

Chapter 26 Tenant Good Cause Eviction and Rent Increase Protection

Definition

Under IRC §42(h)(6), buildings are eligible for the low-income housing credit only if the owner has entered into an extended low-income housing commitment. The commitment is commonly known as the “extended use agreement.” The extended use agreement must be recorded pursuant to state law as a restrictive covenant. See Chapter 16 for additional detail.

3-Year Good Cause Eviction and Rent Increase Protection for Tenants

The term of the agreement is at least 30 years, beginning on the first day of the compliance period and ends on the later of the date specified by the state agency or 15 years after the close of the 15-year compliance period under IRC §42(i)(1). IRC §42(h)(6)(E)(i) describes two circumstances by which the extended use agreement can be terminated:

1. the building is acquired through foreclosure, or
2. the state agency fails to present a qualified contract for the acquisition of the LIHC building (or part thereof) by a party who will continue to operate the building (or part thereof) as low-income housing.

In the event that the extended use agreement is terminated, IRC §42(h)(6)(E)(ii) provides existing low-income tenants protection against two events for three years following the termination. These events are:

1. the eviction or the termination of tenancy¹ (other than for good cause) of an existing tenant of any low-income unit, or
2. any increase in the gross rent with respect to such unit no otherwise permitted under IRC §42.

Revenue Ruling 2004-82: Prohibitions Under IRC §42(h)(6)(B)(i) Apply throughout Extend Use Period

Under section C of Rev. Rul. 2004-82², Q&A #5 provides further guidance regarding extended use agreements. Question 5 asks, “Must the extended low-income housing commitment prohibit the actions described in subclauses (I) and (II) of IRC §42(h)(6)(E)(ii); i.e., eviction or the termination of tenancy (other than for good cause) only for the 3-year period described in IRC §42(h)(6)(E)(ii)?”

The answer is “no”. IRC §42(h)(6)(B)(i) requires that an extended low-income housing commitment include a prohibition during the entire 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

¹ The term “termination of tenancy” has no legal definition. It was first introduced as a term of art specific to IRC §42 in the Omnibus Budget Reconciliation Act of 1990. The bill clarifies that the extended low-income housing commitment must prohibit the eviction or termination of tenancy (other than for good cause) of an existing tenant of a low-income unit or any increase in the gross rent inconsistent with the rent restrictions on the unit. See Committee Reports on P.L. 101-508 (Omnibus Budget Reconciliation Act of 1990) COM-RPT, 94 FED ¶4380.27.

² Rev. Rul. 2004-82, 2004-2 C.B. 350

increase in the gross rent with respect to the unit not otherwise permitted under IRC §42.

The revenue ruling includes the following explanation. When Congress amended IRC §42(h)(6)(B)(i) to add the requirement that the extended use agreement must *prohibit the actions described in subclauses (I) and (II) of subparagraph (E)(ii)*, IRC §42(h)(6)(E)(ii) was already part of §42. As a result, Congress must have intended the amendment to §42(h)(6)(B)(i) to add an additional requirement beyond what was contained in §42(h)(6)(E)(ii), which already prohibited the actions described in that section for the 3 years following the termination of the extended use period. Because the requirements of §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 §42(h)(6)(E)(ii) to apply throughout the extended use period.

The revenue ruling also provided guidance for updating extended use agreements to explicitly provide tenants with protection against evictions without good cause and increases in rent not allowable under IRC §42. The revenue ruling provided that if it is determined by the end of a taxable year that a taxpayer's extended use agreement does not meet the requirements for an extended use agreement under IRC §42(h)(6)(B) (for example, it does not provide no-cause eviction protection for tenants of low-income units throughout the extended use period), the low-income housing credit is not allowable with respect to the building for the taxable year, or any prior taxable year. However, if the failure to have a valid extended use agreement is in effect is corrected within 1 year of the date of the determination, the determination will not apply to the current year of the credit period or any prior year.

The revenue ruling also requires the state agencies to review its extended low-income housing commitments for compliance with the interpretation of §42(h)(6)(B)(i) by December 31, 2004. If, during the review period, the housing credit agency determines that an extended low-income housing commitment is not in compliance with the interpretation of §42(h)(6)(B)(i) provided in Revenue Ruling 2004-82, the 1-year period described under §42(h)(6)(J) will commence on the date of that determination.

