

LIHTC MONTHLY REPORT

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Texas Agency Drafts Qualified Contract Policy

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The Texas Department of Housing and Community Affairs (TDHCA) will conduct a public hearing on Tuesday, July 5, 2005 to gather input on its proposed qualified contract policy. The proposed policy was drafted to assist owners of low-income housing tax credit (LIHTC) properties that received a credit allocation after January 1, 1990 and who desire to exit the program after the initial 15-year affordability period. TDHCA joins several other state housing agencies, including those in North Carolina, Virginia, South Dakota and Washington that have also published guidelines for the qualified contract process.

All properties that received an LIHTC allocation after January 1, 1990 are subject to an extended use period that lengthened, from 15 to 30 years, the time that LIHTC properties were required to maintain affordability. In an effort to ease concerns of owners about the economic viability of maintaining affordability without additional subsidy, the law provided an option for owners to exit the program after the initial 15-year compliance period. Pursuant to §42(h)(6)(E) of the Internal Revenue Code (IRC), after the end of the 14th year of the compliance period, the owner of an LIHTC property can request that the allocating agency find a buyer at the qualified contract price. If a buyer can not be located by the allocating agency within one year, the extended use commitment will expire. TDHCA's proposed rule provides the procedures for the submittal and review of the qualified contract requests.

Eligibility

Under the proposed policy, an owner can submit a qualified contract request at any time after the end of the year preceding the last year of the initial affordability period, following TDHCA's determination that the owner is eligible. Unless the owner has elected an initial affordability period longer than the compliance period, this could commence any time after the end of the 14th year of the compliance period.

If there are multiple buildings placed in service in different years, the policy would base the end of the initial affordability period on the date the last building was placed in service. For example, if five buildings in the development began their credit periods in 1990 and one began in 1991, the 15th year would be 2005. If a development received an allocation in multiple years, policy would determine the end of the initial affordability period based on the last year of a multiple allocation. For example, if a development received its first allocation in 1990 and a subsequent allocation and began the credit period in 1992, the 15th year would be 2006.

Preliminary Qualified Contract Request

An owner can file a preliminary qualified contract request (pre-request) any time after the end of the year preceding the last year of the initial affordability period. The owner is required to submit: a preliminary request form; the \$250 nonrefundable processing fee; a copy of the recorded land use restriction agreement (LURA); first year 8609s for all buildings showing Part II completed; documentation from original application regarding right of first refusal, if applicable; and local code compliance report within the last 12 months or HUD certified uniform Physical Condition Standards (UPCS) inspection. The pre-request does not bind the owner to submit a formal request.

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Right of First Refusal

If the owner elected at the time of application to provide a right of first refusal, all requests for right of first refusal submitted to TDHCA, regardless of existing regulations, must adhere to the process outlined in the proposed policy. If at any time following the end of the compliance period or initial affordability period, as applicable, the owner decides to sell the development and the owner has agreed to provide a right of first refusal to purchase the property for the minimum purchase price provided in, and in accordance with the requirements of, IRC §42(i)(7), the right of first refusal is subject to the following terms under TDHCA's proposed policy.

Upon the earlier of the owner's determination to sell the development, or the owner's request to TDHCA to find a buyer, the owner must provide a notice of intent to sell the development. The notice of intent must be given no later than two years prior to expiration of the compliance period or initial affordability period, as applicable. If the owner decides to sell the property at some point later than the end of the compliance period, the notice of intent should be given no later than two years prior to date upon which the owner intends to sell the development.

Qualified Contract Request

An owner may file a qualified contract request any time after approval that the owner is eligible. A list of the documentation that must be submitted with a request is included in the draft policy. Unless otherwise directed by TDHCA, the owner will then contract with a broker approved by the department to market and sell the property. Within 90 days of the submission of a complete request, TDHCA will notify the owner in writing of the acceptance or rejection of the owner's qualified contract price calculation. TDHCA will then have one year from the date of the acceptance letter to find a qualified purchaser and present a qualified contract.

Determination of Qualified Contract Price

The certified public accountant (CPA) contracted by the owner will determine the qualified contract price in accordance with IRC §42(h)(6)(F) and the following guidelines. (The proposed policy notes that these guidelines are subject to change based upon future IRS rulings and/or guidance on the determination of owner distributions, equity contributions and/or any other element of the contract price.)

- ◆ Distributions to the owner include any and all cash flowing to the owner, including incentive management fees and reserve balance distributions or future anticipated distributions, but excluding payments of any eligible deferred developer fee.
- ◆ All equity contributions will be adjusted based upon the lesser of the consumer price index or 5 percent for each year, from the end of the year of the contribution to the end of year 14 or the end of

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the year of the request for a qualified contract price if requested at the end of the year or the year prior if the request is made earlier than the last year of the month.

- ♦ TDHCA reserves the right to request additional information to document the qualified contract price calculation or other information submitted. If the documentation does not support the price indicated by the CPA hired by the owner, TDHCA can elect to engage its own CPA — at the expense of the owner — to perform a qualified contract price calculation. If an owner disagrees with the price calculated by TDHCA, they may appeal in writing and a meeting will be arranged to attempt to resolve the discrepancy.

Presentation of a Qualified Contract

If TDHCA finds a qualified purchaser willing to present an offer at the qualified contract price, the proposed policy says the owner must agree to enter into a “commercially reasonable form of earnest money agreement or other contract of sale for the property” and provide a reasonable time for necessary due diligence and closing of the purchase. Although the owner is obligated to sell the development for the qualified contract price, the consummation of such a sale is not required for the LURA to continue to bind the development for the remainder of the extended use period. Once TDHCA presents a qualified contract to the owner, the possibility of terminating the extended use period is removed forever and the property remains bound by the provisions of the LURA.

TDHCA will attempt to procure a qualified contract for the acquisition of the low-income portion of any project only once during the extended use period. If the transaction closes under the contract, the new owner will be required to fulfill the requirements of the LURA for the remainder of the extended use period. If the department fails to present a qualified contract before the end of the one-year period, TDHCA will file a release of the LURA and the development will no longer be restricted to low-income requirements and compliance.

However, in accordance with IRC §42(h)(6)(E)(ii), for a three-year period commencing on the termination of the extended use period, the owner may not evict or displace tenants of low-income units for reasons other than good cause and will not be permitted to increase rents beyond the maximum LIHTC rents. Additionally, the owner will be required to submit a signed certification and a copy of a letter to be created by TDHCA, that the tenants in the development have been notified in writing that the LURA has been terminated and have been informed of their protections during the three-year time frame. Prior to TDHCA filing a release of the LURA, the owner must correct all instances of noncompliance with the physical condition of the property.

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Comments Encouraged

The complete text of the proposed rule can be found online at: www.tdhca.state.tx.us/lihtc.htm.

Written comments on the proposal are also encouraged and may be submitted to Emily Price, Multifamily Housing Specialist, Multifamily Finance Production Division, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711-3941, emily.price@tdhca.state.tx.us, or by fax (512) 475-0764. ❖

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