

1 **DIVISION OF HOUSING AND COMMUNITY RENEWAL**

2
3 **LOW-INCOME HOUSING CREDIT QUALIFIED ALLOCATION PLAN, TITLE 9 PART 2040**

4
5 **Statutory Authority: U.S. Internal Revenue Code, Section 42(m); NYS Public Housing Law,**
6 **Article 2 Section 19**
7

8 **Section 2040.1 Purpose and background.**

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

23
24 **Section 2040.2 Definitions.**

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

1 (a) *Adjusted project cost* shall mean the proportional amount of approved project costs
2 attributable to the LIHTC regulated portion of the project.

3 (b) *Certified Service-Disabled Veteran-Owned Business Enterprise or SDVOB* shall mean a
4 business enterprise which meets the requirements of section 40(1) of article 3 of NYS Veterans'
5 Services Law.

6 (c) *Code* shall mean the Internal Revenue Code of 1986, as amended, and the Treasury
7 Regulations, Revenue Rulings and Procedures and other publications of the IRS with binding
8 authority applicable thereunder.

9 (d) *Commissioner* shall mean the commissioner of the Division of Housing and Community
10 Renewal of the State of New York.

11 (e) *Cost certification* shall mean an audited report by an independent third party certified
12 public accountant, with content and opinion in form and substance satisfactory to the division,
13 disclosing any amounts paid for syndication fees or other fees or payments paid in connection with
14 tax credits or other sources of financing, verifying all project costs, the tax credit eligible costs
15 incurred and any other cost data required by the division for a project as support for the amount of
16 the project's allocation of LIHTC or as support for the project's eligibility for an IRS form 8609
17 allocation.

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

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

1 (h) *Division, DHCR or agency* shall mean the Division of Housing and Community
2 Renewal.

3 (i) *Feasibility* shall mean that the proposed project can be financed, completed and operated
4 in compliance with LIHTC regulatory requirements based upon, but not limited to, the
5 reasonableness of development cost, the plan of financing, constructability of the proposed project,
6 rents to be charged, the income and expenses of the project and the market for the units.

7 (j) *High acquisition cost project* shall mean a preservation project in which acquisition cost is
8 25 percent or more of total development cost. Notwithstanding any other provision of this Part, the
9 amount of the developer's fee for a high acquisition cost project shall be based upon the division's
10 assessment of risk assumed by the project owner, considering factors including, but not limited to,
11 rent subsidies or other project operating support, location, financing sources, occupancy level,
12 project type, and identity of interest.

13 (k) *Historic building* shall mean a structure that meets one of the following criteria:

14 (1) it is listed on the New York State or National Register of Historic Places, either
15 individually or as a contributing building to a historic district; or

16 (2) it has been issued a Determination of Eligibility by the Keeper of the National Register
17 of Historic Places; or

18 (3) it has been identified as a contributing building to a Local Historic District that has
19 been certified by the Keeper of the National Register of Historic Places as substantially meeting the
20 National Register Criteria for Evaluation; or

21 (4) it has been issued a State Historic Preservation Office opinion or certification that the
22 building is eligible to be listed on the National Register of Historic Places, either individually or as a
23 contributing building to a historic district.

1
2 (l) *HCR or New York State Homes and Community Renewal* shall be used herein to
3 reference DHCR, HTFC and/or the New York State Housing Finance Agency and their pertinent
4 policies and procedures.

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

8 (n) *Identity of interest* shall mean any financial, familial or business ownership relationship
9 between any of the parties to the transactions involving the acquisition, syndication, financing,
10 development, construction and/or operation of the project. This includes, but is not limited to,
11 existence of a reimbursement arrangement or exchange of funds; common financial interests;
12 common officers, directors or stockholders; or family relationships between officers, directors, or
13 stockholders.

14 (o) *Local non-profit organization* shall mean a tax-exempt organization under section
15 501(c)(3) or (c)(4) of the Code which provides housing-related services in the primary market area
16 or county in which a proposed LIHTC-assisted project is to be located.

17 (p) *Minority-Owned Business Enterprise or MBE* shall mean a business enterprise which
18 meets the requirements of section 310(7) of article 15-A of the NYS Executive Law.

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

1 (r) *Operating deficit guarantee (alternatively, "Operating deficit guaranty")* shall mean a
2 provision in the project owner's organizational documents providing a commitment to pay any
3 operating deficits or operational shortfalls, as set forth in HCR's capital programs manual or other
4 agency guidance, incurred during the first 36 months after the project is placed in service. The
5 amount of such guarantee shall not be less than one-fifth of the developer's fee approved by the
6 division.

