

Maryland Department of Housing and Community Development

PLAN FOR THE ALLOCATION OF LOW INCOME HOUSING TAX CREDITS IN MARYLAND

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Maryland Department of Housing and Community Development
Housing Development Programs
100 Community Place
Crownsville, Maryland 21032-2023
410-514-7446 800-543-3505 TTY 800-735-2258
<http://www.dhcd.state.md.us>

Parris N. Glendening, Governor Kathleen Kennedy-Townsend, Lt. Governor
Raymond A. Skinner, Secretary Marge Wolf, Deputy Secretary

The Governor approved the initial Plan for the Allocation of Low Income Housing Tax Credit in Maryland on April 5, 1990. Subsequently, the Governor approved amended plans on February 2, 1991, March 24, 1992, December 14, 1993, January 12, 1995, October 1, 1995 and October 7, 1999. The public was provided the opportunity to comment at a public hearing on February 23, 2001 on the most recent amendments to the plan, which were approved by the Governor on _____, 2001.



■ Contents

Introduction	1
In General	1
Determining the Amount of Tax Credit	1
Income and Rent Restrictions	1
The Allocation Plan	2
Introduction	2
Award of Tax Credits	2
Adoption of the Allocation Plan	3
Administration of the Allocation Plan	3
Application Process and Fees.....	4
Application Process	4
Fees	4
Extensions	5
Reservations.....	5
In General	5
Forward Reservations	6
Increases in Reservation	6
Tax Credit Rates	6
Cancellation of Reservation	7
Limitations on Reservation	7
Allocations	7
In General	7
Cancellations of Allocation	9
Special Tax Credit Set-Asides.....	9
Non-Profit Set-Aside	9
Secretary’s Reserve	10
Allocation Criteria	10
Project Monitoring.....	11
Introduction	11
Recordkeeping and Record Retention	11
Certification and Review	12
Inspection	14
Notification of Non-Compliance	15
Retention of Records by CDA	15
Compliance Monitoring Fees	15
Changes in Monitoring Procedures	16
Miscellaneous	16
Subsidy Layering Review	16
Correspondence and Submittals	16
Partial Invalidity	17
Disclaimer	17

Appendix A – Multifamily Rental Financing Program Guide

■ Introduction

■ In General

The 1986 Tax Reform Act created the low-income housing tax credit (the “Tax Credit”), under §42 of the Internal Revenue Code of 1986, as amended (together with Treasury Regulations promulgated thereunder, the “Code”), to encourage the private sector to invest in the construction and rehabilitation of housing for low and moderate income individuals and families by providing qualified owners with credits against their federal income tax obligations. The Governor of the State of Maryland has designated the Maryland Department of Housing and Community Development (the “Department”) as the agency authorized to allocate Tax Credits for residential rental projects in Maryland under this program (the “Tax Credit Program”). The Secretary of the Department (the “Secretary”) has assigned this function to the Community Development Administration, an agency in the Division of Development Finance of the Department (“CDA”). The Tax Credits are available to owners of qualifying residential rental projects that meet certain low-income occupancy and rent restrictions.

Generally, each state may allocate a specified amount of Tax Credits annually, based primarily on the state’s population. In addition, states that allocate 100% of their annual authority are eligible for additional authority for the following year from a national pool of unused Tax Credit authority.

■ Determining the Amount of Tax Credit

The Tax Credits are generally provided to project owners in equal annual installments over a 10-year period. The Tax Credits may not exceed the applicable percentage of the qualified basis of each low income building in the project as defined in Section 42(d) of the Code. The applicable percentage is the percentage that will yield, over the 10-year Tax Credit period, Tax Credits with a present value equal to either 70% or 30% of the qualified basis of the building. New construction and rehabilitation projects that are not federally subsidized are eligible for the 70% present value Tax Credit. Projects financed with federal funds or involving the acquisition of existing buildings (when combined with eligible rehabilitation) are eligible for the 30% present value Tax Credit. Federal legislation requires administering agencies to allocate only the amount necessary to make developments feasible. CDA makes this determination at three points in the process: at the time of application; at the time of reservation; and at the time the building is placed in service.

■ Income and Rent Restrictions

The owner must elect to set aside, at a minimum, either 20% of the housing units in the project for households with incomes of 50% or less of the area median gross income, or 40% of the housing units in the project for households with incomes of 60% or less of the area median gross income. Household size is based on certain assumptions involving the bedroom configurations of the rental units. Rents for Tax Credit units may not exceed 30% of the applicable income limit.

The housing units must be set aside for low-income residents for an initial compliance period of 15 years (the “Initial Compliance Period”). In addition, federal law requires the owner to enter into an Extended Low-Income Housing Covenant (“Extended Use Covenant”) with CDA under which the low-income housing set-aside (meaning the actual number of units that generate Tax Credits and are set aside for low-income tenants), the rent restriction, and other requirements must continue for an additional period of at least 15 years beyond the Initial Compliance Period (together, the “Extended Use Period”). Federal law

permits an owner to opt-out of the program restrictions after 15 years under certain circumstances. However, in order to score additional points in the rating and ranking process (see “Allocation Criteria” below), a project owner must agree to an Extended Use Period of at least 40 years.

