Qualified Contract Process

Policy for Opt-Out Provision Introduction

The Omnibus Budget Reconciliation Act of 1989 requires that all properties receiving an Allocation of Housing Credits after January 1, 1990 are subject to an “extended use period” that lengthens the time that credit properties must maintain affordability from fifteen to thirty years or more. However, the 1989 Act also provided an option for owners to exit the program at the end of the initial fifteen year compliance period (“opt-out”) by requesting that the state agency either purchase the property or assist in finding a buyer at a determined “Qualified Contract Price” (QCP). Section 42(h)(6)(E)(i)(II) of the Internal Revenue Code (“ the Code”) states that the extended use period shall terminate if a housing credit agency is unable to present within a one year period, a QCP to a taxpayer who has requested such a contract. The Qualified Contract (QC) is generally defined as an offer to acquire the tax credit property for a defined price per the Code in order to assure continued affordability restrictions.

Although the 1989 Act provided owners with an “opt-out” provision in year fifteen, New Hampshire Housing Finance Authority (“the Authority”) allowed owners to give up this right in return for additional points in the competitive scoring process and, beginning with the 2000 Qualified Allocation Plan, all owners were required to waive this right. This waiver is reflected in the Land Use Restriction Agreement (LURA).

This Process Guide policy will apply to those properties that did not waive their “opt out” rights, and they are only eligible to do so any time after year 14 and prior to year 29. The 14^{th} year is determined as either:

a. The last compliance period for properties with buildings that were placed in service in different years; or,
b. The most recent of multiple allocations to the same property.

Owners must notify the Authority of their desire to sell the property using the process outlined below. Once proper notice and all required documentation have been received, the Authority has one year to find a buyer for the property at the QCP. The qualified purchaser must be an entity that agrees to maintain the affordable housing units and fulfill all requirements of the extended use agreement. In order to encourage “opt out” eligible properties to maintain their affordability without going through the QC process, the Authority has adopted policies that reduce compliance and redefine some of the eligibility criteria. These policies may be found on the Authority’s website. The owner, also, may sell the development outside of the QC process. In this instance, the purchaser would continue to operate the property with the LIHTC restrictions on the property under the reduced compliance requirements referenced previously.

The Authority shall be under no obligation to investigate the accuracy of the information submitted for QC presentation. The Authority’s review shall not constitute a warranty of the accuracy of the information, nor of the quality or marketability of the housing to be purchased, constructed, or rehabilitated pursuant to the program. Developers, potential investors, and interested parties are advised to undertake their own independent evaluations of feasibility, suitability, risk of the development, and engage competent legal and tax professionals. The Authority is not acting in the capacity of a real estate agent or broker. Its role is limited to implementing the Code requirements and facilitation of the presentation of a QC, as defined in the Code.

> *This guide has **not** been reviewed or approved by the IRS and should not be relied upon for interpretation of federal income tax legislation or regulations.*

Terms and Conditions

The following terms and conditions will allow the Authority to administer requests from property owners who intend to make a request under the Code ("the request") to produce a QC. The request asks the Authority to find a buyer who will continue to operate the property as a qualified low-income property under the terms of the QCP pursuant to IRS regulations. If the Authority is unable to find a buyer within one year, the extended use period is terminated except for the statutory three year "ease out" period which is explained later in this policy.

A request for a QC may be submitted only once during the extended use period for each development. If an owner rejects an offer presented under the QC or withdraws its request at any time after application materials have been received by the Authority, no other opportunity to request a QC will be available for the development in question.

Determination by Owner of Eligibility to Request a Qualified Contract

Before requesting a QC, owners should confirm, and will need to certify to the Authority with their Request, the following**:**

1. The owner did not waive their right to "opt out" of the Extended Use Agreement in the LURA.

2. The Request is being made after the end of the 14^{th} year of the compliance period.

3. The owner has secured a waiver of all purchase options, including any right of first refusal. Waivers of purchase options and rights of first refusal connected to the property may be conditioned upon the Authority presenting a QC to the owner.

4. Properties meet the basic physical compliance standards that are (or would be) necessary to claim some or all of the Housing Credit allocations. Owners must correct all such violations prior to submitting a request.

5. Any other outstanding noncompliance issues have been cured prior to application for a QCP.

Application and Fees

The Authority will accept applications at any time of year, under the standard LIHTC application requirements with a fee of $2,500.