**Revenue
Procedure
2005-37**

Effective June 21, 2005, the IRS issued Rev. Proc. 2005-37³ to provide the state agencies guidance for satisfying the review requirements under Rev. Rul. 2004-82, Q&A #5.

Extended Use Agreements Entered into Before January 1, 2006.

If the extended use agreement contain general language requiring building owners to comply with the requirements of' IRC §42 (catch-all language), the requirements of Rev. Ruling 2004-82, Q&A #5, are satisfied if:

1. Agencies notify building owners in writing on or before December 31, 2005, that consistent with the interpretation in Q&A #5, the catch-all language prohibits the owner from evicting or terminating the tenancy of an existing tenant of any low-income unit (other than for good cause) throughout the entire commitment period.

³ Rev. Proc. 2005-37, 2005-28 I.R.B. 79

Further, state agencies must notify building owners that the catch-all language prohibits the owner from making an increase in the gross rent with respect to a low-income unit not otherwise permitted by IRC §42 throughout the entire commitment period;

2. The owner must, as part of its certification under Treas. Reg. §1.42-5(c)(1)(xi), certify annually that for the preceding 12-month period no tenants in low-income units were evicted or had their tenancies terminated other than for good cause and that no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under IRC §42;

Finally, if the extended use agreement is amended for any reason after December 31, 2005, it must also be amended to clearly provide for the prohibition against the eviction or termination of tenancy other than for good cause and any increase in the gross rent not otherwise permitted under IRC §42.

Commitments entered into before January 1, 2006, that do not contain specific language on the IRC §42(h)(6)(B)(i) prohibitions or catch-all language do not satisfy the requirements of Rev. Rul. 2004-82, Q&A #5 and must be amended by December 31, 2005 to clearly provide for the IRC §42(h)(6)(B)(i) prohibitions against the eviction or termination of tenancy of an existing tenant of any low-income unit (other than for good cause) and the increase in the gross rent with respect to a low-income unit not otherwise permitted by IRC §42.

Extended Use Agreements Entered into After December 31, 2005

1. Extended use agreements executed after December 31, 2005, must clearly provide for the prohibition against the eviction or termination of tenancy other than for good cause and any increase in the gross rent not otherwise permitted under IRC §42.
2. The owner must also, as part of its certifications under Treas. Reg. §1.42-5(c)(1)(xi), certify annually that for the preceding 12-month period no tenants in low-income units were evicted or had their tenancies terminated other than for good cause and that no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under IRC §42.

Eviction or “Termination of Tenancy”

Eviction is the act or process of legally dispossessing a person of land or rental property. An owner who wishes to evict a tenant must comply with applicable state and/or local laws governing evictions.

Good Cause

The owner of an IRC §42 property must be able to demonstrate if challenged in state court that good cause existed to support the eviction or termination of a tenant from a low-income unit. For purposes of IRC §42(h)(6)(E)(ii)(I), good cause is determined by the state and local law applicable to the location in which the IRC §42 property is located.

State or local law examples of good cause evictions may include nonpayment of rent, violations of the lease or rental agreement, destruction or damage to the property,

interference with other tenants or creating a nuisance, or using the property for an unlawful purpose.

Owner Fails to Renew Lease

A lease to rent low-income housing is a contract. A lease contract expires at the end of the time period specified in the lease. At that time, the tenant surrenders the low-income housing unit to the owner and the owner accepts it back. The owner and tenant may renew the contract (or enter into a new contract), thereby allowing the tenant to continue occupying the low-income unit, but the owner is not obligated to renew a lease or enter into a new one, and failure to do so does not, per se, constitute an eviction without good cause. However, the owner must be prepared to demonstrate if challenged in state court that the nonrenewal of a lease is not a “termination of tenancy” for other than good cause under IRC §42.

The owner must provide the tenant with timely notice that the lease will not be renewed as required under state law.

In Compliance

Owners are in compliance with the prohibitions against evictions or terminations of tenancy for other than good cause and increases in the gross rent not permitted under IRC §42 when all of the following four requirements are met.