■ **The Allocation Plan**

■ **Introduction**

Federal law requires states to adopt a plan (the “Allocation Plan”) to allocate the Tax Credits to projects based on state priorities and federally mandated requirements. This Allocation Plan is intended to ensure that only projects that comply with federal law and address the housing priorities of Maryland are selected for an allocation of Tax Credits. The Allocation Plan sets forth CDA’s selection criteria for use in determining housing priorities for allocating Tax Credits.

■ **Award of Tax Credits**

Tax Credits are awarded to eligible housing projects on a competitive basis and are limited under the Code to an annual ceiling amount. One or more competitive rounds are held each year, and awards are based on the criteria outlined in this Allocation Plan (see “Allocation Criteria” below) and in CDA’s Multifamily Rental Financing Program Guide (the “Program Guide”), attached to and made a part of this Allocation Plan as Appendix A. The allocation criteria and the competitive process apply to residential rental projects other than those financed by tax-exempt bonds. Projects financed with certain tax-exempt bonds may be eligible to receive all or some of their Tax Credits outside the State’s ceiling. Although these projects need not compete for an award through the competitive process, they must still be evaluated against the threshold criteria and the project selection criteria and must comply with the monitoring provisions of the Allocation Plan.

The Program Guide describes in detail CDA’s criteria, requirements, and policies for evaluating, ranking, and selecting projects for Tax Credits, making Tax Credit reservations and allocations, and administering the Tax Credit Program.

The determination of whether a Project will receive an allocation of Tax Credits rests solely with CDA and is contingent upon owners’ compliance with §42 of the Code and the requirements of the Tax Credit Program, which may be more restrictive than the requirements of §42 of the Code.

■ **Adoption of the Allocation Plan**

Before adopting the Allocation Plan, including the Program Guide, CDA held a public hearing on February 23, 2001, after giving at least 14 days notice to the public by means of publication in a number of newspapers of general circulation. Public comments were permitted in writing at the office of CDA any time up to the beginning of the public hearing, and verbal comments were received by CDA at the public hearing. The Allocation Plan, including the Program Guide, was subsequently submitted to the Governor for approval and was approved by the Governor on _____, 2001, effective as of that date.

CDA may amend the Allocation Plan at any time by means of the procedure described above for adoption of the Allocation Plan. The Allocation Plan shall also be amended as necessary to ensure that

CDA's Tax Credit allocations comply with the requirements of the Code. The Program Guide may be amended for non-substantive changes or for changes which do not affect Tax Credits without further amendment to this Allocation Plan, by determination of the Secretary, to the extent necessary to carry out Department policies.

All reservations and allocations made under prior versions of the Allocation Plan will be honored by CDA. However, compliance monitoring for all projects, regardless of when Tax Credits were reserved or allocated, shall be conducted in accordance with this version of the Allocation Plan, subject to any future amendments.

Applicants for Tax Credits should refer to the Code, and specifically to §42 of the Code, for additional requirements and definitions applicable to the Tax Credit Program. CDA strongly recommends that applicants for Tax Credits consult their tax advisor, legal counsel, accountant, or financial advisor for further details concerning the Tax Credit Program.

CDA is responsible for administering the Tax Credit Program under §42 of the Code and Code of Maryland Regulations Title 05, Subtitle 05, Chapter 06. CDA's interpretation of §42 of the Code is not binding upon the Internal Revenue Service ("IRS"), and CDA neither represents nor warrants to any owner, investor, or other program participant how the IRS will interpret or apply any provision of the Code in any instance.

■ Administration of the Allocation Plan

Nothing in this Allocation Plan is intended to impair or limit the rights of CDA with respect to, or to release a project owner from, any of the covenants or conditions contained in any agreement or contract between the owner and CDA. CDA may take against an owner any action that it deems necessary or expedient, under any agreement or provision of law, for failure to perform any such covenant or condition, including limiting or prohibiting participation by an owner or any of its principals in the Tax Credit Program.

The owner is responsible for complying with the Allocation Plan and the Program Guide in effect when the owner submits to CDA an application for Tax Credits. In addition, CDA reserves the right to modify the Allocation Plan or the Program Guide through the procedures described above and to require the owner to comply with the modifications, as appropriate in the determination of CDA, unless otherwise prohibited by law.

Copies of the Allocation Plan are available upon written request to CDA at 100 Community Place, Crownsville, Maryland 21032, attention: Tax Credit Administrator; by e-mail to taxcredits@dhcd.state.md.us or on the Department's website at <http://www.dhcd.state.md.us>, under "Developing Affordable Rental Housing".

■ Application Process and Fees

■ Application Process

Applications for Tax Credits will be solicited by CDA by public notice in one or more competitive rounds during the year. For a project to be considered for an allocation of Tax Credits, CDA must receive a completed application, together with a non-refundable application fee, within the deadline specified in the public notice. To be evaluated during any round of competition (the competition is referred to as “rating and ranking”), projects must meet all of the threshold criteria specified in the Program Guide. These requirements are intended to eliminate projects that do not meet basic program requirements and to ensure that Tax Credits are reserved for projects that meet federal requirements and are both viable and ready to proceed. Projects that do not meet the threshold criteria will not be rated and ranked during competitive rounds.

■ Fees

Application Fee. All sponsors must pay a nonrefundable fee of \$1,000 for each application requesting a reservation of Tax Credits. If the sponsor is also applying for multifamily rental housing funds, the sponsor shall pay a combined application fee of \$1,000 for both programs. This fee must be paid at the time the application is submitted and is retained by CDA whether or not the application is successful. Projects failing to receive an award of Tax Credits may reapply in another year, but a new application fee will be required.