7 (s) *Persons in need of supportive housing* shall mean persons who require assistance and
8 ongoing services and supports to obtain housing and maintain tenancy, including persons living
9 with HIV/AIDS; persons with a substance use disorder; persons with serious mental illness;
10 persons who are survivors of domestic violence; persons with intellectual/developmental
11 disabilities; young adults aged 18-25; youth aging out of foster care; persons reentering the
12 community from prison or juvenile justice placement; and/or individuals or families who are
13 homeless or at-risk of homelessness, all of which may include such persons who have served in
14 the armed forces of the United States, or any other population so designated by the division.

15 (t) *Persons with special housing needs* shall mean: seniors requiring access to services
16 intended to support aging-in-place and independent living; persons with physical disabilities,
17 including persons with a mobility, hearing or vision impairment or any other population so
18 designated by the division.

19 (u) *Preservation project* shall mean a project in which a currently government regulated
20 residential rental property is rehabilitated to extend its useful life to serve as affordable housing and
21 the project averts the loss of affordable housing currently serving the housing needs of a population
22 whose housing need would justify the replacement of the housing if it ceased to be available to that
23 population. The scope of the rehabilitation must be sufficient for the project to function in good

1 repair as affordable housing for a period of a minimum of 30 years after the project is placed in
2 service or a later date which DHCR may establish.

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

5 (w) *Projects in well-resourced areas* shall mean projects serving households with children
6 which are located in an area that addresses certain socio-economic factors, which may include but
7 not be limited to, educational opportunity and low poverty rates, as set forth in a request for
8 proposals and/or other guidance issued by HCR.

9 (x) *State designated building* shall mean a building, receiving LIHTC that is determined to
10 advance the State's affordable housing goals and policies which may include, but are not limited to,
11 projects in well-resourced areas, and other projects, which may be designated in a request for
12 proposals, and or are otherwise designated by the division as requiring an increase in credits up to
13 an amount determined by the division to ensure financial feasibility as if the building were located in
14 a difficult development area.

15 (y) *Supportable debt* shall mean debt which can be paid by the operating income available
16 after payment of allowable expenses. The amount is determined by examining the residential
17 operating budget (i.e., rents, operating expenses, debt service and cash flow) of the project.

18 (z) *Supportive housing* shall mean projects which designate a percentage of the LIHTC-
19 assisted units in the project for persons in need of supportive housing as set forth in a request for
20 proposals and/or other guidance issued by the division. To be considered supportive housing:

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

1 (2) the applicant must ensure the delivery of appropriate services, for which a
2 documented need exists, to the targeted population as evidenced in a comprehensive service plan
3 and an agreement in writing with a service provider experienced in meeting the specific service
4 needs of the persons intended to be served;

5 (3) the applicant must include a transportation plan to ensure access to necessary
6 services;

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

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

12 (6) the applicant must identify, and have a written agreement with, a public agency or
13 experienced service provider that will include a description of the referral procedure they will use to
14 refer eligible persons and families for the targeted units; and,

15 (7) the project must provide an integrated setting that enables individuals with disabilities
16 to live independently and without restrictive rules that limit their activities or impede their ability to
17 interact with individuals without disabilities.

18 (aa) *Visitability* shall mean that a residential unit includes the provision of at least one means
19 of entry on an accessible route (no-step entrance), a 36 inch or greater clear circulation path
20 through the first floor of the unit, including all interior doorways, and at least a half-bath on the first
21 floor of the unit with a 30 inch by 48 inch clear floor area to accommodate a person in a wheelchair
22 and allow that person to close the door. Notwithstanding the foregoing, a dwelling unit that contains
23 all necessary components and clearances required by the applicable building code for an

1 accessible dwelling unit on an accessible route shall be considered to meet the visitability
2 circulation requirement.

3 (ab) *Women-Owned Business Enterprise or WBE* shall mean a business enterprise which
4 meets the requirements of section 310(15) of article 15-A of NYS Executive Law.
5

6 **Section 2040.3 DHCR allocation process.**

7 (a) *Funding rounds*. The division will publish at least annually in the *State Register* a notice
8 of credit availability which informs applicants of submission dates and deadlines for the next
9 funding round.

10 (b) *Documentation*. Applicants requesting an allocation of credit must submit an application
11 in a form approved by DHCR. The division may request any and all information it deems necessary
12 for project evaluation. If any submission or documentation is insufficient to complete any evaluation
13 of the proposed project, processing will be terminated. DHCR will not request or accept updated
14 information related to incomplete or insufficient exhibits or attachments used primarily for
15 establishing eligibility or scoring and rating an application.

