

Chapter 16
Category 11k
Owner Failed to Execute
and Record Extended Use Agreement
Within Time Prescribed by Section 42(h)(6)(J)

Definition

This category is used to report buildings for which an extended low-income housing commitment (extended use agreement) is not in effect; i.e., the extended use agreement is not executed, is not recorded, or fails to meet the requirements of IRC §42(h)(6). No credit is allowable for a building in a year unless an extended use agreement is in effect at the end of the year. See IRC §42(h)(6)(A). If it is determined that an extended use agreement was not in effect at the beginning of the year, IRC §42(h)(6)(J) permits the owner to correct the problem within one year from the date of the determination.

For all buildings allocated tax credits after 1989, IRC §42(h)(6) requires owners of tax credit properties to enter into an extended use agreement with the state agency that allocated the credits to the project. Building owners must agree to a long-term commitment beginning on the first day of the 15-year compliance period and ending on the later of (1) the date specified by the state agency in the agreement or (2) the date which is 15 years after the close of the 15-year compliance period. In other words, the owner covenants to maintain the property as a low-income housing project for at least 30 years.

Extended use agreements must:

1. specify that the applicable fraction for the building for each year in the extended use period will not be less than the applicable fraction specified in the extended use agreement and which prohibits the eviction or the termination of tenancy (other than for good cause) of an existing tenant of any low-income unit, or any increase in the gross rent with respect to such unit not otherwise permitted under IRC §42.
2. allow individuals (whether prospective, present, or former occupants) who meet the income limitation applicable to the building under IRC §42(g) the right to enforce in state court the requirements and prohibitions under IRC §42(h)(6)(B)(i), including maintaining the applicable fraction and prohibiting the eviction or the termination of tenancy (other than for good cause) of an existing tenant of any low-income unit, or any increase in the gross rent with respect to such unit not otherwise permitted under IRC §42. These prohibitions apply through out the extended use period.¹

¹ Rev. Rul. 2004-82, 2004-35 I.R.B., Q&A #5 explains that IRC §42(h)(6)(B)(i) requires that an extended use commitment include a prohibition during the extended use period against (1) the eviction or the termination of tenancy (other than for good cause) of an existing tenant of any low-income unit (no-cause eviction protection) and (2) any increase in the gross rent with respect to the unit not otherwise permitted under IRC §42. When Congress amended IRC §42(h)(6)(B)(i) to add the language cited, IRC §42(h)(6)(E)(ii) was already part of IRC §42. As a result, Congress must have intended the amendment to IRC §42(h)(6)(B)(i) to add an additional requirement beyond what was contained in IRC §42(h)(6)(E)(ii), which already prohibited the action described in that section for the 3 years following the termination of the extended use period. Because the

3. prohibit the disposition to any person of any portion of the building unless all of the building is disposed of to that person.
4. prohibit the refusal to lease to section 8 voucher holders because of the status of the prospective tenant as such a holder,
5. provide that the agreement is binding on all successors of the taxpayer, and
6. the extended use agreement must be recorded as a restrictive covenant with respect to the property under state law.

In Compliance

The owner is in compliance when the extended use agreement is executed, recorded, and meets the requirements of IRC §42(h)(6). State agencies should require documentation that the extended use agreement has been recorded before issuing the Form 8609.

Out of Compliance

The owner is out of compliance in the absence of a properly executed and recorded extended use agreement and no credit is allowable if the extended use agreement is not in effect as of the end of a taxable year in the credit period. However, if the owner executes and records an extended use agreement within one year after the determination that an extended use agreement is not in effect, the noncompliance is corrected and the taxpayer can claim the low-income housing credit for past taxable years. If the noncompliance is not remedied within one year after the notification, the taxpayer loses the credit for past taxable years until the taxable year in which the extended use agreement is properly in effect.

The one-year period for correcting the noncompliance begins when the owner is notified that an extended use agreement has not been properly executed and/or recorded. The state agency should provide *written* notification of the noncompliance immediately and document the owner's receipt. The notification should:

1. Cite IRC §42(h)(6) as authority
2. Identify the problem and corrective action needed
3. Explain that the date of the letter starts the one-year period for correcting the noncompliance.

When submitting the Form 8823, a copy of the letter should be included as an attachment.

requirements of IRC §42(h)(6)(B)(i) otherwise apply for the extended use period, Congress must have intended the addition of the prohibition against the actions described in subclauses (I) and (II) of IRC §42(h)(6)(E)(ii) to apply throughout the extended use period. In Rev. Proc. 2005-37, 2005-28 I.R.B. 79, the Service established a safe harbor under which housing credit agencies and project owners could meet the requirements of IRC §42(h)(6)(B)(i) in lieu of an extended use agreement which specifically included the language of subclauses (I) and (II) of IRC §42(h)(6)(E)(ii).

Example 1: Owner did not Execute and Record Extended Use Agreement

The owner of a LIHC project placed the buildings in service in February 1998 and submitted the documentation for final approval in June 1998. The state agency issued the Form 8609 in September 1998, prior to receiving the executed extended use agreement from the owner. The owner claimed the credit for the 1998 tax year. The state agency later determined that an extended use agreement was not in effect for the 1998 tax year (the first year of the credit period), issued a notice of noncompliance to the owner in February 1999, and submitted Form 8823 to the IRS in May 1999, reporting the absence of the extended use agreement and attaching a copy of the notification letter to the owner. In December 2000, the owner and state agency executed the extended use agreement, and recorded it.

The date of noncompliance is December 31, 1998, when the state agency determined that an extended use agreement was not in effect as of the end of the tax year. Since the owner failed to execute the extended use agreement within one year from the date of the notification, the owner will lose credits for 1998 and 1999, but can resume claiming the credits for 2000.

Back in Compliance

The owner is back in compliance when the extended use agreement is executed and recorded within one year of the determination of noncompliance. If the extended use agreement is not in effect within one year of the determination that an extended use agreement was not in effect, the taxpayer loses low-income housing credits for past taxable years and cannot claim credit with respect to any building for which an extended use agreement is not in effect by the end of the applicable taxable year.

References

1. IRC §42(h)(6)(A), (B) and (J)
2. Rev. Rul. 2004-82, 2004-35 I.R.B. 350
3. Rev. Proc 2005-37, 2005-28 I.R.B. 79