

**Official Compilation of Codes, Rules and Regulations of the  
State of New York**

**Title 21  
Part 2188**

**§ 2188.1 Introduction.**

- (a) This Qualified Allocation Plan (“Plan” or “QAP”) is adopted by the New York State Housing Finance Agency (“Agency” or “HFA”) pursuant to Section 42 of the Internal Revenue Code of 1986, as amended (“IRC”), and the Treasury Regulations, Revenue Rulings and Procedures, and other publications of the Internal Revenue Service (“Service” or “IRS”) with binding authority applicable thereunder (collectively, the “Code”), to govern the allocation or allowance by the Agency of any Low Income Housing Tax Credit (“LIHTC”) under IRC Section 42. This plan shall apply to: (i) the Agency’s allocation of LIHTC, as a sub-allocating agency under Executive Order No. 135, issued by the Governor Cuomo on February 27, 1990, which was continued by Governor Spitzer’s Executive Order No. 5, issued January 1, 2007 and further continued by Governor Paterson’s Executive Order No. 1, issued March 20, 2008, and by Part 2040 of Title 9 of the New York Official Compilation of Codes, Rules and Regulations; and (ii) the allowance by the Agency of LIHTC to projects financed by obligations subject to the Private Activity Bond Cap, the interest on which is exempt from federal income tax, as provided in IRC §42(h)(4). In addition, pursuant to IRC §42(m)(1)(B)(iii) and Treasury Regulation 1.42-5, this Plan provides certain procedures that the Agency shall follow in monitoring for noncompliance with the Code and for notifying the IRS thereof.
- (b) Although various permutations are possible, HFA generally is involved in two kinds of LIHTC projects: (i) most of the Agency’s projects receive tax exempt bond financing, from the Agency or another issuer, subject to the Private Activity Bond volume cap provisions contained in Section 146 of the Code, and accordingly may be eligible for so called “Private Activity Bond Credits”, “As of Right” or “4% Credits” if the project complies with the applicable requirements of this QAP; and (ii) projects that receive other financing from the Agency and which are eligible for the allocation of LIHTCs subject to the State Credit Ceiling may receive such credits pursuant to this QAP only if the New York State Division of Housing and Community Renewal (“DHCR”) has granted the requisite credit allocation authority to HFA and the project meets all relevant criteria under this QAP.
- (c) The Agency typically allocates LIHTC subject to the State Credit Ceiling to projects that receive financing from the Agency. (As mentioned below, other projects may receive such LIHTC from other agencies.) An allocation of LIHTC is made as part of the Agency’s overall financing process with no application procedure relating solely to LIHTC except for the allowance of As of Right Credits to projects financed by tax exempt bonds from an issuer other than the Agency;
- (d) The Agency may also be involved with other programs or projects pursuant to this QAP in accordance with federal or state mandates.

**§ 2188.2 Definitions.**

- (a) **“42 (m) Letter”** — Letter prepared by the issuer of the tax exempt obligations financing a project indicating that a project eligible for Private Activity Bond Credits generally complies with the provisions of this QAP and estimating the amount of LIHTC which will be allocated if the project is completed as planned.
- (b) **“Agency” or “HFA”** — The New York State Housing Finance Agency, a public benefit corporation

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organized by and under Article 3 of the Private Housing Finance Law.

- (c) **“Binding Agreement”** — Agreement, executed by the applicant and the Agency, which requires HFA under New York State contract law to make an allocation of LIHTC if all conditions in the Agreement and all conditions under Section 42 are met.
- (d) **“Carryover Allocation Document”** — Document meeting Section 42’s requirements as included in §42(h)(1)(E).
- (e) **“Ceiling Credits,” “State Credit Ceiling LIHTCs,” or “9% Credits”** — LIHTC which count against the State Credit Ceiling. Under certain circumstances, such as an acquisition of a building in an acquisition and rehabilitation project, the project may receive “4%” LIHTCs which are subject to the State’s Credit Ceiling. These credits are often also called **“cap credits”**.
- (f) **“Code”** — Internal Revenue Code of 1986, as amended, and the Treasury Regulations, Revenue Rulings and Procedures and other publications of the IRS with binding authority applicable thereunder.
- (g) **“Commitment Letter”** — Letter committing the Agency to finance a project assuming all conditions in the letter are met.
- (h) **“Consolidated Plan”** — The New York State 2006-2010 Consolidated Plan as Approved by United States Department of Housing and Urban Development.
- (i) **“Cost Certification”** — An audited report by an independent third party Certified Public Accountant, with content and opinion in form and substance satisfactory to HFA, verifying the costs incurred, the tax credit eligible costs incurred and any other cost data required by HFA for a project as support for the amount of the project’s allocation of LIHTCs or as support for the project’s eligibility for a Carryover Allocation Document.
- (j) **“Credit Allocation Authority”** — Authority granted by DHCR to the Agency, as a sub-allocating agency under Executive Order No. 135, issued by Governor Cuomo on February 27, 1990, which was continued by Governor Spitzer’s Executive Order No. 5, issued January 1, 2007, and further continued by Governor Paterson’s Executive Order No. 1, issued March 20, 2008, and by Part 2040 of Title 9 of the New York Official Compilation of Codes, Rules and Regulations, to allocate State Credit Ceiling LIHTCs.
- (k) **“DHCR”** — New York State Division of Housing and Community Renewal.
- (l) **“Due Diligence Reports”** — Appraisals, Market Studies, Environmental Reports and, if required for rehabilitation or preservation projects, Physical Condition Assessments or other engineering reports which are sought by the Agency in connection with the financing and LIHTC allocation for the project.
- (m) **“Feasibility Review”** — A review by the Agency to determine that the proposed project can be financed, completed and operated in compliance with LIHTC 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.
- (n) **“IRS” or “Service”** — Internal Revenue Service.
- (o) **“LIHTC”** — Low Income Housing Tax Credit, as the meaning of such term is defined in and by Section 42 and other applicable provisions of the Code.