Reservation Fee. All sponsors must pay a nonrefundable reservation fee. Failure to pay the reservation fee, in the amount and at the time required as set forth below, will result in the cancellation of the reservation. CDA will not issue an allocation of Tax Credits or an IRS Form 8609 needed to claim the Tax Credits unless all reservation fees have been paid.

Allocated Credits:

Profit-Motivated Sponsors. Profit-motivated sponsors must pay a nonrefundable reservation fee equal to 2% of the annual Tax Credits reserved for the project at the time CDA issues a reservation of Tax Credits.

Nonprofit Sponsors. Nonprofit sponsors must pay a fee of \$1,000 at the time CDA issues a reservation of Tax Credits. When the project is placed in service, nonprofit sponsors must pay an additional fee equal to 2% of the annual Tax Credits allocated to the project, less the \$1,000 reservation fee previously paid.

Tax-Exempt Bond Financed Projects:

Projects that have 50% or more of the development and acquisition costs financed with the proceeds of tax-exempt bonds may receive Tax Credits on their entire basis outside the State’s ceiling. Projects with less than 50% of their costs financed with the proceeds of tax-exempt bonds may receive Tax Credits on the portion of their costs so financed without requiring an allocation. In either case, a reservation fee of \$1,000 shall be paid at the time CDA issues the eligibility letter pursuant to section 42(m)(1) of the Code. Sponsors must then pay an additional

fee equal to 2% of the annual Tax Credits the project is eligible to receive, less the \$1,000 reservation fee previously paid, when the project is placed in service.

■ Extensions

Extension of Reservation. Sponsors unable to meet the requirements to receive an allocation of Tax Credits within the period specified in their reservations may request an extension of the reservation. All sponsors must pay a nonrefundable extension fee of \$1,000 for each project for which an extension of the reservation is requested. The fee must be paid at the time the extension request is submitted.

Extension of Time to Satisfy Requirements for Carryover Allocation. Sponsors unable to meet the deadline for meeting the requirements for a carryover allocation (see “Allocations” below) may request an extension of the deadline for one month. All sponsors must pay a nonrefundable extension fee of \$1,000 for each project for which an extension of time to meet this deadline is requested. The fee must be paid at the time the extension request is submitted.

Extensions of Reservations or Carryover Allocations cannot be granted for deadlines applicable under section 42 of the Code and sponsors are responsible for understanding and meeting all such deadlines.

■ Reservations

■ In General

Applications will be evaluated based on the rating and ranking of the projects using the evaluation criteria set forth in detail in the Program Guide. Recommendations for reservations of Tax Credits will be made by CDA to the Department's Housing Finance Review Committee (“HFRC”). After evaluating CDA's recommendations, HFRC will make a final recommendation to the Secretary, who must approve each reservation of Tax Credits. After applications have been evaluated against the threshold criteria and rated and ranked, the Secretary may approve reservations of Tax Credits without recommendations by HFRC in emergencies or when urgent action is required. If, in any round of competition, CDA determines in its sole discretion that the submitted projects have low compliance with the project selection criteria, CDA reserves the right not to make any recommendations for reservations of Tax Credits at that time and to evaluate the applications in a subsequent round.

For projects competing in the spring round of rating and ranking each year, following recommendation by HFRC and approval by the Secretary, CDA will issue a reservation letter to the sponsor. This reservation letter is a binding commitment to reserve Tax Credits for the project, subject to receipt of documentation indicating timely completion of the project, certifying compliance with federal requirements, verifying project costs (at the time of allocation and at the time the project is placed in service), and showing the amount of Tax Credits necessary for the financial feasibility of the project and its viability as a low income housing project.

For projects competing in the fall round of rating and ranking each year, allocations, not reservations, will be issued by CDA after recommendation by HFRC and approval by the Secretary. See the section on Allocations below.

In the event that reservations of Tax Credits are approved or denied on any basis other than an

application's evaluation against the threshold criteria and its rating and ranking under the evaluation criteria or its evaluation under the Secretary's Reserve (described below), CDA will include in the application file, and make available upon public request, a written explanation for the approval or denial of Tax Credits, as applicable.

■ Forward Reservations

Under certain conditions a project may be eligible to receive a reservation of Tax Credits from the State's ceiling for future years (a "Forward Reservation"). To receive a Forward Reservation, project sponsors must agree to comply with all conditions imposed by CDA and the IRS. The following types of projects may receive Forward Reservations from a future year's Tax Credit ceiling:

Projects Unable to Meet Deadlines. CDA may approve a Forward Reservation for projects that have already received reservation letters but are not able to be placed in service in the year of their reservation or to meet the requirements for a carryover allocation. Such projects will be considered for a Forward Reservation only if the Tax Credits reserved can be allocated to other projects or be carried forward for allocation in a future year (if this would not result in Maryland's disqualification for the national Tax Credit pool).

Insufficient Tax Credit. CDA may approve a Forward Reservation for projects that ranked high enough in a round of competition for an award of Tax Credits but for which there are insufficient remaining Tax Credits that can be allocated in the current year.

Multiple-Year Reservations. CDA may approve a Forward Reservation when projects or reservations will be appropriately staged over two or more years. CDA will determine if the sponsor's request for Tax Credits is large enough to limit the available resources in the current or future years for other projects that otherwise qualify for a reservation.