16 (c) *Processing fees*. The division shall charge an application fee of \$3,000, due at the time of
17 application. The division shall charge a fee of \$1,000 if a binding agreement or similar document is
18 requested. A credit allocation fee of eight percent of the first year credit allocation amount is due at
19 the time of request for the issuance of carryover allocation. Non-profit, Minority-Owned Business
20 Enterprise, Women-Owned Business Enterprise or Certified Service-Disabled Veteran Owned
21 Business Enterprise applicants (or their wholly-owned subsidiaries) which will be the sole general
22 partner or partners of the partnership/project owner or sole managing member or members of the

1 limited liability company/project owner may request and be approved to defer payment of
2 processing fees until the time of carryover allocation.

3 (d) *Credit allocation process*. Only applications submitted by a published deadline will be
4 evaluated for an allocation. Applications will be reviewed for completeness, threshold eligibility,
5 scoring, project feasibility, site suitability, consistency with the division's underwriting standards,
6 and whether a proposed project advances the State's housing goals and objectives, including any
7 goals set forth by the Regional Economic Development Council strategic plan applicable to the area
8 in which the project is located. The division expects to notify applicants within 150 days from the
9 application deadline on allocation decisions. The process the division employs for allocating credit
10 entails the following:

11 (1) Credit reservation or binding agreement. The division will determine, in its sole
12 discretion, whether to provide the applicant with a credit reservation and/or binding agreement or
13 similar document based upon the readiness of the project and the availability of credit.

14 (i) Credit reservations will contain deadlines for: closing on construction
15 financing in an amount sufficient to complete the project; attainment of commitments for permanent
16 financing in an amount sufficient to complete the project; construction start; the timeframe for the
17 project owner to incur more than 10 percent of the reasonably expected basis in the project; and
18 submission of documents necessary for the issuance of an allocation of credit.

19 (ii) Applicants, after meeting the conditions of the credit reservation, may
20 request a binding agreement, or similar document, if the applicant has obtained commitments from
21 all sources of construction and permanent financing and has obtained all necessary local
22 approvals. Generally, a binding agreement or similar document will be issued to an applicant

1 qualifying for a credit reservation to facilitate a project's attainment of construction and/or
2 permanent financing.

3 (iii) If the applicant does not comply with the deadlines contained in the credit
4 reservation or binding agreement, or similar document, the division may revoke the reservation or
5 binding agreement, or similar document, and require the applicant to re-apply for credits.

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

16 (3) Final credit allocation. All projects which receive a credit reservation, binding
17 agreement or similar document and/or carryover allocation from the division, enter service and
18 submit necessary documentation will be evaluated for the final time prior to the final credit
19 allocation. The division may request additional information/documents to complete the evaluation of
20 the project. Prior to the final credit allocation, the owner and the division shall execute a regulatory
21 agreement.

22 (4) Waiting list. Any complete application which meets the threshold eligibility review

1 criteria but is not selected for a credit reservation may be placed on a waiting list, at the division's
2 discretion, which will be in effect until the next funding round, at which time the waiting list will be
3 terminated. Applicants on the waiting list will remain eligible to be selected for a credit reservation if
4 the division determines there is sufficient availability of credits.

5 (5) Other notifications. If an application is found to be incomplete, ineligible, or not
6 feasible the applicant will be notified and no further action will be taken on the application. At any
7 stage in the credit allocation process, the applicant must notify DHCR immediately of any proposed
8 material changes to the project including but not limited to, changes in the project scope, ownership
9 structure, development team, financing, budget, design features, and changes affecting threshold
10 eligibility review criteria and scoring and ranking criteria, tenant population, household income
11 levels served and any other significant factors. All proposed material changes are subject to
12 DHCR's approval.

13 (e) *Threshold eligibility review criteria.* At each stage of processing (*i.e.*, application,
14 reservation, binding agreement or allocation) applications will be subject to a threshold eligibility
15 review, which will include, but not necessarily be limited to, whether the project meets the following
16 minimum requirements as well as requirements described in a notice of credit availability, request
17 for proposals, design requirements manual, capital programs manual or other manual or document
18 issued by the division:

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

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

23 (3) At the time of application, the project applicant has identified all required
24
25

1 governmental approvals necessary to construct and operate the project. At each subsequent
2 stage of processing, the applicant must secure all required governmental approvals to construct
3 and operate the project.

4 (4) The project applicant must comply with the Code regarding notification of the
5 chief executive officer (or the equivalent) of the local jurisdiction within which the proposed
6 project is located and provides such individual a reasonable opportunity to comment on the
7 project.

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

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

15 (7) The project developer, owner and/or manager and their principals do not
16 include anyone who has participated in a publicly assisted program or project that has been
17 determined to be out of compliance with statutes, rules, regulations, policies or agreements
18 and has not been corrected or otherwise resolved as determined by the public agency
19 responsible for supervising the project. The project developer, owner and/or manager and
20 their principals must inform the division in a timely manner of any notice of non-compliance
21 issued at any time.