Documentation Required with Request for Qualified Contract

The Authority must present a QC to the Owner within a one-year period. The 1 Year Period (1YP) will not begin until the Authority determines that the owner has met all of the submission requirements and the QCP has been set by the Authority and agreed upon by the Owner. QCP packet materials must include:

1. A fully completed "Calculation of Qualified Contract Price", including Worksheets A-E, along with copies of the documents and other information used to support the QCP. This form must be completed, or reviewed and approved, by an independent Certified Public Accountant. The CPA shall confirm that annual partnership federal income tax returns for all years of operation of the Project, loan documents for all secured debt, and partnership agreements and other organization documents have been reviewed in connection with determining the QCP.

2. A copy of any waivers of purchase options or rights of first refusal that are connected to the property.

3. A thorough narrative description of the Project, including all amenities – suitable for familiarizing prospective purchasers with the Project.

4. A description of all income, rental and other restrictions (including easements or deed restrictions), if any, applicable to the operation of the Project, together with copies of any documents imposing such restrictions.

5. A detailed set of photographs (digital also) of the Project, including the interior and exterior of representative apartment units and buildings, and the property's grounds.

6. A copy of the most recent operating statements for the fiscal year-to-date by which the property will fairly apprise a potential purchaser of the property's operating expenses, debt service, gross receipts, net cash flow and debt service coverage ratio.

7. A current and complete rent roll for the entire property.

8. If any portion of the land or improvements is leased, copies of the leases.

9. First year 8609s showing Part II completed.

10. Annual partnership tax returns for the last 3 years of operation.

11. Audited annual property financial statements for the last 3 years of operation.

12. Loan documents for all outstanding secured debt.

13. Partnership agreement (original, current and all interim amendments).

14. A third-party physical needs assessment.

15. An independent third-party appraisal for the entire property by an appraiser who comports with IRC §1.42-18(d)(3); which, in essence, forbids the use of any individual or organization that is on any list for active suspension or revocation in any state.

16. A current market study, within the past twelve (12) months, by an independent third party that conforms to the Authority's requirements.

17. Title report.

18. Phase I environmental (Phase II if necessary).

Items 7 – 11 are necessary to determine the price as required under IRC §42(h)(6)(F) (QC Price). Items 12 – 18 will be necessary for prospective buyers.

Owners who expect to take advantage of the QC option have a corresponding duty to maintain the records necessary to allow computation of the QCP. There are two options for owners who have not fulfilled this responsibility:

a) The authority deems the property ineligible for consideration; or,
b) An accountant deduces missing information (interpolation).

An example of item (b) is to re-create what would have been the property's financial statement using accountant work papers. The Authority, at its discretion, will determine which option(s) is/are available.

Owner Certification and Commitment

The owner must sign the Authority's Owner Certification form. This certification form is attached to the Qualified Contract Application packet found on the Authority's website.

Presenting a Qualified Contract

1. Under IRC §42(h)(6)(E)(i)(II), the Authority's only obligation is to present to the owner a bona fide contract signed by a prospective buyer to acquire the Owner's property for the QCP (Contract) within a year of establishing the QCP.

2. There is no requirement in IRC §42 that the prospective buyer actually purchase the property. When the Authority presents the Contract to the Owner, regardless of when or if the Contract is fulfilled, the possibility of terminating the extended use period is removed forever and the project remains bound to

the provisions in, and may not terminate, the extended use agreement. Whether or not the seller executes a contract and closes the transaction is a separate, legally unrelated matter.

3. The Authority will create a standard-form contract to use when presenting the QC that includes basic real estate transaction terms and that is as close to a contingency-free contract as possible. This form will establish what the buyer needs to accept for the Authority to meet its statutory obligation of presenting a Contract. Once a buyer agrees to the standard terms and QCP, the owner cannot terminate the extended use period. The Owner and proposed buyer are free to negotiate different transaction terms prior to closing.

General

1. In keeping with the clear purpose of IRC §42 the Authority will resolve every case of doubt or interpretation in determining the QCP, both regarding the overall process and particular projects, in favor of a lower QCP.

2. Any time spent by the owner questioning or challenging the Authority's calculation of the QCP will not count against the 1YP, and further, the 1YP will not begin until the Owner and the Authority agree to a QCP which will then be memorialized in a letter signed by the Authority.

