

DIVISION OF HOUSING AND COMMUNITY RENEWAL

PART 2040

LOW-INCOME HOUSING CREDIT QUALIFIED ALLOCATION PLAN

Statutory Authority: U.S. Internal Revenue Code, Section 42(m); Public Housing Law, Section 19.

Section

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Section 2040.1 Purpose and background.

The Tax Reform Act of 1986, as amended, (the “act”) establishes a Federal tax credit (“low-income housing credit”, “LIHC” or “credit”) administered by state housing agencies for owners of housing for persons of low income. The act authorizes the governor of each state to allocate the low-income housing credit ceiling among governmental units and other issuing authorities in the state. The act requires that the allocation of credit to owners of low-income housing be coordinated by a single state housing credit agency. The act further requires each agency allocating credits to adopt a qualified allocation plan (the “plan”) which sets forth the criteria and preferences by which credit will be allocated to projects. By Executive Order, the New York State Division of Housing and Community Renewal has been designated as the State Housing Credit Agency to allocate the credit in a manner which maximizes the public benefit by addressing the State's need for low-income housing and community revitalization incentives. In order to provide for the effective coordination of the State's low-income housing credit program with section 42 of the United States Internal Revenue Code (the “code”), this plan shall be construed and administered in a manner consistent with the code and regulations promulgated thereunder.

Section 2040.2 Definitions.

As used in this Part, any term defined in the code shall have the same meaning herein unless a different meaning is provided herein.

(a) Adjusted project cost shall mean the proportional amount of approved project costs attributable to the LIHC regulated portion of the project. Adjusted project cost shall include the developer's fee, and any capitalized reserves or operating assistance needed to support the cost of real estate operations and irrevocably assigned to the project but excluding any costs associated with the syndication of the partnership.

(b) Code shall mean section 42 of the United States Internal Revenue Code as set forth in the United States Code Annotated, title 26, Internal Revenue Code, sections 1 to 60, copyright 2002, pages 324 – 386 - including the 2007 Cumulative Annual Pocket Part, pages 154 - 182, published by West Group , St. Paul, MN. Copies are available for public inspection and copying by appointment at the Division of Housing and Community Renewal’s offices located at 38-40 State Street, Albany, New York.

(c) Commissioner shall mean the Commissioner of the Division of Housing and Community Renewal of the State of New York.

(d) Compliance period shall mean the period of 15 taxable years beginning with the first taxable year the building is placed in service or, if irrevocably elected pursuant to the code, the succeeding year .

(e) Cost completion guarantee shall mean a commitment by the developer to provide additional equity or a noninterest bearing loan in an amount sufficient to pay for any increases in project cost which arise subsequent to the applicant's request for a carryover allocation.

(f) Cost of real estate operations shall mean the maintenance and operating cost of the project, required reserves, and debt service. The cost of social services provided to tenants shall not be included as a cost of real estate operations.

(g) Division, DHCR or agency shall mean the Division of Housing and Community Renewal.

(h) Extended use period shall mean the period: (1) beginning the first day in the compliance period on which a building is part of a qualified low-income housing project, and (2) ending on the later of: (i) the date specified in the regulatory agreement required by section 2040.5 hereof or (ii) the date which is 15 years after the completion of the compliance period.

(i) Feasibility review shall mean a review to determine that the proposed project can be financed, completed and operated in compliance with LIHC regulatory requirements based upon the

development cost, financing, rents to be charged, the income and expenses of the project and the market for the units.

(j) High acquisition cost project shall mean a preservation project in which acquisition cost is 25 percent or more of total development cost. Notwithstanding any other provision of this Part, the amount of the developer's fee for a high acquisition cost project shall be based upon the division's assessment of risk assumed by the project owner, considering factors including, but not limited to, rent subsidies or other project operating support, location, financing sources, occupancy level, project type, and identity of interest.

(k) HTFC shall mean the Housing Trust Fund Corporation, a public benefit corporation created and existing as a subsidiary of the New York State Housing Finance Agency pursuant to section 45-a of the New York Private Housing Finance Law.

(l) Identity of interest shall mean any financial, familial or business ownership relationship between any general partner and any participant in the project's development. This includes, but is not limited to, existence of a reimbursement arrangement or exchange of funds; common financial interests; common officers, directors or stockholders; or family relationships between officers, directors, or stockholders.

(m) Local non-profit organization shall mean a tax-exempt organization under section 501 (c)(3) or (c)(4) of the code which provides housing-related services in the primary market area or county in which a proposed LIHC-assisted project is to be located.

(n) Net syndication proceeds shall mean the net present value of all capital contributions by investors in the project determined as of the placed-in-service date less any bridge loan interest and syndication expenses. The net present value shall be determined by applying a discount factor, derived from the current 10-year U.S. Treasury Bill rates, against the project proceeds installment schedule.

(o) Operating deficit guarantee shall mean a provision in the project owner's organizational documents providing a commitment to pay any operating deficits incurred during the first 36 months after the project is placed in service. The amount of such guarantee shall not be less than one-fifth of the developer's fee approved by the division.

(p) Persons with special needs shall mean: persons with HIV/AIDS; persons with alcohol/substance abuse disorders; persons with psychiatric disabilities; homeless persons and families; persons with physical disabilities; persons who have been victims of domestic violence; persons with mental retardation/developmental disabilities; frail elderly persons; or any other population so designated by the division.

(q) Preservation project shall mean a project in which residential rental property is rehabilitated to extend its useful life to serve as affordable housing and the project averts the loss of affordable housing currently serving the housing needs of a population whose housing need would justify the replacement of the housing if it ceased to be available to that population. The scope of the rehabilitation must be sufficient for the project to function in good repair as affordable housing for a period equal to at least 30 years from the date of issuance of the final credit allocation.