22 (8) The amount of requested annual credit allocation does not exceed either the
23 maximum per project or per unit amounts specified in the notice of credit availability, request

1 for proposals, and/or other guidance issued by the division. Such amounts will be established
2 based upon the expected availability of credit allocation authority. The applicants may request
3 and the commissioner may grant a waiver of this requirement if the commissioner determines
4 that there is sufficient credit available, the project is in furtherance of the State's housing goals
5 and in the best interests of the citizens of the State of New York. A written explanation shall be
6 available to the general public for any waiver granted pursuant to this paragraph.

7 (9) The project applicant must provide due diligence reports acceptable to the
8 division including but not limited to: an appraisal, if necessary, a physical needs assessment, if
9 necessary, a comprehensive market study (which must be conducted consistent with guidance
10 provided by the division which demonstrates at a minimum that public housing waiting lists
11 have been considered and that the proposed number and type of units meet an existing and
12 identified need of low-income individuals and can be readily absorbed by existing need in the
13 local area) and, a Phase I Environmental Site Assessment, which meets current American
14 Society for Testing and Materials (ASTM) standards, dated not more than 12 months prior to
15 the application submission deadline.

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

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

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

22 (13) All LIHTC-assisted first floor units in new construction projects without an
23 elevator, all LIHTC-assisted units in new construction projects with an elevator, and as many

1 LIHTC-assisted units as feasible in adaptive reuse or rehabilitation projects shall meet
2 visitability standards, except when such standards are demonstrated to be irreconcilable with
3 Federal, State or local statutes, regulations, ordinances or codes.

4 (14) If the project includes the rehabilitation of any building(s) the acquisition
5 costs of the building(s) must be reasonable as determined by the division and may not exceed
6 25 percent of the total development costs of the project unless:

7 (i) it is a preservation project (as defined at section 2040.2(u) of this Part);

8 or

9 (ii) the commissioner has determined that the preservation of the
10 building(s) is in the best interest of the State. A written explanation
11 shall be available to the general public for any allocation of a housing
12 credit dollar amount which is made in accordance with this subsection.

13 (15) Project construction has not started without prior authorization by the
14 division.

15 (16) The project will:

16 (i) be a qualified low-income housing project subject to a regulatory
17 agreement with the division for no less than 30 years; however, the
18 minimum term may be increased as set forth in the request for
19 proposals and/or other agency guidance; or

20 (ii) be conveyed pursuant to an effective plan for existing tenants to
21 purchase the project at the end of the compliance period.

22 (17) The project's design and construction must comply with both HCR's design
23 guidelines and sustainability guidelines as appropriate for the type of building proposed, as

1 may also be set forth in a request for proposals and/or other agency guidance. Rehabilitation
2 projects must take into account, among other factors, cost effectiveness based on the scope
3 of reconstruction necessary and the historic nature of the project. All projects must identify
4 how sustainability requirements will be met and agree to provide, prior to construction closing,
5 a certification from a responsible green and/or energy professional that the project will meet
6 such requirements.

7 (18) The project's design and construction must provide for a percentage of
8 accessible units for persons with mobility and hearing/vision impairments as set forth in HCR's
9 design guidelines, request for proposals and/or other agency guidance.

10 (19) The division has completed a background review of the project applicant,
11 developer, owner, general contractor and/or manager and their principals with results
12 acceptable to the division.

13 (20) The project applicant, developer, owner, general contractor and/or manager
14 and their principals agree not to contract for any services related to the project with any entity on
15 any Federal or New York State debarment lists and include a provision in all contracts related to
16 the project barring the participation of entities on such lists.

17 (21) The project does not significantly exceed the costs of other proposed projects,
18 unless a determination has been issued by the commissioner finding the project to be in
19 furtherance of the State's housing goals. A written explanation shall be available to the general
20 public for any allocation of housing credit made pursuant to this paragraph.

21 (22) The project applicant, developer, owner, general contractor and/or manager
22 and their principals are in compliance with all relevant Federal and New York State laws, HCR
23 policies and requirements, and local laws and regulations, including but not limited to all fair

1 housing and anti-discrimination requirements and the prohibition against discriminating against
2 Section 8 Housing Choice Voucher holders, nondiscrimination and marketing policies, guidelines
3 and requirements.

4 (23) The project applicant, developer, owner and/or manager and their principals
5 does not include anyone who, in the sole judgment of HCR, has initiated or been the decision
6 maker in requesting a qualified contract under section 42(h)(6)(F) of the Code after May 26,
7 2021.