- (p) **"LIHTC Underwriting"** — A review to determine that the proposed or completed project conforms to the requirements of Section 42 and most specifically § 42(m)(2).
- (q) **"Low Income Units"** — Units subject to rent restrictions pursuant to §42(g).
- (r) **"Market Rate Units"** — Units not subject to rent restrictions pursuant to §42(g).
- (s) **"Members"** — The New York State Housing Finance Agency's membership consisting of the Commissioner of the Division of Housing and Community Renewal, the Director of the Budget, the Commissioner of Taxation and Finance and four Members appointed by the Governor with the advice and consent of the Senate.
- (t) **"Members' Approval"** — The Members' authorization of a financing structure and/or allocation of LIHTC. This authorization gives the Agency's President and Chief Executive Officer, or his designee, the authority to finance a project and/or make an allocation of LIHTC.
- (u) **"Other Issuer"** — An issuer, other than the Agency, of tax exempt bonds subject to the Private Activity Bond Volume Cap established pursuant to Section 142 of the Code.
- (v) **"Owner's Certification"** — Sworn statement by the owner of a project, submitted to the Agency at least annually during the compliance period, certifying that, for the preceding 12-month period, various actions were taken, or not taken, as required by the Code and this QAP.
- (w) **"Per Unit Eligible Basis Limit"** — \$380,000 per unit. This limit is applicable during calendar year 2008 and shall be adjusted no more often than annually thereafter to reflect changes in such indexes of inflation and deflation of construction costs as the Agency in its discretion may determine to apply.
- (x) **"Plan" or "QAP"** — Low Income Housing Tax Credit Qualified Allocation Plan.
- (y) **"Private Activity Bond Credit," or "4% Credit"** — LIHTCs which do not count against the State Credit Ceiling because: (a) 50% or more of the aggregate basis of any building, and the land upon which the building is located, receiving LIHTC is financed by tax exempt bonds subject to the Private Activity Bond Volume Cap contained in Section 142 of the Code; or (b) the LIHTCs are solely based on the portion of the eligible basis of the project receiving the LIHTC which is actually financed by tax exempt bonds subject to the Private Activity Bond Volume Cap established pursuant to Section 142 of the Code. Such LIHTC is often called **"As of Right Credits"**.
- (z) **"Private Activity Bond Volume Cap"** — A limit on the volume of tax exempt bonds established pursuant to Section 142 of the Code.
- (aa) **"Scoring Criteria"** — Certain criteria for the evaluation of LIHTC allocation set forth in this QAP in §2188.6.
- (bb) **"Section 42"** — Section of the Code authorizing and governing credits against federal income taxes to promote the creation of affordable rental housing.
- (cc) **"State"** — State of New York.
- (dd) **"State Credit Ceiling"** — New York State's ceiling on the amount of LIHTC which may be issued in a given calendar year. This ceiling consists of "per capita" credits, national pool credits and returned credits as provided in Section 42.

- (ee) **“State Designated Building”** — a building, receiving LIHTC subject to the State Credit Ceiling, that is so designated by the Members as requiring an increase in credit as if the building were part of a qualified low-income housing project located in a difficult development area in order for such building to be financially feasible.
- (ff) **“Term Sheets”** — Descriptions, published from time to time, of the terms and conditions upon which HFA is willing to finance projects under various programs, usually determined by credit enhancement source, and/or type of project or borrower.
- (gg) **“Threshold Eligibility Requirements”** — Certain essential requirements for LIHTC allocation set forth below in this QAP at §2188.5.

### **§ 2188.3 Goals and Needs Assessment.**

- (a) The goals and needs assessments which produce the housing priorities contained in this QAP are based on the State’s Consolidated Plan which includes an analysis of the housing needs of New York residents along with the State’s housing market and inventory conditions. The strategic plan section of the State’s Consolidated Plan delineates the State’s general priorities for assisting low income residents and includes these three housing objectives, which to the extent consistent with the Code, are intended to be implemented by this QAP:
  - (1) Preserve and increase the supply of decent, safe and affordable housing available to all low and moderate income households, and help identify and develop available resources to assist in the development of housing;
  - (2) Improve the ability of low and moderate income New Yorkers to access rental housing and home ownership opportunities; and,
  - (3) Address the shelter, housing, and service needs of the homeless poor and others with special needs.
- (b) While the demographic analysis and statewide market analysis contained in the Consolidated Plan demonstrate a need for more affordable rental housing for all types of low and extremely low income households, the Consolidated Plan also indicates that there are substantially more low and extremely low income elderly rental households with housing problems as opposed to low and extremely low income large family rental households with housing problems. For the purposes of this Plan, low and extremely low income elderly rental households will therefore be considered as a population with special needs.