(r) Primary market area shall mean the geographic area from which a project is expected to draw the majority of its residents.

(s) Qualified low-income housing project shall mean a project in which either:

(1) 20 percent or more of the residential units are rent restricted and occupied by individuals whose income is 50 percent or less of area median income; or

(2) 40 percent or more of the residential units are rent restricted and occupied by individuals whose income is 60 percent or less of area median income; or

(3) 25 percent or more of the residential units are rent restricted and occupied by individuals whose income is 60 percent or less of area median income, where allowable under the code.

(t) Supportable debt shall mean debt which can be paid by the operating income available after payment of allowable expenses and a nominal return on equity. The amount is determined by examining the operating budget (i.e., rents, operating expenses, debt service and cash flow) of the low-income portion of the project and permitting a nominal return on equity.

(u) Supportive housing shall mean projects which give preference in tenant selection to persons with special needs for at least 30 percent of the LIHC-assisted units. To be considered supportive housing:

(1) The applicant must document the need for housing for the targeted population within the primary market area;

(2) The applicant must ensure the delivery of appropriate services, for which a documented need exists, to the targeted population as evidenced in a comprehensive service plan and an agreement in writing with an experienced service provider;

(3) The applicant must include a transportation plan to ensure access to necessary services;

(4) The applicant must have funding in place or identify a viable plan for the funding of appropriate services;

(5) The applicant must include provision for an ongoing rental subsidy or other form of subsidy which will be available to ensure that rents paid by the targeted population remain affordable; and

(6) The applicant must identify, and have a written agreement with, a public agency or experienced service provider that will refer eligible persons and families for the targeted units.

(v) Visitability shall mean that a residential unit includes the provision of at least one means of entry on an accessible route (no-step entrance), a 36 inch or greater clear circulation path through the first floor of the unit, including all interior doorways, and at least a half-bath on the first floor of the unit large enough to accommodate a person in a wheelchair and allow that person to close the door.

Section 2040.3 DHCR allocation process.

(a) Funding rounds. The division, no later than January of each year, will publish in the State Register a notice of credit availability which informs applicants of submission dates and deadlines for future funding rounds.

(b) Documentation. Applicants requesting an allocation of credit must submit an application in a form approved by DHCR. The division may request any and all information it deems necessary for project evaluation. If any submission is incomplete or if documentation is insufficient to complete any evaluation of the proposed project, processing will be suspended. DHCR will notify applicants how the submission is incomplete and provide at least 10 business days for the applicant to submit the requested documentation. DHCR will not request or accept updated information related to incomplete or insufficient exhibits or attachments used primarily for rating an application.

(c) Processing fees. The division shall charge an application fee of \$2000, due at the time of application. A credit allocation fee of six percent of the first year credit allocation amount is due at the time of request for the issuance of carryover allocation. Not-for-profit applicants (or their wholly-owned subsidiaries) which will be the sole general partner of the partnership/project owner or sole managing member of the limited liability company/project owner may request and be approved to defer payment of fees until the time of carryover allocation.

(d) Credit allocation process. Only applications submitted by a published deadline will be evaluated for an allocation. Applications will be reviewed for completeness, eligibility, scoring, project feasibility, and consistency with the division's underwriting standards. The division expects to notify applicants within 150 days from the application deadline on allocation decisions. The process the division employs for allocating credit entails the following:

(1) Credit reservation or binding agreement. The division will determine, in its sole discretion, whether to provide the applicant with a credit reservation or binding agreement based

upon the readiness of the project and the availability of credit. (i) Credit reservations will contain deadlines for: closing on construction financing in an amount sufficient to complete the project; attainment of commitments for permanent financing in an amount sufficient to complete the project; construction start; the project owner to incur more than 10 percent of the reasonably expected basis in the project; and submission of documents necessary for the issuance of an allocation of credit. (ii) Applicants, after meeting the conditions of the credit reservation, may request a binding agreement if the applicant has obtained commitments from all sources of construction and permanent financing and has obtained all necessary local approvals. Generally, a binding agreement will be issued to an applicant qualifying for a credit reservation to facilitate a project's attainment of construction and/or permanent financing. (iii) If the applicant does not comply with the deadlines contained in the credit reservation or binding agreement, the division may revoke the reservation or binding agreement and require the applicant to re-apply for credits.

(2) Carryover allocation. Carryover allocations issued by the division will contain any special conditions and specific performance standards. A carryover allocation will be issued if the division determines that an applicant has met the requirements contained in the credit reservation and has submitted the proper certification that more than 10 percent of the reasonably expected basis in the project has been incurred by the project owner. In making a determination to issue a carryover allocation the division will consider the project's status with respect to environmental assessments, local reviews and financial commitments. The issuance of a carryover allocation by the division shall not impose upon the applicant more restrictive performance deadlines than those specified in the credit reservation.

(3) Final credit allocation. All projects which receive a credit reservation, binding agreement or carryover allocation from the division, enter service and submit necessary documentation will be evaluated for the final time prior to the final credit allocation. The division may

request additional information/documents to complete the evaluation of the project. Prior to the final credit allocation the owner and the division shall execute a regulatory agreement.

(4) Waiting list. Any complete application which meets the threshold eligibility review criteria but is not selected for a credit reservation will be placed on a waiting list which will be in effect until the next funding round, at which time the waiting list will be terminated. Applicants on the waiting list will remain eligible to be selected for a credit reservation if credits are made available to the division from the national credit pool, expired credit reservation or binding agreement, or recaptured credits.