■ Increase of Reservations

CDA may approve increases in the amount of Tax Credits reserved for projects of up to 10% of the amount previously approved by the Secretary. Such increases may be approved only from the time the reservation letter is issued until the time a Carryover Allocation is issued. Projects whose Tax Credits are increased after approval by the Secretary need not be reevaluated against the threshold and project selection criteria. The aggregate increases approved by CDA may not exceed 10% of the State's Tax Credit ceiling for the year of the increase.

■ Tax Credit Rates

For projects receiving allocated Tax Credits, the sponsor may lock-in the tax credit rate by filing a Binding Agreement and Election Statement (the "Election Statement"). The Election Statement must be notarized and filed with CDA no later than the 5th day of the month following either (i) the month in

which the Reservation Letter is issued by CDA and executed by both CDA and the sponsor or (ii) the month in which the Carryover Allocation is issued and accepted.

For tax exempt bond financed projects, the Election Statement may be filed with CDA only in the month the bonds are sold or in the first 5 days of the following month.

If a sponsor does not file an Election Statement, the tax credit rate will be the rate in the month the project is placed in service.

■ **Cancellation of Reservation**

Each reservation of Tax Credits will be based on the representations made by the sponsor about the qualification of their project under the project selection criteria set forth in the Program Guide. As the project is completed and placed in service, the sponsor must show that all of the representations and undertakings made in the application and all project selection criteria are and will continue to be fulfilled to CDA's satisfaction. Failure of a sponsor to show that all representations and undertakings were carried out and all project selection criteria continue to be met may result in cancellation of a reservation. Substantial delays in construction of a project may also result in cancellation of a reservation. As required by federal law, sponsors must certify, at specific points in the process, as to the amount of all federal, State and local subsidies included or expected to be included in their projects.

Failure to submit the certification and supporting documentation will result in cancellation of the reservation. Any Tax Credits available from canceled reservations will be awarded to other projects or carried forward in Maryland's unallocated pool.

■ **Limitations on Reservations**

Based on the demand for Tax Credits and on project rankings, CDA may in its sole discretion limit the Tax Credits reserved for any one sponsor or for projects in any specific jurisdiction.

■ **Allocations**

■ **In General**

As required by federal law, sponsors must either place the project in service in the year of reservation or qualify for a binding commitment to carry over the Tax Credits for up to two additional years (a "Carryover Allocation"). To qualify for a Carryover Allocation, a sponsor must (a) incur costs in excess of 10% of the reasonably expected basis of the project (the "10% expenditure test") by the later of (i) the date which is six months after the date the Carryover Allocation is made, or (ii) the end of the year in which the Carryover Allocation is made, and (b) place the project in service by the end of the second year following the year of the Carryover Allocation. Failure to meet these requirements will result in the loss of the Tax Credits for the project.

For projects competing in the spring round of rating and ranking each year, CDA requires sponsors to certify, by November 1 in the year of reservation, that projects have been placed in service or that the sponsor has incurred costs in excess of 10% of the reasonably expected basis of the project. If a sponsor

has not met either of these requirements by November 1, then the reservation may be canceled unless the sponsor can present a plan of action showing that the project will be placed in service or the 10% expenditure test will be satisfied before December 1. To be considered for an extension of the reservation, sponsors must submit a non-refundable extension fee of \$1,000 at the time of the request. A Carryover Allocation will not be issued until the sponsor demonstrates to CDA that it has satisfied the 10% expenditure test.

For projects competing in the fall round of rating and ranking each year, CDA will issue a Carryover Allocation upon satisfaction of all conditions to the reservation other than the 10% expenditure test. CDA also requires sponsors to certify, within 5 months of the date of the Carryover Allocation, that the sponsor has incurred costs in excess of 10% of the reasonably expected basis of the project. If a sponsor has not met the 10% expenditure test by the fifth month following the Carryover Allocation, then the Carryover Allocation may be canceled unless the sponsor can present a plan of action showing that the 10% expenditure test will be satisfied before the sixth month following the Carryover Allocation. To be considered for an extension of the reservation, sponsors must submit a non-refundable extension fee of \$1,000 at the time of the request.

To qualify for a Carryover Allocation, in addition to the requirements above, the sponsor must submit a third-party attorney's or certified public accountant's certification that is acceptable to CDA and includes an itemization of the project's reasonably expected basis and the costs incurred. Alternatively, the sponsor may prepare and submit a certification and itemization of the project's reasonably expected basis and the costs incurred, along with supporting documentation acceptable to CDA.

Failure to submit the certification and supporting documentation will result in cancellation of the reservation. Any Tax Credits available from canceled reservations or allocations will be awarded to other projects or carried forward in Maryland's unallocated pool.

While CDA is required to verify that a project has satisfied this 10% expenditure test, CDA's determination is not binding on the IRS. As with all other matters under §42 of the Code, sponsors and investors must rely on their own professionals to determine whether the 10% expenditure test has been satisfied.

Placed-in-Service Evaluation. CDA will issue IRS Form 8609, certifying the allocation of Tax Credits to a project, at the time buildings are placed in service. The form is needed for the sponsor to claim Tax Credits on the project. Before the IRS Form 8609 is issued, CDA must receive and review the documentation specified below. As required by federal law, CDA will undertake a final evaluation of each project to determine the amount of Tax Credits needed to make the project feasible. Only the amount of Tax Credits needed for financial feasibility and viability of the project as a qualified low income housing project throughout the compliance period will be allowed. Any additional Tax Credits previously allocated to the project will be recaptured.