3. The Agency may add to or amend Year 15 and QC Policies at any time. Such changes may include, but are not limited to, the following: required documentation or property information, effect of withdrawing a Request, number of times an owner may submit a Request for a particular property, treatment of owner investment, and characterization of cash distributions.

4. The owner is not required to accept the first or any of the purchase offers presented. However, if the owner rejects an offer at or above the QCP that has been presented by a qualified purchaser, the development will remain as affordable for the remaining term of the extended use period. The owner may accept less than the QCP but cannot *require* a price higher than the QCP.

5. The Owner is required to notify the Authority of any purchase offers. The Authority must be satisfied that the purchaser is familiar with and prepared to comply with the requirements of the LIHTC program. The Authority may reject purchasers who have failed to demonstrate proficiency with the LIHTC program or housing programs. Additionally, the Authority must approve any change in management which includes at the time of a sale, as well as any time thereafter.

Review Process

The Authority's Management & Development Division will assign a staff member to work with the owner to discuss issues pertinent to the development and possible alternatives to the QC process, and if the Owner proceeds with the QC process, to ensure the submittal of all necessary documents.

1. Upon receipt of the owner's application materials, the Authority will have up to 60 days to review the owner's packet of due diligence materials for completeness. If the Authority must request additional documentation or information during this 60-day period, this review time will be extended for the length

of time taken to submit the additional material. Once the Authority determines that all necessary materials have been submitted, it will send the owner written notification of completeness acknowledging that all QC documentation requirements have been met.

2. After the Authority has confirmed receipt of all required documentation, the Authority will then have an additional 60 days to substantiate the QCP proposed by the Owner. This will require Authority staff and the owner to work closely together to ensure that an appropriate QCP has been reached, and this agreed upon QCP will then be memorialized in a letter signed by the Authority. If the Authority must request additional documentation or information during this 60-day period, this timetable will be extended for the length of time taken to submit the additional material.

3. Once the QCP has been approved, the Authority will notify the owner in writing that the 1YP to find a prospective buyer for the development has begun and this letter will also state the date on which the 1YP ends.

4. During the 1YP the Authority will advertise the property in good faith.

5. If noncompliance is discovered during the processing of the QC Request, the owner will have 30 days to correct the noncompliance. The owner may request additional time, up to six months, to correct a noncompliance issue; however, the processing of the QC Request will be suspended until the noncompliance is corrected.

6. Additionally, if noncompliance is discovered during the 1YP, the owner will have 30 days to correct the noncompliance. The owner may request additional time, up to six months, to correct a noncompliance issue; however, the 1 YP will be suspended until the noncompliance is corrected.

7. If the 1YP is suspended as outlined in #6, the Authority will notify the owner in writing of the suspension, and once the noncompliance has been corrected to the satisfaction of the Authority, it will notify the owner in writing of the new end date of the 1YP.

Additional Owner Requirements during the 1-Year Period

1. List the property for sale with a broker who works with multifamily housing properties.

2. Agree to allow the Authority to post summary data about the property on its website.

3. Reasonably cooperate with the Authority and its agents to present a QC for purchase of the property. This may include providing copies of additional rent rolls, project tax returns, income certifications, repair and maintenance records, operating expenses and debt service information, and other due diligence documents.

4. Provide access to the property for inspection by the Authority, its agents and prospective purchasers.

Completion of Qualified Contract Process

Finally, if the Authority finds a prospective purchaser willing to present an offer to purchase the property for an amount at the QCP, the owner must agree to enter into a commercially reasonable form of earnest money agreement or other contract of sale for the property and provide a reasonable time for necessary due diligence and closing of the purchase.

Three-Year "Ease Out" Period if QC not presented

If the Authority fails to present a QC before the expiration of the 1YP (or such longer period as the owner may agree to in writing), the extended use period terminates. However, the project will remain subject to the requirements set forth in §42(h)(6)(E)(ii); that is, for a three-year period commencing on the termination of the extended use period, the owner may not (i) evict or terminate a tenancy (other than for good cause) of an existing tenant of any low-income unit, or (ii) increase the gross rent with respect to such unit except as permitted under Section 42 of the Code, as well as the requirements of the regulatory agreement. The Owner must provide notice to existing tenants of their rights during this "ease out" period. This notice will be provided by the Authority and copies of each individual tenant notice must be provided to the Authority within one (1) week of distribution.

For more information on this process please contact the Asset Manager assigned to the property.