(5) Other notifications. If an application is found to be incomplete, ineligible, or not feasible the applicant will be notified and no further action will be taken on the application.

(e) Threshold eligibility review criteria. At each stage of processing (i.e., application, reservation, binding agreement or allocation) applications will be subject to a threshold eligibility review, which will include, but not necessarily be limited to, whether the project meets the following minimum requirements:

(1) The project meets the occupancy, rent restrictions and any other requirements of the code.

(2) The project applicant has site control consistent with the code, for the project real estate through a lease, option, purchase contract or deed.

(3) The project applicant has taken all steps necessary at each stage of processing to secure the required governmental approvals to construct and operate the project and the applicant demonstrates that the project is eligible for all necessary governmental approvals.

(4) Evidence is provided that the project is consistent with the applicable HUD approved consolidated plan for the locality in which the project will be located.

(5) The project applicant has taken reasonable steps to address the objections to the proposed project, if any, raised by the chief executive officer of the locality where the project is proposed.

(6) The project developer, owner and/or manager have successfully developed and operated projects comparable to the proposed project and have the capacity and experience to undertake, complete and operate the proposed project.

(7) The project developer, owner and/or manager and their principals do not include anyone who owns or manages an existing project for which an IRS Form 8823 has been issued and has not been corrected or otherwise resolved as determined by the supervising agency.

(8) The project developer, owner and/or manager and their principals do not include anyone who has participated in a publicly assisted capital project that has been determined to be out of compliance with statutes, rules, regulations, policies or agreements and has not been corrected or otherwise resolved as determined by the public agency responsible for supervising the project.

(9) The amount of requested annual credit allocation does not exceed either the maximum per project or per unit amounts specified in the notice of credit availability issued by the division. Such amounts will be established based upon the expected availability of credit allocation authority. The applicants may request and the commissioner may grant a waiver of this requirement if the commissioner determines that there is sufficient credit available, the project is in furtherance of the State's housing goals and in the best interests of the citizens of the State of New York (this paragraph is not applicable to applications reviewed under section 2040.4 of this Part).

(10) A comprehensive market study, conducted by a market study analyst who has been pre-approved by the division, which demonstrates at a minimum that the proposed number and type of units meet an existing and identified need of low-income individuals and can be readily absorbed by existing need in the local area.

(11) There will be no adverse impact on the occupancy rates of other publicly-assisted housing in the local area.

(12) The project does not involve the permanent involuntary displacement of existing tenants in order to qualify for credits.

(13) The number of bedrooms in the units in the proposed project are appropriate for the type of occupancy proposed.

(14) All LIHC-assisted first floor units in new construction projects without an elevator, all LIHC-assisted units in new construction projects with an elevator, and as many LIHC-assisted units as feasible in adaptive reuse or rehabilitation projects shall meet visitability standards, except when such standards are demonstrated to be irreconcilable with federal, state or local statutes, regulations, ordinances or codes.

(15) If the project includes the rehabilitation of any building(s) the acquisition costs of the building(s) may not exceed 25 percent of the total development costs of the project unless:

(i) it is a preservation project (as defined at section 2040.2[q] of this Part); or

(ii) the commissioner has determined that the preservation of the building(s) is in

the best interest of the State (not applicable to applications reviewed under section 2040.4 of this Part).

(16) Project construction has not started without prior authorization by the division.

(17) The project will:

(i) be a qualified low-income housing project for no less than 30 years; or

(ii) be conveyed pursuant to an effective plan for existing tenants to purchase

the project at the end of the compliance period.

(18) The project must meet the following green building measures:

(i) utilize appliances which are labeled Energy Star including, but not limited to, refrigerators;

(ii) utilize Energy Star light fixtures, with the exception of light fixtures located in basements or storage areas;

(iii) utilize Energy Star heating systems or the equivalent which will produce the same or comparable energy efficiency or savings;

(iv) where appropriate, select and place native trees and plants to minimize water usage and maximize energy efficiency;

(v) use water-conserving fixtures;

(vi) maximize energy efficiency by use of daylight sensors and timers on outdoor lighting;

(vii) where indicated by local conditions for new construction, install a passive radon-reduction system to be activated should tests confirm the presence of radon gas in the building or, for rehabilitation projects, install an active radon-reduction system and measures should tests confirm the presence of radon gas in the building; and

(viii) for properties built before 1978, use lead-safe work practices during renovation, remodeling, painting and demolition.

(f) Project scoring and ranking criteria. Project applications which pass threshold eligibility review shall be scored and ranked based upon the following criteria. The scoring criteria are listed below in descending order according to the relative weight given to each group:

(1) Community impact/revitalization (maximum of 15 points). Scored on the extent the project provides affordable housing in an area that meets the following criteria:

(i) limited or no subsidized affordable housing production and an unmet demand for affordable housing in the past 10 years within the primary market area of the proposed location of the project (5 points);

(ii) strong housing market as evidenced by a vacancy rate of less than 5 percent for comparable units in the primary market area (5 points);

(iii) the project is part of a comprehensive community revitalization plan which includes the use or reuse of existing buildings, which may include the historic rehabilitation of existing buildings, and addresses employment, educational, cultural and recreational opportunities within the community (5 points);

(iv) is supported by the implementation of significant measures including but not limited to infrastructure improvements, real property tax relief and rezoning (5 points).

(2) Financial leveraging (13 points).

Scored to the extent that other funding sources (not including a deferred developer's fee) finance a portion of the project's total development cost, including but not limited to sources such as:

(i) permanent funding from sources other than the division or HTFC;

(ii) the donation of land and/or building(s);

(iii) the provision of a long term lease at a nominal amount;

(iv) the net syndication proceeds as a proportion of the total credit requested;

and/or

(v) the amount of credit requested per unit adjusted for unit size.