8 (24) Any required project reserves must be used to maintain the project and the
9 property on which it is situated, benefit the project's residents, and remain with the project
10 throughout the term of the regulatory agreement, except as otherwise consented to by DHCR.

11 (25) Any project in which a Qualified Nonprofit Organization (as set forth in section
12 42(i)(7) of the Code) ("QNPO") is involved (within the meaning of section 42(h)(5)(B) of the Code)
13 shall enter into a right of first refusal agreement which complies with the terms of section 42(i)(7)
14 of the Code and the provisions of this paragraph, as more specifically set forth in subparagraph
15 2040.3(e)(25)(i) below (the "ROFR Agreement"). Such projects must submit a credit commitment
16 letter or letter of intent from a tax credit investor in which the investor agrees and certifies it will
17 enter into a ROFR Agreement which complies with the terms of this paragraph, and to a ROFR
18 purchase price which complies with the provisions of this paragraph.

19 (i) The ROFR Agreement must state the parties agree that the right of first
20 refusal ("ROFR") contemplated by the ROFR Agreement and allowed under
21 section 42(i)(7) of the Code is different from a common law right of first
22 refusal and does not require nor will it be conditioned upon a bona fide third-
23 party offer, as otherwise may be required under New York State law,

1 including statutory, court-interpreted, or common law. The ROFR
2 Agreement must state that the intent of parties is that the seller is a willing
3 seller under the terms of the ROFR Agreement and consent to such sale by
4 all parties to the ROFR Agreement shall not be unreasonably withheld.

5 (ii) The ROFR Agreement must state the following, in such form as may be
6 approved by and consented to by DHCR:

7 (a) The ROFR may be exercised any time after the close of
8 the compliance period. Once exercised, the QNPO shall
9 have at least 12 months to close on the purchase of the
10 project or the ownership interests in the project.

11 (b) The QNPO may transfer or assign the property and the
12 ROFR Agreement and its rights thereunder to another
13 QNPO, including to a related party, upon consent of
14 DHCR. Consent to such transfer or assignment by the
15 other members, partners or other entities holding an
16 ownership interest in the project shall not be
17 unreasonably withheld, conditioned or delayed, nor
18 withheld for a non-material breach of the project
19 organizational documents.

20 (c) There are no other conditions to the exercise of the
21 ROFR except as explicitly identified in the ROFR
22 Agreement.

1 (d) The purchase price to exercise the ROFR set forth in
2 the ROFR Agreement shall be calculated in accordance
3 with the minimum purchase price pursuant to section
4 42(i)(7)(B) of the Code. Any additional amounts added
5 to such purchase price will be subject to DHCR consent
6 prior to exercise of the ROFR. DHCR's review in
7 connection with issuance of consent of any such
8 additional amounts shall be for the purpose of
9 maintaining the long-term financial stability and
10 affordability of the project.

11 (e) In the event that section 42(i) of the Code is amended to
12 provide for an option to purchase, as opposed to or in
13 addition to a ROFR to purchase, the QNPO may elect to
14 exercise the option right under the Code in the manner
15 allowed for under the Code, notwithstanding anything
16 set forth in the ROFR Agreement.

17 (f) DHCR consent is required for any material amendments
18 thereto or assignments of the ROFR Agreement.

19 (iii) Projects in which a QNPO does not hold an ownership interest and is not
20 otherwise involved (as described in section 42(h)(5)(B) of the Code) but
21 instead projects in which tenants (organized in cooperative or other form)
22 intend, or a partner, member or other entity in the project ownership
23 structure intends, to exercise a ROFR must submit a credit commitment

1 letter or letter of intent from a tax credit investor in which the investor agrees
2 and certifies it will enter into a ROFR Agreement with such entity, and
3 agrees to a ROFR purchase price which complies with the provisions of this
4 paragraph 2040.3(e)(25) of this subdivision, in such form as may consented
5 to by DHCR.

6 (26) The project is further subject to any additional threshold eligibility review
7 criteria as may be set forth in a request for proposals and/or other agency guidance.

8 (f) *Project scoring and ranking criteria.* Project applications which pass threshold eligibility
9 review shall be scored and ranked based upon the following criteria as may be further described in
10 a notice of credit availability, request for proposals, design requirements manual, capital programs
11 manual or other manual or document issued by HCR.

