

Chapter 12
Category 11h
Project not Available to the General Public

Note

As part of the Housing Assistance Act of 2008, IRC §42(g) was amended to add a clarification of the General Public Use requirement. Until further guidance is provided through administrative ruling or regulation, IRS will evaluate an owner's compliance with the General Public Use Rule as explained here.

Definition

This category is used to report properties that are not available to the general public. A residential rental unit is for use by the general public if the property conforms to the requirements of Treas. Reg. §1.42-9. The general public use rules are violated any time the general public is denied access to LIHC housings.¹

Under Treas. Reg. §1.42-9(b), if a residential unit is provided only for a member of a social organization or provided by an employer for its employees, the unit is not for use by the general public and is not eligible for credit under IRC §42. However, as clarified in IRC §42(g)(9),² a qualified low-income project does not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants (1) with special needs, (2) 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 (3) who are involved in artistic or literary activities.

In addition, any residential rental unit that is part of a hospital, nursing home, sanitarium, life care facility, retirement home providing significant services other than housing, dormitory, trailer park, or intermediate care facility for the mentally and physically disabled is not for use by the general public.

Fair Housing Act LIHC properties are also subject to Title VIII of the Civil Rights Act of 1968, which makes it unlawful to discriminate in any aspect relating to the sale, rental, or financing of dwellings because of race, color, religion, sex, or national origin. The Fair Housing Act of 1988 expanded coverage of Title VIII to include familial status and disabilities. Notifications of administrative and legal actions in regards to the Fair Housing Act are also reported to the IRS using Form 8823. See Chapter 13 for complete discussion.

In Compliance

Owners must rent their units in a manner consistent with the general public use requirements to be in compliance with IRC §42. Residential rental units must be for use by the general public and all of the units in a project must be used on a nontransient basis. In addition, the owner must not evict, nonrenew the lease for, or otherwise terminate the tenancy of, an

¹ General Explanation of the Tax Reform Act of 1986, H.R. 3838, 99th Congress; Public Law 99-514.

² IRC §42(g)(9) was added by section 3004(g) of the Housing Assistance Act of 2008 and is applicable to buildings placed in service before, on, or after July 30, 2008, the date of enactment.

existing tenant of any low-income unit for other than good cause. (See Chapter 26.) Residential rental units are not for use by the general public, for example, if the units are provided only for members of a social organization or provided by an employer for its employees.

Example 1: Proximity to Supportive Services³

A LIHC project composed entirely of single room occupancy (SRO) units is located adjacent to, but is separate from, a clinic providing supportive services for homeless individuals. In addition to the street entrances to the project, the owner has provided covered walkways from the housing to the clinic facility. Although the owner anticipates that a large number of the SRO units will be rented to homeless individuals participating in the clinic's programs, participation is not a requirement for leasing a unit.

The owner has not violated the General Public Use Rule. The SRO units are available to all homeless individuals regardless of whether the tenant participates in the clinic's programs.

Marketing Owners must make reasonable attempts to make vacant low-income units available to the public for rent. Owners should advertise the availability of vacant units using advertising methods designed to be accessible to all prospective tenants.

“Reasonable attempts” will vary depending on factors such as size and location of the project, tenant turnover rates, and market conditions. Advertising can include printed and electronic media. Common examples include banners and “For Rent” signs at the entrance to the project, classified ads in local newspapers and accessing the local public housing authority's list of section 8 voucher holders. Consider the appropriateness of the advertising for the location of the property. See Rev. Rul. 2004-82, Q&A #9.

Out of Compliance

The failure of LIHC buildings to comply with the general public use requirements will result in the denial of low-income housing credits on a per-unit basis. A unit is out of compliance starting on the date of the event triggering the noncompliance. State agencies will also need to consider whether the problem is systemic and whether owner has met the minimum set-aside under IRC §42(g)(1). See Chapter 10.

Example 1: LIHC Units Restricted to Members of a Social Organization

The owner of an LIHC building started renting only to members of a local fraternal organization in the third year of the compliance period. By the fifth year, all the tenants in the building were members of the organization.

This building is in violation of the general public use requirements under Treas. Reg. §1.42-9(b), which provides that a residential unit rented only to a member of a social organization is not for use by the general public and is not eligible

³ For an example, see PLR 9814006

for the credit under IRC §42. The noncompliance started on the date the first nonqualified tenant moved into a unit in the third year of the credit period and each unit is in violation when that unit was rented to a member of the organization.

Example 2: LIHC Units Rented Exclusively to Student Households

The owner of an LIHC building starts rent low-income units only to households where at least one adult member of the household is a student attending a nearby university. If all the household members were full-time students, the household met one of the exceptions under IRC §42(i)(3)(D). The student households are not a qualified group under IRC §42(g)(9).

Although the units are in compliance with the rules for full-time student households, the owner has violated the General Public Use Rule by renting units exclusively to student households. The date of noncompliance for each unit is the date that unit is rented to a household with at least one member attending the university.

Back in Compliance

Generally, an owner is back in compliance with the general public use requirements when two conditions are met:

1. The owner demonstrates that marketing and rental practices are no longer in violation of the general public use rules.
2. All the units are made available to the general public.

Example 1: Units Rented to Members of an Occupational Group

An owner placed a 100% LIHC building in service, began claiming the credit in 2000, and elected the 40/60 minimum set-aside. In 2002, when all 25 units were in compliance with qualifying households, the owner decided to rent units solely to teachers. Assume the teachers are not part of a qualifying group under IRC §42(g)(9). The first unit was rented to a teacher on January 21, 2002 and by December 31, 2002, five vacated units were rented to teachers. During 2003, the owner rented an additional 6 units to teachers. The last of the 6 units was rented on November 1, 2003, and the character of all the units remained unchanged through the close of 2003. The issue was identified during the state agency's inspection in 2004.

Although each unit fell out of compliance on the date it was rented to a teacher, the building is as out of compliance as of January 21, 2002, when the first unit is rented to a teacher. The applicable fraction for 2002 is 20/25 or 80%. The applicable fraction for 2003 is 9/25 or 36%. Since the minimum set-aside was violated at that time and continued to be so as of the close of 2003, no credit is allowable for 2003.

The building is back in compliance when:

1. The owner demonstrates that marketing and rental practices are no longer in violation of the general public use rules, and
2. All the units are made available to the general public.

References

1. IRC §42(g)(9)
2. Treas. Reg. §1.42-9