### **§ 2188.4 HFA Allocation Process.**

- (a) Under New York State’s overall tax credit allocation process as it pertains to the HFA, the Agency typically allocates LIHTC to projects that receive financing from the Agency and, as provided in Section 42(h)(4) of the Code, allows Private Activity Bond Credits to qualified residential rental projects located in New York State financed by obligations subject to the Private Activity Bond Cap, the interest on which is exempt from federal income tax. Applications for both State Credit Ceiling LIHTCs and Private Activity Bond Credits for projects financed by the Agency are therefore only made as part of the Agency’s overall financing application process as described in (c) through (h) below. Applications for the allowance of As of Right Credits to projects financed by tax exempt bonds from an issuer other than the Agency are governed by the provisions of (i) of this section.

- (b) Applications for HFA financing and/or LIHTC through the Agency will be accepted and processed as they are received throughout the year.
- (c) Preliminary underwriting information must be submitted in the form required by the Agency.
- (d) The preliminary underwriting information, additional material required by the Agency as part of the HFA financing application and the appropriate Due Diligence reports to be obtained by the Agency, will serve as the application for LIHTC from HFA.
- (e) Upon, or before, completion of the phase of underwriting prior to submission to the Members, the following actions are taken and reviews are performed:
  - (1) (i) The first of three LIHTC Underwritings and Feasibility Reviews required by Section 42(m)(2)(C) of the Code is performed.
  - (ii) If the eligible basis of all the buildings in a project divided by the number of units in a project, prior to any increase for buildings in high cost areas under Section 42(d)(5)(B) of the Code, exceeds the Per Unit Eligible Basis Limit, the eligible basis shall be reduced to the maximum eligible basis permitted by the Per Unit Eligible Basis Limit unless the Per Unit Eligible Basis Limit requirement has been waived or is not applicable to the project.
- (2) All applicants must meet the Threshold Eligibility Requirements listed below.
- (3) If an applicant for Private Activity Bond Credits meets the Threshold Eligibility Requirements listed below, the application is consistent with this QAP and the application may be considered by the Members for a Members' Approval of an allocation of Private Activity Bond Credits.
- (4) State Credit Ceiling LIHTC projects are also evaluated pursuant to the Scoring Criteria listed below and ranked against all other State Credit Ceiling LIHTC applicants which have met the Threshold Eligibility Requirements and have not yet received a Members' Approval:
  - (i) A State Credit Ceiling LIHTC applicant's request generally will only be submitted to the Members for Members' Approval if HFA has unallocated Credit Allocation Authority. The Members, however, reserve the right, in their sole discretion, to consider any State Credit Ceiling LIHTC applicant's request when the Agency does not have unallocated Credit Allocation Authority. Any Members' Approval issued when HFA does not have unallocated Credit Allocation Authority will be contingent upon DHCR making available the requisite Credit Allocation Authority.
  - (ii) Applications shall be submitted to the Members for consideration in the order of their ranking pursuant to the Scoring Criteria.
  - (iii) The Members may designate a building or buildings in a State Credit Ceiling LIHTC project as a State Designated Building eligible for a credit increase as if the building was located in a difficult to develop area if the Members find, based on the facts and circumstances pertaining to the building or buildings, that such a designation is necessary for the financial feasibility of the building and find that such a designation will promote one or more of the State's housing priorities as stated in §2188.3 of this Plan or any other statement of housing policy from the Agency or the State.

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- (iv) Notwithstanding the Scoring Criteria set forth in this QAP, the Members retain the right to deny any request for an allocation of LIHTC irrespective of its ranking if such request is inconsistent with the housing goals reflected herein and shall have the power to allocate LIHTC to a project irrespective of its ranking, if such intended allocation is: in compliance with the Code; in furtherance of the State's housing goals reflected herein; and determined by the Members to be in the interests of the citizens of the State.
  - (iv) A Members' Approval of State Credit Ceiling LIHTC merely represents a reservation of LIHTC and does not obligate the Agency to allocate LIHTC.
- (f) After a project receives the Members' Approval, and after all relevant requirements in the applicable Term Sheet, and Members' Approval are met, the second LIHTC Underwriting and Feasibility Review required by Section 42 is performed prior to the financing of the project.
  - (1) If the eligible basis of all the buildings in a project divided by the number of units in a project, prior to any increase for buildings in high cost areas under §42 (d)(5)(B), exceeds the Per Unit Eligible Basis Limit, the eligible basis shall be reduced to the maximum eligible basis permitted by the Per Unit Eligible Basis Limit unless the Per Unit Eligible Basis Limit requirement has been waived or is not applicable to the project.
  - (2) Projects financed by tax exempt obligations of the Agency and expected to receive Private Activity Bond Credits will receive a 42(m) Letter prior to the issuance of the tax exempt obligations.
  - (3) Projects which have received a Members' Approval of State Credit Ceiling LIHTCs will be issued a Binding Agreement prior to the financing of the project. The Binding Agreement must be executed by the applicant and returned to the Agency prior to the financing. If a project is not financed by the Agency, the Binding Agreement will incorporate all relevant terms usually contained in Agency financing documents including the setting of appropriate fees.
- (g) Projects receiving State Credit Ceiling LIHTC must be placed in service during the calendar year of allocation or obtain a Carryover Allocation Document.
  - (1) The Cost Certification required to obtain a Carryover Allocation Document must be in form and substance acceptable to the Agency.
  - (2) The Cost Certification must be filed with the Agency by the later of the date which is eleven months after the date that the allocation was made, unless the Agency grants an extension of time in writing to file this Cost Certification.
- (h) The third and final LIHTC underwriting and Feasibility Review required by Section 42 is performed prior to the issuance of the IRS Form or Forms 8609, Low Income Housing Credit Allocation Certification.
  - (1) All projects must provide the Agency with Certificates of Occupancy or Temporary Certificates of Occupancy as they are issued.
  - (2) The third and final LIHTC underwriting and Feasibility Review must be based on a final Cost Certification satisfactory to the Agency in form and substance and in all ways in compliance with Section 42.
  - (3) The final Cost Certification must be filed with the Agency within 120 days after the end of the

first year of the credit period for the building within a project with the latest credit period. The Agency may extend this period in its sole discretion.