(3) Sponsor characteristics (10 points). Scored on the applicant's development and management team experience in the timely development and completion of low-income housing within approved development budgets, and the management of such housing within approved operating budgets in a manner consistent with all statutes, regulations and policies.

(4) Green building (10 points). Scored to the extent the project provides:

(i) the following sustainable development measures (up to 7 points):

(a) submission of a green development plan outlining an integrated design approach for the operation and development of the project;

(b) smart site location characterized by: 1) close proximity to existing

development, infrastructure, community services and retail facilities; 2) close proximity to public transit services; 3) nondisturbance of wetlands, critical habitat, steep slopes, prime farmland or park land; 4) compact densities for new construction; and 5) for new construction, building orientation maximizing use of passive solar heating/cooling;

(c) sidewalks linking the project to public spaces, open spaces and adjacent development;

(d) a Phase I Environmental Site Assessment;

(e) a surface water management plan;

(f) use of alternative, non-toxic and safe materials and practices to minimize health impacts for residents and workers; and

(g) ventilation measures to promote healthy indoor air quality.

(ii) one (1) or more of the following additional sustainable development measures (3 points):

(a) project is located on a brownfield, grayfield or adaptive reuse site;

(b) installation of photovoltaic panels to provide at least 10 percent of the project's estimated electricity; or

(c) utilization of building products and techniques beneficial to the environment.

(5) Long term affordability (7 points). Scored on the extent the applicant proposes to enter into an extended use agreement, which may include a commitment to convey ownership to a local non-profit organization, to operate the project as a qualified low-income housing project for a period longer than 30 years.

(6) Fully accessible and adapted, move-in ready units (6 points). Scored on whether:

(i) at least 5 percent (rounded up to the next whole number) of the project units are fully accessible and adapted, move-in ready for person(s) who have a mobility impairment and

the unit(s) will be marketed to households with at least one member who has a mobility impairment; and at least 2 percent (rounded up to the next whole number) of the project units are fully accessible and adapted, move-in ready for person(s) who have a hearing or vision impairment and the unit(s) will be marketed to households with at least one member who has a hearing or vision impairment (3 points); or

(ii) the percentages of units meeting the requirements of (i) above are equal to or exceed 10 percent and 4 percent (rounded up to the next whole number) respectively (a minimum of two units each)(6 points).

(7) Affordability (5 points). Scored on the percentage of LIHC units in the project which will be affordable to persons with the lowest incomes (e.g., 30 percent, 40 percent, or 50 percent of area median income).

(8) Individuals with children (5 points). Scored on the ratio of bedrooms to units in a project serving households with children.

(9) Energy efficiency (5 points). Scored to the extent the applicant demonstrates it will be eligible for, will participate in, and will meet the energy efficiency standards of the New York State Energy Research and Development Authority Multifamily Building Performance Program or the New York Energy Star Labeled Homes Program or, if the project is not eligible to participate in the aforementioned programs, demonstrates that the project will meet comparable energy efficiency standards.

(10) Marketing plan/public assistance (5 points). Scored on the extent preference in selection of tenants will be given to persons from public housing waiting lists or other existing waiting lists for subsidized housing and/or to persons and families whose current housing fails to meet basic standards of health and safety and who have little prospect of improving the condition of their housing except by residing in a project receiving tax credits and the preference is evidenced by an enforceable agreement with the source of referral.

(11) Project readiness (5 points). Scored on the status of financing commitments.

(12) Persons with special needs (5 points). Scored if: the project will give preference in tenant selection to persons with special needs for at least 15 percent of the LIHC-assisted units and whether the persons with special needs will be served by supportive services as evidenced by a comprehensive service plan and an agreement or commitment in writing with an experienced service provider.

(13) Participation of non-profit organizations (4 points). Scored on the extent of participation of a non-profit organization:

(i) whether a local non-profit organization or its for-profit wholly owned subsidiary:

(a) has fostering of low-income housing as one of its tax-exempt purposes,

(b) is not affiliated, established or controlled by a for-profit entity, and

(c) will serve as sole general partner of the limited partnership/project owner or sole managing member of the limited liability company/project owner (4 points);

OR

(ii) whether a local non-profit organization or its for-profit wholly owned subsidiary has a defined and substantive role in the development or management of the project through the extended use period (2 points);

OR

(iii) whether a non-profit organization that does not qualify as a local non-profit organization under section 2040.2(m), or its for-profit wholly owned subsidiary, has a defined and substantive role in the development or management of the project through the extended use period (1 point).

(14) Mixed income (3 points). Scored to the extent the project would reserve at least 15 percent of total project units for households earning above 60 percent of area median income.

(15) Project amenities (2 points).

Scored to the extent the project provides:

- (i) access to discounted broadband internet service;
- (ii) on-site Energy Star or equivalent laundry facilities or washer/dryer hookups;
- (iii) Energy Star central air-conditioning or the equivalent that will produce comparable energy efficiency or savings;
- (iv) an outdoor recreational area or garden space;
- (v) Energy Star dishwashers or the equivalent that will produce the same or comparable energy efficiency or savings; and/or
- (vi) a computer lab.

(g) Determination of the amount for credit allocation.