12 (1) Community impact/revitalization (up to 10 points). Scored to the extent the project
13 provides affordable housing in an area that meets the following criteria:

14 (i) the project proposes the use or reuse of existing buildings, infill new
15 construction, and/or the demolition and replacement of buildings having a negative impact on a
16 community and the rehabilitation of which is impracticable and advances a neighborhood specific
17 revitalization plan or is complementary to an ongoing neighborhood specific planning and/or
18 revitalization effort (“a Concerted Community Revitalization Plan”). Plans and/or efforts may be led
19 by local government, locally based community organizations and/or individuals. Plans and/or
20 efforts will be evaluated based on the extent to which they propose community enhancements that
21 seek to fundamentally improve the quality of life and opportunities for neighborhood residents
22 based on the following criteria (up to 5 points):

24 (a) incorporate easy access to public transportation and/or promote

1 walkable communities in which essential goods and services are
2 accessible within a short and safe walking distance;

3 (b) are consistent with the historic character and density of the
4 neighborhood;

5 (c) provide evidence of an ongoing, multi-faceted revitalization effort
6 and/or plan that addresses the homeownership, commercial, service,
7 employment, nutritional, recreational, educational and cultural needs
8 of the neighborhood;

9 (d) result from an open, public process in which neighborhood residents
10 have had meaningful opportunities to contribute to its development;

11 (e) identify existing neighborhood strengths upon which the revitalization
12 plan and/or effort is based, including, but not limited to, access to
13 employment opportunities and proximity to viable commercial
14 districts, stable neighborhoods, and cultural institutions;

15 (f) identify goals to be met and obstacles to be overcome by the plan;
16 and

17 (g) promote mixed income development.

18 (ii) Scored as to whether the project (2 points):

19 (a) will provide non-residential space (i.e., retail, commercial or
20 community facility) that clearly serves the critical unmet needs of
21 both the tenants and local residents; or

22 (b) will include commercial space available for ownership/operation by a

1 local resident.

2 (iii) the project clearly advances specific housing objectives of a Regional
3 Economic Development Council strategic plan applicable to the area in which the project is located
4 or another State-sponsored community revitalization effort or initiative, as may be set forth in a
5 request for proposals and/or other agency guidance (up to 3 points).

6 (2) Financial leveraging (up to 10 points). Scored to the extent that other funding
7 sources (not including a deferred developer's fee) finance a portion of the project's total
8 development cost, including but not limited to, sources such as:

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

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

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

12 (iv) the net syndication proceeds as a proportion of the total credit
13
14
15

16 requested; and/or,

17 (v) the amount of credit requested per unit adjusted for unit size.
18

19 (3) Sponsor characteristics (up to 11 points). Scored on the applicant's development and
20 management team experience in;

21 (i) the timely development and completion of low-income housing within
22 proposed development budgets and project scope;

23 (ii) meeting and exceeding MBE, WBE and SDVOB participation goals on
24 previous HCR-financed projects; and/or,

25 (iii) the management of such housing within approved operating budgets in a
26 manner consistent with all statutes, regulations and policies.

1 (4) Sustainability (up to 5 points). Scored to the extent the project identifies and will comply
2 with a sustainable green building strategy which exceeds the minimum baseline requirements as
3 set forth in HCR's sustainability guidelines, request for proposals and/or other agency guidance.

4 (5) Additional HCR accessible units (up to 5 points). Scored to the extent

5 (i) the project's design and construction will provide for an additional percentage
6 of accessible units for persons with a mobility impairment and hearing or vision impairment which
7 exceeds the minimum standard required as set forth in HCR's design guidelines, request for
8 proposals and/or other agency guidance; and

9 (ii) the applicant has provided evidence that there is sufficient market demand
10 for the number and type of units proposed and has certified it will enter into a written agreement
11 with an experienced service organization(s) to provide appropriate referrals for occupancy of
12 such units.

13 (6) Affordability (up to 7 points). Scored on the percentage of LIHTC units in the project
14 which will be affordable and targeted to persons with the lowest incomes (e.g., 30 percent, 40
15 percent, or 50 percent of area median income).

16 (7) Individuals with children (up to 5 points). Scored on the ratio of bedrooms to units in
17 a project serving households with children which qualifies for scoring points pursuant to
18 subparagraph 2040.3(f)(14) of this section or advances a neighborhood specific revitalization plan
19 and/or effort.

20 (8) Project readiness (up to 10 points). Scored to the extent the application
21 demonstrates the likelihood of a construction closing in the shortest possible timeframe based upon
22 an assessment of the status of financing commitments and whether the project is supported by the

1 implementation of significant measures including but not limited to infrastructure improvements, real
2 property tax relief and rezoning.

3 (9) Special housing needs and supportive housing (up to 5 points). Scored to the extent
4 that the project will designate a percentage of the LIHTC-assisted units in the project to:

5 (i) serve persons with special housing needs; and/or

6 (ii) persons in need of supportive housing (which shall meet the requirements
7 enumerated in section 2040.2(z) of this Part), each as set forth in the request for proposals and/or
8 other agency guidance.