Date Project Placed in Service. In order to demonstrate that a project has been placed in service, the sponsor must provide use and occupancy permits for each building in the project. If the project involves rehabilitation, or the local jurisdiction does not issue use and occupancy permits, the sponsor may provide other evidence of the month the project was placed in service.

In the case of a rehabilitation project, the sponsor must provide a statement as to the placed-in-service date(s) selected for building(s) in the project.

Cost Certification. Each sponsor must submit a cost certification or other statement of costs, certified by the sponsor, detailing the total sources and uses of funds for the project and containing a statement of the project's eligible basis for each building in the project. For projects of 30 or more units, the certification must be prepared by a third-party qualified professional. For projects financed by the Rural Housing Service of Rural Development, an agency of the U.S. Department of Agriculture, or insured by the Federal Housing Administration ("FHA"), the federal cost certification may be submitted if it includes the total sources and uses of funds for the project.

Limited Partnership/LLC Operating Agreement. Each sponsor must provide to CDA a copy of the fully executed limited partnership agreement or limited liability company operating agreement, including all amendments, attachments and exhibits.

Extended Use Covenant. Each sponsor must submit a copy of the Extended Use Covenant in the form required by CDA, with evidence that it has been recorded.

■ **Cancellation of Allocation**

Each allocation of Tax Credits will be based on the representations made by the sponsor about the qualification of their project under the project selection criteria set forth in the Program Guide. As the project is completed and placed in service, the sponsor must show that all of the representations and undertakings made in the application and all project selection criteria are and will continue to be fulfilled to CDA's satisfaction. Failure of a sponsor to show that all representations and undertakings were carried out and all project selection criteria continue to be met may result in cancellation of an allocation. Substantial delays in completing a project may also result in cancellation of a allocation. As required by federal law, sponsors must certify, at each point in the process, as to the amount of all federal, State and local subsidies included or expected to be included in their projects.

Failure to submit the certification and supporting documentation will result in cancellation of the allocation. Any Tax Credits available from canceled allocations will be awarded to other projects or carried forward in Maryland's unallocated pool.

■ **Special Tax Credit Set-Asides**

■ **Non-Profit Set-Aside**

As required by the Code, a minimum of 10% of the total Tax Credits available for allocation (the "Non-Profit Set-Aside") will be set aside annually for projects involving qualified nonprofit organizations. Additional set-aside categories and amounts may be established periodically by CDA, by amendment to this Allocation Plan, to address particular needs. Other than the required Non-Profit Set-Aside and the Secretary's Reserve, discussed below, set-aside amounts shall have an expiration date established by CDA, at which time uncommitted Tax Credits will revert to the general pool of Tax Credits available to all qualified projects.

■ Secretary's Reserve

Ten percent of Maryland's annual Tax Credit ceiling will be set aside in a Secretary's reserve for projects that meet the threshold requirements and are designated as special projects by the Secretary or require urgent action. Before the application deadline for the first scheduled round of competition, the Secretary may increase the Secretary's reserve to accommodate distressed projects with a high public purpose. The reserve may be increased for the current year or any subsequent year, up to a cumulative maximum of 20% of the State's annual Tax Credit ceiling for that year.

A reservation of Tax Credits from the Secretary's reserve may be approved by the Secretary other than during a scheduled round of competition. Sponsors of these projects must still submit applications and meet the threshold criteria. Reservations from the Secretary's reserve will be subject to the same conditions discussed in the reservation section of this Allocation Plan. The Secretary may also approve forward reservations from the Secretary's reserve for any future year for projects that meet the threshold criteria. Before approving any reservation from the reserve, the Secretary will consider the project's location and characteristics, including whether the project includes the use of existing housing as part of a community revitalization plan, the State's housing needs, the owner's characteristics, any participation of local tax-exempt organizations, tenant populations with special housing needs, and public housing waiting lists, tenant populations of individuals with children, and projects intended for eventual tenant ownership.

After projects have received reservations of Tax Credits from the Secretary's reserve, at the Secretary's discretion, they may also compete for reservations during a round of competition. If the projects then qualify for and receive reservations for Tax Credits under other provisions of this plan, the Tax Credits from the Secretary's reserve will revert to the Secretary's reserve. The Secretary may make any Tax Credits in the Secretary's reserve available for projects competing in a round of competition.

■ Allocation Criteria

CDA has developed allocation criteria for use in selecting projects for Tax Credit allocations. The allocation criteria include, among others: serving the lowest income residents, serving qualified residents for the longest periods, location in qualified census tracts, the extent to which the project contributes to a concerted community revitalization plan, project location, housing needs characteristics, project characteristics, including whether the project includes the use of existing housing as part of a community revitalization plan, sponsor characteristics, participation of local tax-exempt organizations, tenant populations with special housing needs, public housing waiting lists, tenant populations of individuals with children, and projects intended for eventual tenant ownership. **The allocation criteria are set forth in detail in the Program Guide attached as Appendix A.**

The application material requests information concerning how the project meets the allocation criteria. This information will be used by CDA to assign points to projects based on the allocation criteria. The order of priority for reserving or allocating available Tax Credits to projects will be determined by rating and ranking projects in accordance with the number of points received.