- (4) Form or Forms IRS 8609 formally allocating any LIHTC will not be issued until after the third and final LIHTC underwriting and Feasibility Review, based on a final Cost Certification satisfactory to the Agency in form and substance and in all ways in compliance with Section 42, is completed.
  - (5) If the eligible basis of all the buildings in a project divided by the number of units in a project, prior to any increase for buildings in high cost areas under Section 42(d)(5)(C), exceeds the Per Unit Eligible Basis Limit, the eligible basis shall be reduced to the maximum eligible basis permitted by the Per Unit Eligible Basis Limit unless the Per Unit Eligible Basis Limit requirement has been waived or is not applicable to the project.
- (i) Projects Financed By Other Issuer's Private Activity Bonds.
- (1) Projects financed by tax-exempt bonds from an issuer other than the Agency subject to the Private Activity Bond Volume Cap in accordance with Section 42(h)(4)(A) of the Code may be allowed LIHTC which is not taken into account regarding the State Credit Ceiling. The Agency's President and Chief Executive Officer, or his or her designee, is hereby authorized to take any actions necessary and appropriate to allow LIHTC to qualified residential rental projects located in New York State that are financed by the proceeds of tax-exempt bonds of an Other Issuer subject to the Private Activity Bond Volume Cap, where such allowance is consistent with this QAP.
  - (2) Complete applications for the allowance of such LIHTCs must be submitted at least 60 days prior to the later of the proposed construction start date or the planned bond sale date in a form approved by the Agency, and will be accepted and processed throughout the calendar year. The Agency may request any and all information it deems necessary or appropriate for project evaluation. If, in the Agency's sole discretion, any submission is incomplete or if documentation is insufficient to complete any evaluation of the proposed project, processing will be suspended. In such instances, the Agency will notify the respective applicant of how the submission is incomplete and provide at least ten business days for the applicant to submit the requested documentation. Complete applications will be reviewed relative to criteria contained herein at §2188.5 for eligibility and public purpose. Within 60 days after receipt of a complete application the Agency will issue to the applicant a finding as to whether the application is consistent with this QAP and the amount of LIHTC for which the project qualifies pursuant to Financial Feasibility Review. If the application is consistent with this QAP, the applicant will receive processing instructions for a final allocation of credit. If the project is found to be inconsistent with this Plan, the owner will be notified of the reasons for such finding.
  - (3) The Agency shall charge a reasonable application fee, due at the time of application. A credit allocation fee, in a reasonable amount determined by the Agency, also is due upon request for issuance of IRS Form 8609. A not-for-profit applicant (or its wholly-owned subsidiary) 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 for deferral of payment of the application fee until the date of issuance of IRS Form 8609.
  - (4) In accordance with Code Section 42(m)(2)(D), the issuer of the tax exempt bonds financing a project is responsible for determining the dollar amount of LIHTCs which is necessary for the financial feasibility of such project and its viability as a qualified low-income housing project pursuant to Section 42(g)(1) of the Code throughout the applicable credit period. Such

determination must be included in the applicant's request to the Agency for a final allocation of credit. The Agency will process requests for a final allocation of credit within 60 days after the date of receipt of all required documentation including an executed credit regulatory agreement in a form satisfactory to the Agency with proof of recording. The Agency will apply the criteria for Feasibility Review and LIHTC Underwriting, as described herein at §2188.5(d), in determining the amount for the final credit allocation with respect to such project.

- (5) Regulatory Term. The regulatory requirements of projects receiving an allocation or allowance of LIHTC under the terms of this Plan are described in §2188.5 of this Plan and shall be subject to compliance monitoring as described in §2188.7 of this Plan.

**§ 2188.5 Threshold Eligibility Requirements for LIHTC Allocation.**

At each stage of processing, 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:

- (a) The applicant is willing to enter into a regulatory agreement with HFA requiring the project to conform to the income, occupancy and rent restrictions of Section 42.
- (b) The applicant is willing to enter into a regulatory agreement with HFA for extended low income use of the project with a minimum extended use period, ending no earlier than thirty (30) years after the project is placed in service, that is in conformance with the requirements of Section 42.
- (c) The applicant agrees to comply with all applicable federal and state fair housing laws and regulations and not to engage in any illegal discriminatory conduct including discrimination against Section 8 voucher tenants.
- (d) The project receives an acceptable Financial Feasibility Review and underwrites in accordance with the applicable HFA underwriting criteria including meeting any criteria limiting costs, fees or expenses contained in the relevant Term Sheet.
  - (1) If a project is being bond financed by HFA, the Financial Feasibility Review will be conducted using the standards in the Term Sheet for the program the project is being financed under.
  - (2) Otherwise the Financial Feasibility Review will be conducted using the standards in the most reasonably applicable Term Sheet published by the Agency.
- (e) The eligible basis of all the buildings in a project divided by the number of units in a project, prior to any increase for buildings in high cost areas under Code §42(d)(5)(B), in the applicant's request for LIHTC and/or in any Cost Certifications to support the allocation of such LIHTC, does not exceed the Per Unit Eligible Basis Limit or the eligible basis has been reduced to the maximum eligible basis permitted by the Per Unit Eligible Basis Limit under §§2188.4(e)(1)(ii), (f)(1), and (h)(5) hereinabove. This requirement may be waived by the Members if the Members make a finding that it is in the public interest to recognize a greater amount of eligible basis per unit.
- (f) The project is of the appropriate type (new construction, substantial rehabilitation, moderate rehabilitation and/or acquisition) and design needed to address the housing needs in the area where project is located.
- (g) The size of the units in the proposed project must be appropriate for the type of occupancy proposed.
- (h) The applicant has site control, consistent with the Code, for the project real estate through a lease,