(1) (i) Evaluation of project. All projects considered for an allocation of credit shall be evaluated pursuant to the code at the following times: at application; at allocation; and after the building is placed in service. The division will consider the project ranking, analyze operating economics, financing and development cost for reasonableness and determine the amount of credit necessary for the financial feasibility of the project and its viability as a qualified low-income housing project. The division will require that: the operating economics of the project be fiscally sound and in compliance with LIHC regulatory requirements; and, that all project costs, including developer's fee, are necessary and reasonable based upon the project size, project characteristics, location and risk factors. Capitalized operating reserves shall be limited to real estate operations and may not be used to fund social services. The sources of all proposed financing for the project will be reviewed to ensure that the assistance proposed for the project does not exceed that amount necessary for project feasibility.

(ii) Preference in allocation of credit dollar amounts. Among the projects selected for a credit allocation, preference in the dollar amount of the credit allocation will be given to projects which:

- (a) serve the lowest income tenants;
- (b) are obligated to serve qualified tenants for the longest periods; and,
- (c) are located in a qualified census tract and their development

contributes to a concerted community revitalization plan.

These evaluations will be based upon the project's specific economic needs subject only to statutory limitations.

(2) Cost standards. If HUD assistance is proposed for the project, DHCR will apply HUD subsidy review layering guidelines. Otherwise the division shall apply the following standards when calculating the maximum amount of the credit necessary for the project:

(i) Construction related items (costs). The maximum allowable construction related costs shall be, in relation to the contractor's contract: builder's profit of 10 percent; builder's overhead of 4 percent; and general requirements of 6 percent.

(ii) Developer's fee. The amount of developer fee compensation for services, overhead, and profit recognized in the adjusted project cost shall be 10 percent of the acquisition and improvement cost associated with the low-income portions of the project. This can be increased up to a ceiling of 15 percent of improvement cost of the low-income portion where either the developer or its affiliate provides to the satisfaction of the division both a cost completion guarantee and an operating deficit guarantee as those guarantees are set forth in the project owner's organizational documents. Notwithstanding any other provision of this Part, the amount of the developer's fee for a high acquisition cost project shall be based upon the division's assessment of risk assumed by the project owner, considering factors including, but not limited to, rent subsidies or other project operating support, location, financing sources, occupancy level, project type, and identity of interest.

(iii) Identity of interest. The division may reduce any allowable costs, including but not limited to the developer's fee, where an identity of interest has been found among the parties to the transactions involving the syndication, development, and/or operation of the project. All applicants will be required to submit an affidavit disclosing the nature of any identity of interest. Where there exists such an identity of interest, the applicant will be required to demonstrate expenditures to be customary given the financial structure of the project. The division may also request that the applicant provide information regarding all officers, directors and principal shareholders of the development and contracting organizations and their relationship to the project and each other.

(3) Syndication standards. The division will require that the value received on sale of the credit from projects receiving an allocation from the division be valued at market rates or greater. The amount of equity capital contributed by investors to a project partnership shall not be less than the amount generally contributed by investors to similar projects as determined by using sales of comparable credit projects and the division's evaluation of market trends. The division will base all calculations of the minimum net syndication proceeds available to the project on the assumption that 99 percent of the project has been sold to investors unless advised otherwise by the applicant. If limited partners own 95 to 99 percent of the project the applicable market rate will be used; for projects in which the general partner ownership retained is greater than 5 percent, but less than 50 percent, the applicable market rate will be increased by 10 percentage points. For projects in which the general partner ownership retained is over 50 percent the applicable market rate will be increased by 20 percentage points.

(4) Calculation of credit amount. The credit amount for a project shall be the lesser of the eligible allocation or the gap amount.

(i) Eligible allocation. The eligible allocation is the maximum amount the project is eligible for under the code. It is determined by multiplying the qualified basis of the project by the applicable credit percentage.

(ii) Gap amount. The gap amount is determined by subtracting the amount of supportable debt and other associated financing from the adjusted project cost and then dividing this financing gap by a factor based upon either the market or syndication pricing proposed for the project, whichever is higher.

(5) General. The division reserves the right to allocate credit in a manner which yields an equitable distribution of credit throughout the State, to insure the participation of qualified non-profit organizations and to implement such special priorities or demonstration programs contained in the notice of credit availability. Any special priorities or demonstration programs shall be consistent with the priorities and selection criteria set forth herein and shall be described in detail in the notice of credit availability and request for proposals. Notwithstanding the scoring system set forth above, DHCR reserves the right to deny any request for an allocation of credit irrespective of its point ranking if such request is inconsistent with the State's housing goals and shall have the power to allocate credits to a project irrespective of its point ranking, if such intended allocation is: in compliance with the code; in furtherance of the State's housing goals ; and determined by the commissioner to be in the interests of the citizens of the State of New York. A written explanation shall be available to the general public for any allocation of a housing credit dollar amount which is not made in accordance with established priorities and the selection criteria set forth herein.

(6) Set-Asides. The division reserves the right to set aside credit for the purpose of implementing the State's housing goals, including, but not limited to, set-asides for preservation projects and supportive housing projects.

Section 2040.4 Projects financed by private activity bonds.

(a) Eligible projects. Projects financed by tax-exempt bonds subject to the private activity bond volume cap in accordance with section 42(h)(4)(A) of the code may be allocated low-income housing credit which is not taken into account regarding the State housing credit ceiling.

(b) Application process. Complete applications must be submitted at least 60 days prior to the proposed construction start date on a form approved by DHCR and will be accepted and processed throughout the calendar year. The division may request any and all information it deems necessary for project evaluation. If any submission is incomplete or if documentation is insufficient to complete any evaluation of the proposed project, processing will be suspended. DHCR will notify applicants how the submission is incomplete and provide at least 10 business days for the applicant to submit the requested documentation. Complete applications will be reviewed relative to criteria contained herein at section 2040.3(e) and (f) of this Part for eligibility and public purpose. Within 60 days after receipt of a complete application the division will issue to the applicant a finding as to whether the application is consistent with this qualified allocation plan and the amount of LIHC for which the project qualifies pursuant to section 2040.3(g) of this Part. If the application is consistent with this qualified allocation plan, the applicant will receive processing instructions for a final allocation of credit. If the project is found to be inconsistent with the division's qualified allocation plan the owner will be notified of the reasons.