The allocation criteria reflect federal tax law requirements, State housing needs, and CDA policies. While the criteria set forth in the Allocation Plan and the Program Guide will be used to evaluate whether projects meet CDA's housing objectives, projects will also be evaluated on their financial feasibility and

viability as low-income housing projects. The determination that a project will receive an allocation of Tax Credits rests solely with CDA.

The Program Guide includes information regarding CDA's criteria, requirements, and policies for administering the Tax Credit Program. **The Program Guide incorporates many of the federal requirements for the Tax Credit but is not intended to replace or fully represent the Tax Credit requirements under §42 of the Code. If there is a conflict between a requirement of the Allocation Plan or the Program Guide and the requirements of §42 of the Code, the more restrictive requirement shall apply in the sole discretion of CDA.**

■ Project Monitoring

■ Introduction

The Code requires CDA to include in its Allocation Plan a procedure that CDA will follow in monitoring Tax Credit projects for noncompliance with the provisions of §42 of the Code and in notifying the Internal Revenue Service of any noncompliance of which CDA becomes aware. Treasury Regulation §1.42-5 sets forth minimum standards that the monitoring procedures must meet in order for the Allocation Plan to meet Code requirements. Compliance with the requirements of §42 is the responsibility of the owner of the building for which the credit is allowable. CDA's obligation to monitor for compliance with the requirements of §42 does not make CDA liable for an owner's noncompliance

CDA adopts the following requirements for evaluating compliance with §42 of the Code and the Tax Credit Program. These minimum standards may be modified or amended in CDA's sole discretion by amendment to the Allocation Plan.

■ Recordkeeping and Record Retention

Recordkeeping. The owner of a low-income housing project must keep records for each qualified low-income building in the project that show, for each year throughout the term of the Extended Use Period in effect for that project:

- (i) the total number of residential rental units in the building (including the number of bedrooms and the size in square feet of each residential rental unit);
- (ii) the percentage of residential rental units in the building that are low-income units;
- (iii) the rent charged on each residential rental unit in the building (including any utility allowances);
- (iv) the number of occupants in each low-income unit, but only if rent is determined by the number of occupants in each unit under §42(g)(2) of the Code (as in effect before the amendments made by the Revenue Reconciliation Act of 1989);
- (v) the low-income unit vacancies in the building and information that shows when, and to whom, the next available units were rented;

- (vi) the annual income certification of each low-income tenant per unit, unless the Secretary of the Treasury has, on application by the owner, waived annual income recertification for a building occupied entirely by low-income tenants;
- (vii) documentation to support each low-income resident's income certification;
- (viii) the eligible basis and qualified basis of the building at the end of the first year of the credit period; and
- (ix) the character and use of the nonresidential portion of the building included in the building's eligible basis under §42(d) of the Code.

Record Retention. The owner of a low-income housing project must retain the records described above for at least six years after the due date (with extensions) for filing the federal income tax return for that year. The records for the first year of the credit period (defined in Code §42(f)(1)), however, must be retained for at least six years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period (defined in Code §42(i)(1)) of the building.

Building Inspection Record Retention. The owner of a low-income housing project must retain the original local health, safety, or building code violation reports or notices that were issued by the State or local government unit for CDA's inspection. Retention of the original violation reports or notices is not required once CDA reviews the violation reports or notices and completes its inspection, unless the violation remains uncorrected.

■ Certification and Review

Certification. The owner of a low-income housing project must certify to CDA at least annually, in a form acceptable to CDA and under penalty of perjury, that for the preceding 12-month period:

- (i) the project met the requirements of:
 - (A) the 20-50 test under §42(g)(1)(A) of the Code, or the 40-60 test under §42(g)(1)(B) of the Code, whichever minimum set-aside test was applicable to the project; and
 - (B) if applicable to the project, the 15-40 test under §42(g)(4) and §142(d)(4)(B) of the Code for "deep rent skewed" projects;
- (ii) there was no change in the applicable fraction (as defined in §42(c)(1)(B) of the Code) of any building in the project, or that there was a change, and a description of the change;
- (iii) the owner has received an annual income certification from each low-income resident, and documentation to support that certification;
- (iv) each low-income unit in the project was rent-restricted under §42(g)(2) of the Code;
- (v) all units in the project were for use by the general public, including the requirement that no finding of discrimination under the Fair Housing Act, 42 U.S.C. 3601-3619, occurred for the project. For these purposes, a "finding of discrimination" includes an adverse final decision by the Secretary of the Department of Housing and Urban Development (HUD) under 24 CFR

180.680, an adverse final decision by a substantially equivalent state or local fair housing agency under 42 U.S.C. 3616a(a)(1), or an adverse judgment from a federal court;

(vi) the buildings and low-income units in the project were suitable for occupancy, taking into account local health, safety, and building codes (or other habitability standards), and the State or local government unit responsible for making local health, safety, or building code inspections did not issue a violation report for any building or low-income unit in the project. If a violation report or notice was issued by the governmental unit, the owner must attach a statement summarizing the violation report or notice or a copy of the violation report or notice to the annual certification submitted to CDA under paragraph (1) of this section. In addition, the owner must state whether the violation has been corrected;

(vii) there was no change in the eligible basis (as defined in §42(d) of the Code) of any building in the project, or if there was a change, the nature of the change;

(viii) all tenant facilities included in the eligible basis under §42(d) of the Code of any building in the project, such as swimming pools, other recreational facilities, and parking areas, were provided on a comparable basis without charge to all tenants in the building;