9 (10) Participation of non-profit organizations (up to 4 points). Scored to the extent of
10 participation of a non-profit organization or organizations:

11 (i) whether local non-profit organization(s) or for-profit wholly owned
12 subsidiary(ies):

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

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

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

18 (ii) whether local non-profit organization(s) or for-profit wholly owned subsidiary(ies), with
19 demonstrable housing experience and capability, has a defined and substantive role in the
20 development or management of the project through the extended use period (2 points); or

21 (iii) whether non-profit organization(s) that does not qualify as a local non-profit

1 organization(s) under section 2040.2(o) of this Part, or its for-profit wholly owned
2 subsidiary(ies), has a defined and substantive role in the ownership, development or
3 management of the project through the extended use period (1 point).

4 (11) Mixed income (up to 4 points). Scored to the extent the project would serve households
5 earning above 60 percent of area median income.

6 (12) Historic nature of project (up to 2 points). Scored on whether:

7 (i) the project includes the rehabilitation of a historic building (1 point);

8 (ii) the applicant demonstrates that the project will include a building that will be eligible
9 for, and the applicant will seek, a Federal tax credit for the rehabilitation of historic
10 buildings (1 point).

11 (13) Cost effectiveness (5 points). Points will be awarded to individual projects based upon a
12 comparison of project costs to the costs proposed in other project applications.

13 (14) Projects in well-resourced areas (up to 5 points). Scored to the extent the project is
14 located in an area which addresses certain socio-economic factors, which may include, but not be
15 limited to, educational opportunity and low poverty rates, as set forth in a request for proposals
16 and/or other guidance issued by HCR.

17 (15) Transit-oriented development (up to 2 points). Scored to the extent the project promotes
18 transit-oriented development by its close proximity to public transportation, as set forth in a request
19 for proposals and/or other guidance issued by HCR.

20 (16) Investment in underserved areas (5 points). Scored on whether there is limited or no
21 subsidized affordable housing production and an unmet demand for affordable housing in the past
22 10 years within the primary market area of the proposed location of the project.

1 (17) Minority and Women-Owned Business Enterprise and Certified Service-Disabled
2 Veteran-Owned Business participation (up to 5 points). Scored to the extent the project includes a
3 MBE and/or WBE with a controlling or material ownership interest in the project to be maintained
4 throughout the development, construction and regulatory term of the project, as set forth in a
5 request for proposals or other agency guidance and/ or the development team includes a MBE,
6 WBE, or SDVOB.

7 (g) *Determination of the amount for credit allocation.*

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

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

23 (a) serve the lowest income tenants;

1 (b) are obligated to serve qualified tenants for the longest periods; and,

2 (c) are located in a qualified census tract and their development contributes to a
3 concerted community revitalization plan.

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

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

9 (i) Construction related items (costs). The maximum allowable construction
10 related costs shall be, in relation to the contractor's contract: builder's profit of 6 percent;
11 builder's overhead of 2 percent; and general conditions of 6 percent, or any combination of
12 these costs totaling no more than 14 percent, based upon actual and reasonable construction
13 costs.

14 (ii) Developer's fee. The amount of developer fee compensation for services,
15 overhead, and profit recognized in the adjusted project cost shall be 10 percent of the
16 acquisition and improvement cost associated with the low-income portions of the project. This
17 can be increased up to a ceiling of 15 percent of improvement cost of the low-income portion
18 where either the developer or its affiliate provides to the satisfaction of the division both a cost
19 completion guarantee and an operating deficit guarantee as those guarantees are set forth in
20 the project owner's organizational documents. Notwithstanding any other provision of this
21 Part, the amount of the developer's fee for a high acquisition cost project shall be based upon
22 the division assessment of risk assumed by the project owner, considering factors including,

1 but not limited to, rent subsidies or other project operating support, location, financing
2 sources, occupancy level, project type, and identity of interest.

3 (iii) Identity of interest. The division may reduce any allowable costs, including
4 but not limited to the developer's fee, where an identity of interest has been found among the
5 parties to the transactions involving the acquisition, syndication, financing, development,
6 construction and/or operation of the project, if it is determined that such costs exceed
7 reasonable amounts. At the time of application, all applicants will be required to submit an
8 affidavit disclosing the nature of any identity of interest. Where there exists such an identity of
9 interest, the applicant will be required to demonstrate expenditures to be customary given the
10 financial structure of the project. At the time of carryover allocation and at the time of the
11 submission to the agency of the request for IRS form 8609, the applicant must disclose any
12 additional identities of interest among the parties to transactions involving the syndication,
13 financing, development, construction and/or operation of the project.