(c) Processing fees. The division shall charge an application fee of \$2,000, due at the time of application. A credit allocation fee of 3 percent of the first year credit allocation amount is due at the time of request for the issuance of final credit allocation. Not-for-profit applicants (or their wholly-owned subsidiaries) which will be the sole general partner of the partnership/project owner or sole managing member of the limited liability company/project owner may request and be approved to defer payment of the application fee until the time of issuance of the final credit allocation.

(d) Determination of credit amount. In accordance with code section 42(m)(2)(D) the issuer of the tax exempt bonds is responsible for determining the dollar amount of credit which is necessary for

the financial feasibility of the project and its viability as a qualified low-income housing project throughout the credit period. Such determination must be included in the applicant's request to the division for a final allocation of credit. The division will process requests for a final allocation of credit within 60 days from receipt of all required documentation including an executed credit regulatory agreement with proof of recording. The division will apply the criteria as set forth in section 2040.3(g) of this Part (except for section 2040.3(g)(1)(ii) of this Part) in determining the amount for the final credit allocation.

(e) Regulatory term. The regulatory requirements of projects receiving an allocation under the terms of this section is described in section 2040.5 of this Part and shall be subject to compliance monitoring as described in section 2040.7 of this Part.

(f) This section 2040.4 shall apply to applications filed with DHCR, pursuant to section 42(h)(4)(A) of the code, prior to March 1, 2008. All other provisions of this Part shall remain in full force and effect for applications filed pursuant to this section prior to March 1, 2008.

Section 2040.5 Regulatory agreement.

(a) Restrictive covenant. The division shall require the owners of projects which receive a credit allocation after 1989 to execute a regulatory agreement. The regulatory agreement must be recorded as a restrictive covenant which runs with the land and returned to the division after recording (prior to the issuance of the final credit allocation). The regulatory agreement shall be made available for public inspection at the rental office of the owner and referenced in all marketing materials and a copy, or a division approved summary thereof, attached to the lease of each low-income unit.

(b) Other provisions. The regulatory agreement shall specify, for the low-income portion of the building(s) that: the agreement shall be binding on all successors of the owner; the owner agrees to be bound by any regulations duly promulgated by the division or the Federal government for projects

receiving low-income housing credits; the owner shall disclose the restricted rent for a dwelling unit to the prospective tenant prior to the execution of a lease; the owner shall secure from the tenant such information as is reasonably necessary to annually verify income; the owner shall address any citations for building code violations made by a municipality within 90 days of receipt; the owner shall ensure that the applicable fraction, as defined in the code, for the building for each taxable year in the extended use period will not be less than the applicable fraction specified therein; the owner shall consent to enforcement in any State court of the extended use requirement by any income eligible person; the owner shall annually submit a certification to DHCR stating that the building(s) is (are) owned and operated in compliance with the provisions of the code and any regulations promulgated thereunder, and provide such other information as the division may deem necessary; and the owner shall not retaliate against any tenant who notifies the division of alleged violations of the regulatory agreement. The extended use agreement shall contain a provision which states that the agreement shall not be terminated if ownership is transferred by foreclosure or by a deed-in-lieu of foreclosure as a result of any action to collect debt which is owed to any entity which at any time after the issuance of an final credit allocation had any ownership interest in the project.

(c) Request for a qualified contract. The owner may request only in writing, by certified mail to DHCR, that DHCR produce a qualified contract from a buyer who will continue to operate the building(s) for low-income use. A request for a qualified contract shall be an irrevocable offer to sell during the applicable one year period. If DHCR presents a qualified contract during the above one year period, such qualified contract shall confer upon the buyer an exclusive right to purchase the project. For the purpose of determining the value of a qualified contract, "cash distributions from (or available for distribution from) the project" as set forth in the code shall include management incentive fees paid or due to anyone who at any time after the issuance of an final credit allocation had any ownership interest in the project.

Section 2040.6 Miscellaneous issues.

(a) Information requests. Requests for information made under the Freedom of Information Law, must be in writing, and may be mailed to DHCR's Office of Legal Affairs, 38-40 State Street, Albany, New York 12207, or e-mailed to FOIL@dhcr.state.ny.us.

(b) Changes in ownership. Any and all changes in the ownership interests or principals of any project (prior to issuance of final credit allocation) for which an application has been submitted to DHCR, will be subject to the approval of DHCR. DHCR reserves the right to disallow any application where there have been changes in the ownership interests or principals.

Section 2040.7 Monitoring.

(a) Applicability. The following monitoring sections apply to all buildings for which the low-income housing credit determined under the code is, or has been, allowable at any time.

(b) DHCR monitoring officer. All DHCR administrative functions related to the operation of qualified low-income buildings shall be the responsibility of the monitoring officer who, unless otherwise designated by the commissioner, shall be the Deputy Commissioner for Housing Operations. The monitoring officer will be responsible for enforcing all regulatory agreements and reporting noncompliance to the IRS. All correspondence and/or legal notices should be addressed to the attention of the low-income housing monitoring officer at DHCR's Office of Housing Operations.

(c) Monitoring fee. A reasonable annual fee for monitoring may be charged by DHCR. Said fee is applicable to all buildings for which the low-income housing credit is or has been allowable at any time and shall not exceed 0.5 percent of the maximum restricted rents for the low-income units.