(ix) if a low-income unit in the project became vacant during the year, reasonable attempts were or are being made to rent that unit or the next available unit of comparable or smaller size to tenants having a qualifying income before any units in the project were or will be rented to tenants not having a qualifying income;

(x) if the income of tenants of a low-income unit in the project increased above the limit allowed in §42(g)(2)(D)(ii) of the Code, the next available unit of comparable or smaller size in the building was or will be rented to residents having a qualifying income;

(xi) an extended low-income housing commitment as described in section 42(h)(6) of the Code was in effect, including the requirement under section 42(h)(6)(B)(iv) of the Code that an owner cannot refuse to lease a unit in the project to an applicant because the applicant holds a voucher or certificate of eligibility under section 8 of the United States Housing Act of 1937; and

(xii) all low-income units in the project were used on a non-transient basis (except for transitional housing for the homeless provided under section 42(i)(3)(B)(iii) of the Code or single-room occupancy units rented on a month-by-month basis under section 42(i)(3)(B)(iv) of the Code.

Review.

(i) CDA will conduct on-site inspections of all buildings in all low-income housing projects by the end of the second calendar year following the year the last building in the project is placed in service and, for at least 20 percent of the project's low-income units, inspect the units and review the low-income certifications, the documentation supporting the certifications, and the rent records for the tenants in those units;

(ii) At least once every 3 years, CDA will conduct on-site inspections of all buildings in all low-income housing projects and, for at least 20 percent of the project's low-income units,

inspect the units and review the low-income certifications, the documentation supporting the certifications, and the rent records for the tenants in those units; and

(iii) CDA will randomly select which low-income units and tenant records are to be inspected and reviewed. The review of tenant records may be undertaken wherever the owner maintains or stores the records (either on-site or off-site). The units and tenant records to be inspected and reviewed will be chosen in a manner that will not give owners of low-income housing projects advance notice that a unit and tenant records for a particular year will or will not be inspected and reviewed. However, CDA may give an owner reasonable notice that an inspection of the building and low-income units or tenant record review will occur so that the owner may notify tenants of the inspection or assemble tenant records for review.

(iv) At the sole discretion of CDA, the review of annual certifications may be waived for buildings of which 50% or more of the aggregate basis (taking into account the building and the land) is financed with the proceeds of tax-exempt bonds, if CDA has entered into an agreement with the tax-exempt bond issuer that requires the issuer to provide information concerning the income and rent of the tenants in the building. At its discretion, CDA may assume the accuracy of the information provided by the tax-exempt bond issuer without verification, or seek such additional verification as it deems appropriate. CDA will review the information and determine that the income limitation and rent restriction of §42(g)(1) and (2) of the Code are met. If the information is not sufficient for CDA to make this determination, CDA will request the necessary additional rent and income information from the owner of the buildings. CDA will notify the owner of the project in writing if no evidence of noncompliance has been found.

(v) CDA will report its compliance monitoring activities annually to the IRS on Form 8610, "Annual Low-Income Housing Credit Agencies Report."

■ Inspection

(i) CDA has the right to perform an on-site inspection of any low-income housing project throughout the Extended Use Period applicable to the buildings in the project. This inspection provision is separate from any review of low-income certifications, supporting documents, and rent records.

(ii) Inspection standard. For the on-site inspections of buildings and low-income units required above, CDA will review any local health, safety, or building code violations reports or notices retained by the owner and will determine:

(a) Whether the buildings and units are suitable for occupancy, taking into account local health, safety, and building codes (or other habitability standards); or

(b) Whether the buildings and units satisfy, as determined by CDA, the uniform physical condition standards for public housing established by HUD (24 CFR 5.703). The HUD physical condition standards do not supersede or preempt local health, safety, and building codes. A low-income housing project under section 42 of the Code must continue to satisfy these codes and, if CDA becomes aware of any violation of these codes, CDA will report the violation to the IRS. However, provided CDA determines by inspection that the HUD standards are

met, CDA is not required to determine by inspection whether the project meets local health, safety, and building codes.

■ Notification of Non-Compliance

Notice to Owner. CDA will provide prompt written notice to the owner of a low-income housing project if it does not receive the required annual certifications; does not receive all compliance monitoring fees when due; does not receive for compliance review any requested tenant income certifications, supporting documentation, or rent records; or discovers by inspection, review, or in some other manner that the project is not in compliance with the provisions of §42 or the Tax Credit Program. Each notice will specify a period (the “Correction Period”), not to exceed 90 days from the date of the notice, within which the owner must supply any missing certifications and bring the project into compliance with the provisions of §42 of the Code and the Tax Credit Program. CDA may extend the Correction Period for up to six months for good cause.

Notice to Internal Revenue Service. CDA will file Form 8823, “Low-Income Housing Credit Agencies Report of Noncompliance,” with the IRS no later than 45 days after the end of the Correction Period and no earlier than the end of the Correction Period, whether or not the noncompliance or failure to certify is corrected. CDA will explain on Form 8823 the nature of the noncompliance or failure to certify and indicate whether the owner has corrected the noncompliance or failure to certify. Any change in either the applicable fraction or eligible basis that results in a decrease in the qualified basis of the project under §42(c)(1)(A) of the Code is noncompliance that must be reported to the IRS. If the noncompliance or failure to certify is corrected within 3 years after the end of the correction period, CDA will file Form 8823 with the IRS reporting the correction of the noncompliance or failure to certify.