- option, purchase contract or deed.
- (i) All local governmental approvals required to construct and operate the project have been obtained or the applicant demonstrates that the project can obtain all necessary governmental approvals.
  - (j) The project applicant has successfully developed and operated projects comparable to the proposed project and/or has, or will obtain, the capacity and experience to undertake, complete and operate the proposed project.
  - (k) The Agency has completed an acceptable credit and background review of the project developer, owner and/or manager and their principals.
  - (l) The project developer, owner and/or manager and their principals does not include anyone who has participated in a state assisted capital project, with HFA, DHCR or any other state entity, 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 supervising agency.
  - (m) HFA's Due Diligence Reports include an Appraisal and/or Market Study from a licensed third party appraiser or a market study consultant, which is satisfactory in HFA's sole judgment, concerning the demand for the units to be constructed, the value of the proposed project and any other matters or issues addressed in the Due Diligence Reports.
  - (n) If the project developer, owner and/or manager and/or their principals have had any prior involvement with HFA, there are no unresolved LIHTC compliance or other compliance issues with the Agency.
  - (o) If the project developer, owner and/or manager and/or their principals have had any prior involvement with any state agency financing housing, there are no outstanding defaults or compliance problems which have not been resolved to the satisfaction of the agency involved.
  - (p) Projects which contain both Low Income and Market Rate Units must comply with the Agency's proportionality and distribution policy unless such compliance is waived by HFA.
    - (1) The Agency's proportionality and distribution policy provides that Low Income Units must be comparable to Market Rate Units; the Low Income Units must be acceptably distributed through all unit types and all floors and/or buildings in the project; and no floor and/or building should contain an undue concentration of Low Income Units.
    - (2) The average quality standard must be the same for the Low Income Units as for the Market Rate Units unless the Agency approves additional or modified amenities which cause the Market Rate Units to be above the average quality standard of the Low Income Units.
    - (3) If the Market Rate Units are above the average quality standard of the Low Income Units, the project is subject to the provisions of Code Section 42(d)(3) which reduces eligible basis where there are disproportionate standards for units and the applicant must advise the Agency, and any Cost Certification must certify, if the cost on a per square foot basis for the Market Rate Units is no more than 15% more than the cost for the Low Income Units and therefore meets the requirements of Section 42(d)(3)(B)(i)(I) of the Code and is, or will be, excluded from basis pursuant to Code Section 42(d)(3)(B)(i)(II).
  - (q) Effective with applications received after 1/1/2009, the project's design and construction complies with the Agency's minimum standards for energy efficiency and sustainable development appropriate for the type of building and occupancy proposed as described in the Agency's currently effective published

policies for energy efficiency and sustainable development (commonly known as the Agency's "Green" guidelines).

**§ 2188.6 Scoring Criteria for State Credit Ceiling LIHTC Allocation.**

All projects applying for a State Credit Ceiling LIHTC Allocation shall be evaluated in accordance with the following scoring criteria (maximum of 100 points):

- (a) Project Location (maximum of 5 points):
  - (1) The project fosters the geographic dispersion of low income housing, by siting Low Income Units in an area with few such units.
  - (2) The project location is suitable for the intended low income tenant population. Depending on the intended population (elderly, families with children etc.), this criterion requires the evaluation of the proximity of schools, medical and recreational facilities, employment opportunities, appropriate social services, mass transit, etc.
  - (3) The project site is appropriate for the planned development and will not require extraordinary sitework or infrastructure development.
- (b) Housing Needs Characteristics (maximum of 5 points):
  - (1) The project satisfies a demonstrated need and demand in the market area for the number and size of units and the mix of Low Income Units and Market Rate Units.
  - (2) The project has support from state or local officials or community groups. Local support may be demonstrated by the award of a locally administered grant, subsidy or tax abatement, by reference to a formally adopted local development plan, or by statements submitted by local officials or leaders of community groups. State support may be demonstrated by statements, actions or awards of DHCR or any other State housing agency.
- (c) Project Characteristics (maximum of 15 points):
  - (1) The project promotes the economic integration of tenants, by providing units at a variety of sizes and rents.
  - (2) The project provides social services suitable for the intended tenant population (e.g., employment counseling, subsidized day care, etc.).
  - (3) The project provides appropriate facilities for residents (e.g., community rooms, children's play areas, etc.).
  - (4) The project's design and engineering will minimize maintenance and operating costs over the useful life of the project.
  - (5) The project's design, engineering and proposed operations will result in a more energy efficient project than required by the applicable building codes; other applicable laws, ordinances or regulations and the Agency's policies on energy efficiency and sustainable development.
  - (6) The project includes the preservation and/or adaptive reuse of the historic nature of the project's existing structure, structures or site, for example, by including the rehabilitation of certified

historic structures.