(d) Recordkeeping. The owner of a low-income housing project shall keep records for each qualified low-income building in the project and make these records available to the division upon request for monitoring. These records shall contain the following information for each year of the monitoring period:

- (1) the total number of residential rental units in each building, including the number of bedrooms and size in square feet of each residential rental unit;
- (2) the percentage and location of residential rental units that are low-income units in each building;
- (3) the rent charged for each residential rental unit, including any utility allowances;
- (4) the number of occupants in each low-income unit, if the rent is determined by the number of occupants in each unit pursuant to code section 42(g)(2) (as in effect before the amendments made by the Revenue Reconciliation Act of 1989);
- (5) the low-income unit vacancies in the building and information that shows when, and to whom, the next available units were rented;
- (6) all income certifications submitted by each past and present tenant of low-income units;
- (7) the documentation submitted to support each low-income tenant's income certification (for example, a copy of the tenant's Federal income tax return, W-2 form, or verifications of income from third parties such as employers or State agencies paying unemployment compensation). Tenant income is calculated in a manner consistent with the determination of annual income under section 8 of the United States Housing Act of 1937 (section 8), not in accordance with the determination of gross income tax for Federal income tax liability. In the case of a tenant receiving housing assistance payments under the HUD section 8 program, the documentation requirement is satisfied if the public housing authority provides a statement to the building owner declaring that the tenant's income does not exceed the applicable income limit under code section 42(g). In accordance with Internal Revenue Procedure 94-65, an owner may satisfy the documentation requirement for income from assets for a low-income tenant or prospective tenant whose net family assets do not exceed \$5,000 by annually obtaining a signed, sworn statement that includes: that the tenant's net family assets do not exceed \$5,000; the tenant's annual income from

net family assets; and the owner adheres to all requirements of Revenue Procedure 94-65. However, an owner may not rely on a low-income tenant's signed, sworn statement of annual income from assets if a reasonable person in the owner's position would conclude that the tenant's income is higher than the tenant's represented annual income. In this case, the owner must obtain other documentation of the tenant's annual income from assets to satisfy the requirement in section 1.42-5 (b)(1)(vii) of the income tax regulations;

(8) the eligible basis and qualified basis of the building at the end of the first year of the credit period (using the information contained on the IRS form 8609 which was filed with the IRS for the first credit period year for each building);

(9) a description listing the character and use of the non-residential portion of each building included in the building's eligible basis under code section 42(d) (e.g., tenant facilities that are available on a comparable basis to all tenants and for which no separate fee is charged for use of the facilities, or facilities reasonably required by the project);

(10) fiscal documentation to include annual budgets, all financial records pertaining to the project including, but not limited to bank statements, and all records related to the operation and maintenance of the project;

(11) documentation to support the maintenance practices of management;

(12) all tenant waiting lists, leases, inquiries, complaints and related records;

(13) utility allowance; and

(14) any original local health, safety, or building code violation reports or notices issued by a State or local government unit which pertain to the project.

(e) Record Retention. The owner of a low-income housing project shall retain the above records for each building in the project 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,

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 of the building.

Section 2040.8 Annual certification.

(a) Certification period. Annual certifications shall be submitted for all projects for which final credit allocation has been issued and shall be submitted annually for the 30-year period during which the project is subject to regulation under the code. The owner of a low-income housing project shall certify annually under the penalty of perjury that the project or building is in compliance with all applicable State and Federal laws, regulations, procedures, policies and contractual obligations in a form approved by DHCR.

(b) Certification content. The owner's certification shall include, but shall not necessarily be limited to the following elements:

(1) project and ownership data;

(2) certification that:

(i) the project meets the requirements of the 20-50 test under code section 42(g)(1), the 40-60 test under code section 42(g)(1)(B), or the 25-60 test under code section 42(g)(4) and Internal Revenue Code (the "IRC") section 142(d)(6) for New York City, whichever minimum set-aside test is applicable to the project, and the 15-40 test under code section 42(g)(4) and IRC section 142(d)(4)(B) for "deep rent skewed" projects, if applicable to the project;

(ii) (a) the owner has received an annual income certification from each tenant residing in a low income-unit and documentation to support that certification, or, in the case of a tenant receiving section 8 housing assistance payments, the statement from a public housing authority described in paragraph (b)(1)(vii) of 26 CFR section 1.42-5;

(b) the certification required by this subparagraph shall not be required if a waiver of the annual income recertification has been obtained for the project from the U.S. Internal

Revenue Service (the “IRS”) and a copy of the recertification waiver has been attached to the annual certification required by this section. The division shall not provide a statement in support of an owner’s application for a recertification waiver to the IRS that each residential rental unit in the building was a low-income unit under section 42 of the code at the end of the most recent credit period for the building, if the division has:

(1) determined that the project is not in compliance with the provisions of this low-income housing credit qualified allocation plan or the regulatory agreement required by section 2040.5 of this Part;

(2) has notified the project owner of the event(s) of noncompliance;
and

(3) the project owner has not documented correction of, or otherwise resolved, the noncompliance to the satisfaction of the division;

(iii) each low-income unit in the project is rent restricted under code section 42(g)(2);

(iv) all low-income units in the project are for use by the general public (as defined in 26 CFR part 1, section 1.42-9), including the requirement that no finding of discrimination under the Fair Housing Act, 42 U.S.C. 3601-3619, occurred for the project;

(v) all low-income units in the project are used on a nontransient basis except for transitional housing for the homeless provided under code section 42(i)(3)(B)(iii);

(vi) each building in the project is suitable for occupancy, taking into account local health, safety, and building codes 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 the DHCR. In addition, the owner must state whether the violation has been corrected;