1. The extended use agreement includes the prohibitions.
 - a. For agreements entered into before January 1, 2006, the agreement must contain general language requiring building owners to comply with the requirements of IRC §42 (catch-all language) and the state agency must notify the owner in writing on or before December 31, 2005, that the catch-all language prohibits the owner from evicting or terminating the tenancy of an existing tenant of any low-income unit (other than for good cause) or increases the gross rent not otherwise permitted by IRC §42 throughout the entire commitment period.
 - b. For extended use agreements executed after December 31, 2005, the agreement must clearly provide for the prohibition against the eviction or termination of tenancy other than for good cause and any increase in the gross rent not otherwise permitted under IRC §42.
2. The owner must, as part of its annual certification under Treas. Reg. §1.42-5(c)(1)(xi), certify annually that for the preceding 12-month period no tenants in low-income units were evicted or had their tenancies terminated other than for good cause and that no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under IRC §42.
3. The owner must not evict or terminate the tenancy of, an existing tenant of any low-income unit for other than for good cause.
4. The owner must not increase the gross rent unless permitted by IRC §42.

Out of Compliance

Owners are out of compliance with the prohibitions against evictions or terminations of tenancy for other than good cause and increases in the gross rent not permitted under IRC §42 if any of the following three requirements is not met.

Extended Use Agreement

Generally, no credit is allowable for a building in a year unless an extended use agreement is in effect at the end of the year. The extended use agreement is not in effect and the owner is out of compliance if (1) the extended use agreement does not include the prohibitions, or (2) does not contain the general catch-all language requiring compliance with IRC §42 if the agreement was entered into before January 1, 2006.

Noncompliance is reported under category 11k, Owner Failed to Execute and Record Extended Use Agreement Within Time Prescribed by Section 42(h)(6)(J). See Chapter 16 for additional discussion.

Annual Certification

Owners are out of compliance if they fail to certify annually, or certify incompletely or inaccurately, under the penalty of perjury, that for the preceding 12-month period no tenants in low-income units were evicted or had their tenancies terminated other than for good cause and that no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under IRC §42.

Noncompliance is reported under category 11d, Owner Failed to Provide Annual Certifications or Provided Incomplete or Inaccurate Certification. See Chapter 7 for additional discussion.

Increased Gross Rent

The owner is out of compliance if the gross rent is increased in a manner not permitted by IRC §42. A unit qualifies as an LIHC unit when the gross rent does not exceed 30 percent of the imputed income limitation applicable to such unit under IRC §42(g)(2)(C). The income limit for a low-income housing unit is based on the minimum set-aside election made by the owner under IRC §42(g)(1).

Noncompliance is reported under category 11g, Gross Rent(s) Exceed Tax Credit Limits. See Chapter 11 for additional discussion.

Back in Compliance

Owners are back in compliance with the prohibitions against evictions or terminations of tenancy for other than good cause and increases in the gross rent not permitted under IRC §42 if:

Extended Use Agreement

The extended use agreement is in effect and the owner is back in compliance when the extended use agreement is amended to clearly provide for the prohibition against the eviction or termination of tenancy other than for good cause and any increase in the gross rent not otherwise permitted under IRC §42.

Corrected noncompliance is reported under category 11k, Owner Failed to Execute and Record Extended Use Agreement Within Time Prescribed by Section 42(h)(6)(J). See Chapter 16 for additional discussion.

Annual Certification

The noncompliance is corrected when the owner certifies that for the preceding 12-month period no tenants in low-income units were evicted or had their tenancies terminated other than for good cause and that no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under IRC §42. In the event that tenant(s) in low-income units were evicted or had their tenancies terminated other than for good cause, or that tenant(s) had an increase in the gross rent with respect to a low-income unit not otherwise permitted under IRC §42, the annual certification must disclose the violations.

Corrected noncompliance is reported under category 11k, Owner Failed to Provide Annual Certifications or Provided Incomplete or Inaccurate Certification. See Chapter 7 for additional discussion.

Increased Gross Rent

A unit is back in compliance when the rent charged does not exceed the limit. An owner cannot avoid the disallowance of the LIHC by rebating excess rent to the affected tenants. Corrected noncompliance is reported under category 11g, Gross Rent(s) Exceed Tax Credit Limits. See Chapter 11 for additional discussion.

Reference

1. IRC §42(h)(6)
2. Rev. Rul. 2004-82, 2004-35, I.R.B. 1
3. Rev. Proc. 2005-27, 2005-28 I.R.B. 1