■ Retention of Records by CDA

CDA will retain records of noncompliance or failure to certify for six years following CDA’s filing of the related Form 8823. In all other cases, CDA will retain the certifications and records for three years from the end of the calendar year in which CDA receives them.

■ Compliance Monitoring Fees

CDA shall charge an annual compliance monitoring fee for all low-income housing projects of \$25.00 per unit. The fee shall be applicable to all units in all new and existing low-income housing projects receiving Tax Credits. The fee will be charged on January 1 of each year for the preceding calendar year, commencing on January 1, 2002 for the calendar year beginning January 1, 2001. Fees may be adjusted at the discretion of CDA to cover increases in compliance monitoring expenses generally, or in the case of instances of noncompliance at a particular project, at such project.

■ Changes in Monitoring Procedures

CDA reserves the right, without amending this Allocation Plan, to modify any and all compliance monitoring, reporting and notification procedures and requirements as necessary to comply with changes in applicable industry standards or federal law or regulations.

■ Miscellaneous

■ Subsidy Layering Review

HUD is required to undertake subsidy layering reviews of each project receiving HUD housing assistance to ensure that sponsors do not receive excessive government subsidies by combining HUD housing assistance with other forms of federal, State, or local assistance. For projects that combine HUD housing assistance with Tax Credits, HUD has delegated the subsidy layering review to CDA. HUD and CDA have entered into a Memorandum of Understanding (“MOU”) governing the procedures that CDA must follow when undertaking the subsidy layering review. Generally, the fee limits for developers fee, overhead, builder’s profit and other fee limits set forth in this Allocation Plan and the Program Guide will be applied by CDA in its subsidy layering review. Copies of the MOU are available from CDA upon request. CDA will complete the subsidy layering review for applicable projects after the sponsor and HUD submit relevant documentation for review. This information includes the results of HUD’s underwriting analysis, the sponsor’s proposed development costs, and information concerning any syndication of the project. Specific documentation required by CDA includes those items referenced in HUD’s guidelines and implementing instructions. CDA will undertake the subsidy layering review for each project after completion of HUD’s and CDA’s underwriting, if applicable. CDA will complete a second subsidy layering review at the time the IRS Form 8609 is issued for the project.

CDA reserves the right, without amending this Allocation Plan, to amend its subsidy layering procedures as necessary to comply with changes in applicable federal law or regulations, HUD guidelines or the MOU.

■ Correspondence and Submittals

All correspondence and submittals to be given to CDA pursuant to the Allocation Plan shall be in writing and sent or delivered to the Community Development Administration, Maryland Department of Housing and Community Development, 100 Community Place, Crownsville, Maryland 21032, attention: Tax Credit Administrator, for matters involving the application, reservation and allocation processes, and Director, Rental Service Programs, for matters involving compliance, or in either case, by e-mail to taxcredits@dhcd.state.md.us.

■ Partial Invalidity

If any provision of the Allocation Plan, or the application of the Allocation Plan to any person or circumstances, is found by a court to any extent to be invalid or unenforceable, the remainder of the Allocation Plan, or the application of that provision to persons or circumstances other than those with respect to which it is held invalid or unenforceable, shall not be affected. Each provision of the Allocation Plan shall be valid and enforceable to the fullest extent permitted under State or federal law.

■ Disclaimer

In making an allocation of Tax Credits to an owner, CDA will determine, based solely on information submitted in the owner's application, that the low-income housing project, if completed as proposed in the application, will qualify for an allocation of Tax Credits. CDA will neither underwrite the project nor certify that any building in a project will actually meet the requirements necessary to qualify for Tax Credits. CDA will not perform any independent investigation as to the initial qualification of any building for Tax Credits and will not perform any subsequent investigation or otherwise monitor the project or any building for eligibility for Tax Credits in the future, except as required by law. CDA will make no representation concerning the eligibility of any building in a project for Tax Credits, the ability of any owner or investor in a project to use the Tax Credits, or the status of a project as a "qualified low-income housing project" as that term is defined under §42 of the Code. **The Internal Revenue Service is not bound by determinations made by CDA in the allocation of Tax Credits or the monitoring of project compliance.**

Neither CDA nor its officers, employees, agents, or representatives will bear any liability to any owner, investor, tenant, lender, or any other person or entity for any claim arising out of a project or the Tax Credit Program. The applicant, sponsor, developer, and owner of a project are not the agents of CDA and have no authority to act on behalf of or bind CDA or its officers, employees, agents, or representatives. This limitation of liability applies not only to matters related to the Tax Credit Program but also to any matter or claim involving the acquisition, development, financing, ownership, operation, or management of any building or project, including an applicant's, owner's, developer's, sponsor's, or any other party's failure to comply with any federal, state, or local environmental, labor, housing, employment discrimination, permitting, zoning, or land use law, regulation, or requirement.

No officer, employee, agent, or representative of CDA shall be personally liable in any matter arising out of the administration of the Tax Credit Program, including the undertakings or obligations set forth in the Allocation Plan or in any other document or agreement executed or delivered in conjunction with the Tax Credit Program.

Lenders and investors should consult with their own tax or investment counsel to determine whether a project qualifies for Tax Credits, whether a lender on foreclosure or an investor may use the Tax Credits, and whether any project is commercially feasible.

APPENDIX A

Maryland Department of Housing and Community Development

Community Development Administration Housing Development Programs

MULTIFAMILY RENTAL FINANCING PROGRAM GUIDE