- (7) The project includes the use of existing housing as part of a community revitalization plan.
- (d) Sponsor Characteristics (maximum of 10 points):
- (1) The sponsor and the development team have a track record in developing housing of the type and scale proposed.
- (2) The development team includes one or more State certified minority business enterprises or women owned business enterprises.
- (e) The project is intended to serve a population of individuals with children (maximum of 5 points).
- (f) The project is intended for eventual tenant ownership ( maximum of 5 points).
- (g) Tenant Populations with Special Housing Needs (maximum of 10 points):
- (1) To the extent permitted by law, the project provides a significant amount of housing for populations with special housing needs such as the elderly or the homeless.
- (2) The project provides handicapped adaptable units above the minimum required by the Americans with Disabilities Act and/or any other applicable statute, ordinance or regulation.
- (h) The project's marketing plan includes outreach to persons on public housing waiting lists (maximum of 5 points).
- (i) Serving the Lowest Income Tenants (maximum of 10 points):
- (1) The project provides housing for a higher percentage of Low Income Units than required by Section 42's minimum low income set aside.
- (2) The project provides housing to a lower income population than required by Section 42's minimum low income set aside.
- (j) The applicant agrees to extend the period of low income use beyond the minimum required by Section 42 (maximum of 10 points).
- (k) The project is located in a qualified census tract and the development of the project contributes to a concerted community revitalization plan (maximum of 5 points).
- (l) The applicant agrees to waive the right under Code Section 42(h)(6)(E)(i)(II) to terminate the "extended use period" (as defined in Code Section 42(h)(6)(D)) if the Agency is unable to present the project owner with a "qualified contract" (as defined in Code Section 42(h)(6)(F)) (maximum of 15 points).

#### **§ 2188.7 Procedures for Monitoring of Projects.**

- (a) With respect to each project to which the Agency has allocated or allowed LIHTC, the owner of the project shall be required to execute a Regulatory Agreement, which outlines the program requirements. The Regulatory Agreement will be recorded as a restrictive covenant binding all subsequent owners and managing agents of the project.

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- (b) Section 42(m)(1)(B)(iii) of the Code mandates that state housing credit agencies monitor all placed in service tax credit developments for compliance with the provision of Section 42. The Code also mandates that the state housing credit agencies notify the Internal Revenue Service of any instance of noncompliance through the issuance of IRS Form 8823. Although the Agency is responsible for monitoring the owner's compliance with the Code, it is expressly understood that this responsibility does not and will not make the Agency liable in any manner whatsoever for any noncompliance by the owner.
  
- (c) **Monitoring Fees:**
  - (1) A reasonable annual monitoring fee will be charged by the Agency and will vary depending on the type and size of the project.
  - (2) The monitoring fee for any project financed by HFA shall be included in the Agency's normal financing servicing fee for the applicable financing program as specified in the appropriate financing documents.
  - (3) If HFA does not provide permanent financing to a project for which it allocates LIHTC, or if the permanent financing of a project is prepaid, or the Agency otherwise is no longer entitled to a fee for servicing such financing, the Agency shall charge a monitoring fee based on the Agency's estimate of the costs associated with monitoring the project.
  
- (d) **Required Staff Training:**
  - (1) The Agency mandates applicants to require staff administering any project which may receive an allocation of LIHTC to complete a training seminar on Low Income Housing Tax Credit compliance before the project is placed in service.
  - (2) All project management plans must include a requirement that appropriate staff administering any project containing Low Income Units shall receive training at the commencement of employment, if necessary, and periodic refresher training in LIHTC compliance.
  
- (e) **Recordkeeping and Record Retention.**
  - (1) **Recordkeeping.** The Regulatory Agreement shall provide that the owner of the project is required to keep records for each building with respect to which LIHTC has been allocated or allowed that show for each year in the "compliance period" (as defined in Code Section 42(i)(1)):
    - (i) The total number of residential rental units in each 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 each building that are Low Income Units (as defined in Code Section 42(i)(3));
    - (iii) The rent charged on each residential rental unit in each building (including any utility allowances);
    - (iv) The Low Income Units vacancies in each building and information that shows when, and to whom, the next such available units were rented;
    - (v) The annual income certification and recertification of each tenant of a Low Income Unit

in the project if a waiver has not been granted under §2188.7(h) below;

- (vi) Documentation to support the income certification and recertification made by each tenant of a "Low Income Unit" (for example, a copy of the tenant's federal income tax return, Forms W-2, or verifications of income from third parties such as employers or state agencies paying unemployment compensation), in accordance with Section 1.42-5(b)(1)(vii) of the applicable IRS regulations;
  - (vii) The "eligible basis" (as defined in Code Section 42(d)) and the "qualified basis" (as defined in Code Section 42(c)) of each building, at the end of the first year of the "credit period" (as defined in Code Section 42(f)(1)), the placed in service date of each building, the applicable fraction chart for each building, list of services and amenities offered to all residential tenants with corresponding fee charges, if any, and a copy of the IRS Form 8609;
  - (viii) The character and use of the nonresidential portion of the building included in the building's "eligible basis";
  - (ix) In a format acceptable to the Agency, the data elements specified by the Agency that are necessary for the Agency to meet its reporting requirements under Section 36, Collection of Information on Tenants in Tax Credit Projects, of Title I of the United State Housing Act of 1937; and
  - (x) Such other information as the Agency may reasonably request from time to time.
- (2) Record Retention. The Regulatory Agreement shall provide that the owner of the project shall retain the foregoing records for at least six years after the due date (including any extensions for any filings required to be made by the owner with the Internal Revenue Service or its successor agency) for that year, except that the records for the first year of the "credit period" shall be retained for at least six (6) years after the due date (including any extensions for any filings required to be made by the owner with the Internal Revenue Service or its successor agency) for the last year of the "compliance period."
- (3) Inspection Record Retention. The Regulatory Agreement shall provide that the owner of the project shall retain the original local health, safety, or building code violation reports or notices that were issued by the State or local government unit responsible for making local health, safety, or building code inspections for the Agency's inspection under §2188.7(i) below. Retention of the original violation reports or notices is required until the later of when the Agency reviews the violation reports or notices and completes its inspection under §2188.7(i) below or when the violation is corrected.
- (f) Certification, Inspection and Review.
- (1) Certification. The Regulatory Agreement shall provide that the owner of the project must certify, in a sworn statement (the "Owner's Certification"), at least annually during the "compliance period" to the Agency, that, for the preceding 12-month period.
  - (2) The project meets the requirements of:
    - (i) The 20-50 test under Code Section 42(g)(1)(A), the 40-60 test under Code Section 42(g)(1)(B), or the 25-60 test under Code Section 42(g)(4) and 142(d)(6) for New York City, whichever minimum set-aside test was elected for the project; and

