Cause Notification Packet, were sent recently to owners and managers of LIHTC properties in Washington by the Washington State Housing Finance Commission (WSHFC). Along with a copy of Rev. Rul. 2004-82, the packet included a letter from WSHFC explaining the provision of particular interest to operators of LIHTC projects and interpreting the timeframe during which "no cause" eviction is prohibited. LIHTC owners are required to sign the letter as acknowledgement of receipt and return it to WSHFC within 30 days. However, regardless of when the notification is signed and returned, WSHFC cautions that the "good cause" eviction/termination requirement is effective no later than July 30, 2004.

In the letter, WSHFC states that LIHTC properties' regulatory agreements require compliance with all conditions to tax credit eligibility under IRC Section 42 and, effective no later than July 30, 2004, no low-income residents of any LIHTC project may be evicted or otherwise have their

(continued on page two)

'Good Cause'

(continued from page one)

lease terminated other than for good cause. This prohibition includes non-renewal of a lease or rental agreement other than for good cause. WSHFC's letter says "Generally, 'good cause' is defined as 'the serious or repeated violations of a material term of the lease,'" as that definition is applied with respect to federal public housing." WSHFC's notice to tenants says that: "There is no specific list of 'good causes' to evict a tenant. Rather, the matter has been left to the courts to decide and define. But, not paying your rent or intentionally causing serious damage to your rental unit are the types of things that judges will likely consider to be 'good cause' to evict a tenant."

WSHFC also warned owners that it may determine that an amendment of certain agreements regarding their properties is also required. The agency said it was in the process of determining whether all of the regulatory agreements it has issued under the LIHTC program would require such amendments. If the determination is made that all existing regulatory agreements need to be amended, WSHFC said the form of amendment will be submitted to property owners within 180 days. The letter says that failure to comply with the amendment process will be treated as a reportable instance of non-compliance and the agency will issue a Form 8823.

The Good Cause packet also included a copy of a new lease rider that WSHFC says must be utilized for all new resident households upon initial leasing and for all existing households upon annual recertification and for any executed lease renewal. A copy is also posted to the agency's web site: www.wshfc.org. A draft letter (in English and Spanish) for notifying resident households of their rights was also sent. Finally, WSHFC has modified and amended its Compliance Procedures Manual for Low-Income Housing Tax Credit Projects, also available online, at www.wshfc.org/managers. ❖

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Address all correspondence and editorial submissions to:

Jane Bowar Zastrow
Property Compliance Report
Novogradac & Company LLP
246 First Street, 5th Floor
San Francisco, CA 94105
Telephone: 415.356.8034
E-mail: cpas@novoco.com
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