(vii) there has been no change in the eligible basis (as defined in code section 42[d]) of any building in the project; or if there has been such a change(s), the owner shall certify to the nature of the change(s) (e.g., a common area has become commercial space, or a fee is now charged for a tenant facility formerly provided without charge) on a building-by-building basis;

(viii) there has been no change in the applicable fraction (as defined in code section 42[c][1][B]) of any building in the project; if there has been such a change(s) the owner shall certify to the nature of the change(s) on a building-by-building basis;

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

(x) when and if a low-income unit in the project became vacant, reasonable attempts were being or will be 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;

(xi) if the income of tenants of a low-income unit increased above the limit allowed in IRC section 42(g)(2)(D)(ii), the next available unit of comparable or smaller size in the building was rented to tenants having a qualifying income;

(xii) an extended low-income housing commitment (regulatory agreement), as described in IRC section 42(h)(6), was in effect for buildings subject to section 7108(c)(1) of the Revenue Reconciliation Act of 1989, 103 stat. 2106, 2308-2311, including the requirement 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, 42 U.S.C.

1437f (for buildings subject to section 13142[b][4] of the Omnibus Budget Reconciliation Act of 1993, 107 stat. 312, 438-439);

(xiii) the project has been operated in compliance with the DHCR regulatory agreement (if applicable);

(xiv) there has been no change in ownership of the project or any building within the project during the previous calendar year; and

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

Section 2040.9 Compliance and inspection.

(a) For all buildings placed in service on or after January 1, 2001, the division shall conduct on-site inspections of all buildings in the project 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 for habitability and review the low-income certifications, the documentation supporting the certifications, and the rent records for the tenants in those units.

(b) At least once every three years, the agency shall conduct on-site inspections of all buildings in the project and, for at least 20 percent of the project's low-income units, inspect the units for habitability and review the low-income certifications, the documentation supporting the certifications, and the rent records for the tenants in those units.

(c) The agency shall randomly select which low-income units and tenant records are to be inspected and reviewed by the agency. 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 shall 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. DHCR 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.

(d) The division shall review any local health, safety, or building code violations reports or notices retained by the owner and must determine whether the buildings and units satisfy, as determined by the agency, 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 must continue to satisfy these codes and, if the agency becomes aware of any violation of these codes, the agency must report the violation to the IRS. However, provided the agency determines by inspection that the HUD standards are met, the agency is not required to determine by inspection whether the project meets local health, safety, and building codes.

(e) Exception from inspection provision. The division shall not be required to inspect a building under this subdivision (d) of this section if the building is financed by the Rural Housing Service (RHS) under the section 515 program, the RHS inspects the building (under 7 CFR part 1930), and the RHS and DHCR enter into a memorandum of understanding, or other similar arrangement, under which the RHS agrees to notify the agency of the inspection results.

(f) An inspection may include, but is not limited to: a physical inspection of the building, grounds, individual rental units, common facilities and central systems for general construction; a review of all records described above; interviews of tenants and project employees; and any other information which the division deems relevant.

Section 2040.10 Notification of noncompliance.

In addition to any other remedies which may be available, in accordance with the requirements of the code, the division shall notify project owners and the IRS of noncompliance with any of the above requirements or failure to submit any owner certification required by this plan as follows:

(a) The division shall provide prompt written notice to the owner of a low-income housing project if the division does not receive the certification described in section 2040.8 of this Part or does not receive, or is not permitted to inspect, the tenant income certifications, supporting documentation, and rent records described in section 2040.7 of this Part, or discovers upon inspection, review, or in some other manner, that the project is not in compliance with the provisions of the code.

(b) The division shall file a “Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition” (the “form”), and/or provide such other notification as required by the code, with the IRS no later than 45 days after the end of the correction period (as described in subdivision [c] of this section, including such extensions of time granted by the division for correction) and no earlier than the end of the correction period, whether or not the noncompliance or failure to certify is corrected; and shall explain on the form 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 eligible basis or applicable fraction under sections 2040.8(b)(2)(vii) and (viii) of this Part respectively, that results in a decrease in the qualified basis of the project under code section 42(c)(1) is noncompliance that must be reported to the IRS. If the division reports on the form that a building is entirely out of compliance and will not be in compliance at any time in the future, the division need not file the form in subsequent years to report that building's noncompliance. (The division shall file the form with the IRS to report a sale of a project and or building for which the low-income housing credit is, or has been allowable at any time.) If the noncompliance or failure to certify is corrected within 3 years after the end of a correction period, the division shall file the form with the IRS reporting the correction of the noncompliance or failure to certify.

(c) The division shall provide the owner a correction period in which to cure a failure to certify or event(s) of noncompliance. The correction period shall not exceed 90 days from the date the division sends a notification of noncompliance. The division may extend the correction period for up to six months if, in its sole discretion, the division determines there is good cause for granting the extension.

Section 2040.11 Agency retention of records.

The division shall retain records of noncompliance or failure to certify for six years beyond the agency's filing of the respective IRS form 8823. In other cases the division must retain the certifications and records described in sections 2040.7 and 2040.8 of this Part for three years from the end of the calendar year the division receives the certified records.

Section 2040.12 Delegation of authority.

The division, at its discretion, may delegate its monitoring functions to another State housing credit agency or retain an agent or other private contractor to perform monitoring to the extent delegation of the division's monitoring activities is permitted by law.

Section 2040.13 Liability.

Compliance with the requirements of the code is the sole responsibility of the owner of the building for which the credit is allowable. DHCR's obligation to monitor for compliance with the requirements of the code does not create liability for an owner's noncompliance.