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- (ii) If applicable to the project, the 15-40 test under Code Section 42(g)(4) and Code Section 142(d)(4)(B) for "deep rent skewed" projects.
- (3) There was no change in the "applicable fraction" (as defined in Code Section 42(c)(1)(B)) of any building in the project, or that there was a change, and a description of the change.
- (4) The owner has received an annual income certification from each tenant of a Low Income Unit and documentation to support that certification, or, in case of a tenant receiving Section 8 housing assistance payments, a statement from a public housing authority described in paragraph (b)(1)(vii) of Section 1.42-5 of the IRS regulations, if a waiver has not been granted pursuant to §2188.7(h) below.
- (5) Each Low Income Unit in the project is rent restricted within the meaning of Code Section 42(g)(2).
- (6) All units in the project are and have been for use by the general public and used on a nontransient basis (except for transitional housing for the homeless provided under Code Section 42(i)(3)(B)(iii)).
- (7) Each building in the project is and has been suitable for occupancy, in compliance with all applicable 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 either attach a statement describing the nature of the violation(s) or a copy of each violation report to the Owner's Certification. The owner must also indicate whether the violation has been corrected.
- (8) There has been no change in the "eligible basis" of any building in the project or, if there has been a change, the nature of the change.
- (9) All tenant facilities included in the "eligible basis" 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.
- (10) If and when a Low Income Unit in the building 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 a tenant having a qualifying income before any units in the building were or will be rented to tenants not having a qualifying income; except, in the case of a deep rent skewed project, if and when a Low Income Unit in the building became vacant during the year, reasonable attempts were or are being made to rent that unit or the next available Low Income Unit in the building to a tenant having a qualifying income before any Low Income Units in the building were or will be rented to tenants not having a qualifying income.
- (11) If the income of the tenant of a Low Income Unit in the building increased above 140% of the applicable income limitation elected pursuant to Code Section 42(g)(1), then, pursuant to Code Section 42(g)(2)(D)(ii), the next available unit of comparable or smaller size in the building was or will be rented to a tenant having a qualifying income; except that in the case of a deep rent skewed project, if the income of a tenant of a Low Income Unit increased above 170% of the income limitation applicable to the project pursuant to the election made under Code Section 42(g)(1), then the provisions of Code Section 42(g)(2)(D)(ii) with respect to the occupation of any Low Income Unit in the building by a new resident were or will be applied.

- (12) An "extended low income housing commitment" as defined in Code Section 42(h)(6), was in effect (for buildings subject to Code Section 7108(c)(1) of the Revenue Reconciliation Act of 1989) which includes the requirement that the 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.
  - (13) The project is in compliance with the Code, including any Treasury Regulations, this QAP, all other applicable laws, rules and regulations and, if applicable, with the HFA Regulatory Agreement.
  - (14) If applicable, the owner received its credit allocation from the portion of the state ceiling set-aside for the project involving "qualified non profit organizations" under Section 42(h)(5) of the Code and its' non profit entity materially participated in the operation of the development within the meaning of Section 469(h) of the Code.
  - (15) The owner has not refused to lease a unit in the project to any holder of a voucher or certificate of eligibility under Section 8 of the United States Housing Act of 1937 because of the status of the prospective tenant as such a holder.
  - (16) There has been no finding of discrimination under the Fair Housing Act, 42 U.S.C. 3601-3619, against the project. A finding of discrimination includes an adverse final decision by the Secretary of the Department of Housing and Urban Development (HUD), 24 CFR 180.680, an adverse final decision by a substantially equivalent state or local fair housing agency, 42 U.S.C. 3616a(a)(1), or an adverse judgment from a federal court.
- (g) All Owner's Certifications shall be reviewed for compliance with the requirements of Section 42 and retained by the Agency for not less than three years from the end of the calendar year in which the Agency receives the certifications.
  - (h) Waiver of Annual Tenant Income Recertification Requirement. Annual tenant income recertifications requirements are waived for any project where all the tenants are income qualified for any year if during such year no residential unit in the project is occupied by a new resident whose income exceeds the applicable income limit. The Agency reserves the right, at its discretion, to continue requiring annual income recertifications, or to reinstate annual recertification requirements.
  - (i) Inspection and Review. The Regulatory Agreement shall provide that the Agency shall have the right to perform inspections and reviews necessary and convenient for project monitoring, and the project owner and the employees and agents thereof shall cooperate with the Agency with respect to such inspections and reviews, and shall facilitate audits of the Project during and through the end of the compliance period. Such audits may include physical inspection of any building in the project and any individual Low Income Unit in any building in the project. The Regulatory Agreement shall further provide that the project owner shall include provisions in the lease given to each low income tenant requiring the tenant to permit inspection of the Low Income Unit by the authorized representatives of the Agency in compliance with the provisions of the Code and this Plan. Such audits, site visits, and physical inspections shall be performed at least as often as required by the Code, and may be as frequent as deemed necessary and appropriate by the Agency in its sole discretion. The audits may also include review of the owner's records as described in the record keeping section herein.
  - (j) In addition to the inspections described above, the Regulatory Agreement shall provide that HFA shall have the right to perform, upon reasonable notice, an on site inspection of any LIHTC project at least through the end of the compliance period and, to the extent deemed applicable by the Agency, the

extended use period, in order to implement and/or enforce any provision of this QAP or the Code.

(k) Notification of Noncompliance.

(1) Notice to Owner. The Regulatory Agreement shall provide that the Agency shall notify the owner promptly in writing if the Agency does not receive the certification described in §2188.7 (f) and (h) of this Plan, or is not permitted to inspect the tenant income documentation, or discovers by inspection, review, or in any other manner, that the project is not in compliance with the provisions of Section 42.

(2) Correction Period. The Regulatory Agreement shall provide that the owner of the project must supply any missing certification required to be supplied to the Agency, or correct any noncompliance with the requirements of Section 42, within a period (the "Correction Period") of no more than 90 days from the time of notice from the Agency to the owner as described in the preceding paragraph. The Regulatory Agreement shall further provide that the Agency may extend the Correction Period for up to six months, but only if the Agency determines that there is good cause for granting the extension.

(3) Notice to Internal Revenue Service. The Regulatory Agreement shall provide that the Agency shall file IRS Form 8823, "Low Income Housing Credit Agencies Report of Noncompliance and Building Disposition," with the IRS no later than 45 days after the end of the Correction Period, whether or not the noncompliance or failure to certify is corrected. The filing and contents of such Form 8823 by the Agency shall be governed by the applicable Income Tax Regulations or other rules promulgated by the IRS. The Regulatory Agreement shall provide that the Agency shall retain records of any noncompliance or failure to certify reported on any Form 8823 filed by the Agency for a period of six years from the filing of said Form 8823.

(l) Agency Retention of Records. HFA shall retain records of noncompliance or failure to certify for six years beyond the Agency's filing of the respective Form 8823. In other cases HFA must retain the certifications and records described in §2188.7(f) and (g) of this QAP for three years from the end of the calendar year the Agency receives the certified records.

(m) Compliance with the requirements of the Code is the sole responsibility of the owner of the building for which the credit is allowable. HFA's obligation to monitor for compliance with the requirements of the Code does not create liability for an owner's noncompliance.

(n) Delegation. To the extent permitted under applicable law, and determined by the President and Chief Executive Officer of the Agency to be advisable, the Agency may delegate monitoring functions under this Plan to any other housing credit agency or any qualified agent selected by the Agency.

**§2188.8 Miscellaneous Provisions.**

(a) Subsidy Layering Review: Applicability.

(1) Certain projects that receive LIHTC are subject to a process called "subsidy layering review." Pursuant to Section 102(d) of the Department of Housing and Urban Development Reform Act of 1989, 42 U.S.C. §3545(d), the Department of Housing and Urban Development ("HUD") is required to ensure that housing projects are not awarded excessive subsidies by combining "HUD Housing Assistance" with "Other Government Assistance." "HUD Housing Assistance" currently includes selected federal programs administered by the Housing division of HUD (not programs administered by the Community Planning and Development Division).



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- (2) The review process whereby HUD ensures against excessive subsidy is termed "subsidy layering review." Every project with HUD Housing Assistance and LIHTC is subject to subsidy layering review. Note, however, that the mere transfer of existing HUD Housing Assistance (such as a Section 236 Contract or a HAP Contract) does not trigger subsidy layering review. Only the award of new HUD Housing Assistance (combined with Other Government Assistance) triggers the review.
- (3) Pursuant to Section 911 of the Housing and Community Development Act of 1992, 42 U.S.C. §3545 note, state or local agencies may elect to undertake subsidy layering review on behalf of HUD for projects that receive LIHTC. The Agency has elected to undertake subsidy layering review when allowable.
- (b) No Recourse or Reliance. No provision of this QAP shall be the basis for any claim against the Agency or any Member, officer or employee of the Agency. The QAP may be amended at any time, and such amendment may be prospective or retroactive. The QAP may also be applied as necessary and convenient in response to federal or state mandates.
- (c) Information Requests. Requests for information made under the Freedom of Information Law must be forwarded to Freedom of Information Officer, New York State Housing Finance Agency, 641 Lexington Avenue, New York, NY 10022.
- (d) Any and all changes in the ownership interests or principals of any project (prior to issuance of IRS Form 8609) for which an application has been submitted to HFA, will be subject to the approval of the Agency which reserves the right to disallow any application where there have been changes in the ownership interests or principals.
- (e) Requests for a Qualified Contract during the period such a request is permitted under Code §42(h)(6). A project owner may request only in writing, by certified mail to HFA, that HFA 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 HFA 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 IRS Form 8609 had any ownership interest in the project.

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