14 (3) Syndication standards. The division will require that the value received on sale of the
15 credit from projects receiving an allocation from the division be valued at market rates or greater.
16 The amount of equity capital contributed by investors to a project partnership shall not be less than
17 the amount generally contributed by investors to similar projects as determined by using sales of
18 comparable credit projects and the division's evaluation of market trends. The division will base all
19 calculations of the minimum net syndication proceeds available to the project on the assumption
20 that 99.9 percent of the project has been sold to investors.

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

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

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

8 (5) General.

9 (i) The division reserves the right to allocate credit in a manner which
10 affirmatively advances fair housing, yields an equitable distribution of LIHTC throughout the
11 State, to ensure the participation of qualified non-profit organizations, to implement such
12 special priorities or demonstration programs contained in the notice of credit availability or
13 request for proposals and/or other agency guidance, and to advance coordinated investments
14 by State, Federal, and local governmental partners.

15 (ii) The division also reserves the right, in its sole discretion, to:

16 (a) assign scoring points as set forth in section 2040.3 of this Part to the
17 extent a project addresses HCR's underwriting standards, which may
18 include an evaluation of project market support, operating economics
19 and/or plan of finance, and/or design standards, as set forth in a
20 request for proposals, design guidelines and/or other agency
21 guidance; and

22 (b) exclude a project from consideration for funding if the division
23 determines that the project's underwriting and/or design proposal

1 negatively impacts prospective occupants and/or the community.

2 (iii) Notwithstanding the threshold eligibility review criteria and/or the scoring
3 criteria set forth herein, the division, at its sole discretion, may:

4 (a) deny any request for an allocation of credit to a project irrespective of
5 the outcome of its threshold eligibility review and/or the project scoring
6 if such a request is either inconsistent with the housing objectives of
7 the Regional Economic Development Council applicable to the area in
8 which the project is located, and/or presents issues not addressed in
9 the threshold eligibility review or the project scoring which may pose
10 excessive risks, costs and/or negative impacts to the project, its
11 prospective occupants and/or the community; and

12 (b) allocate credit to a project irrespective of its scoring if such an
13 intended allocation is in compliance with the Code, in furtherance
14 of the State's housing goals as may be set forth in a request for
15 proposals and/or other agency guidance and is determined by the
16 division to be in the interests of the citizens of the State of New
17 York.

18 (6) Set-Asides. For the purpose of implementing the State's housing goals, including the
19 housing objectives of the Regional Economic Development Council applicable to the area in which
20 the project is located, the division reserves the right to set aside credit, including, but not limited to,
21 set-asides for projects in well-resourced areas, preservation projects, including such projects
22 located in rural areas, and supportive housing projects.

1 **Section 2040.4 Projects financed by private activity bonds.**

2 (a) *Eligible Projects.* After March 1, 2008, applications for LIHTC from projects financed by
3 tax-exempt bonds subject to the private activity bond volume cap in accordance with section
4 42(h)(4)(A) of the code will be processed by the New York State Housing Finance Agency under its
5 procedures. This section shall apply to applications filed with DHCR pursuant to section 42(h)(4)(A)
6 of the code. All other provisions of this Part shall remain in full force and effect for applications filed
7 pursuant to this section prior to March 1, 2008. Projects financed by tax-exempt bonds subject to
8 the private activity bond volume cap in accordance with section 42(h)(4)(A) of the code may be
9 allocated low-income housing credit which is not taken into account regarding the State housing
10 credit ceiling.

11 (b) *Application process.* Complete applications must be submitted at 60 days prior to the
12 proposed construction start date on a form approved by DHCR and will be accepted and processed
13 throughout the calendar year. The division may request any and all information it deems necessary
14 for project evaluation. If any submission is incomplete or if documentation is insufficient to complete
15 any evaluation of the proposed project, processing will be suspended. Complete applications will be
16 reviewed relative to criteria contained in section 2040.3(e) and (f) of this Part for eligibility and
17 public purpose. Within 60 days after receipt of a complete application the division will issue to the
18 applicant a finding as to whether the application is consistent with this qualified allocation plan and
19 the amount of LIHTC for which the project qualifies pursuant to section 2040.3(g) of this Part. If the
20 application is consistent with this qualified allocation plan, the applicant will receive processing
21 instructions for a final allocation of credit. If the project is found to be inconsistent with the division's
22 qualified allocation plan the owner will be notified of the reasons.

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

8 (d) *Determination of credit amount*. In accordance with code section 42(m)(2)(D) the issuer
9 of the tax exempt bonds is responsible for determining the dollar amount of credit which is
10 necessary for the financial feasibility of the project and its viability as a qualified low-income
11 housing project throughout the credit period. Such determination must be included in the applicant's
12 request to the division for a final allocation of credit. The division will process requests for a final
13 allocation of credit within 60 days from receipt of all required documentation including an executed
14 credit regulatory agreement with proof of recording. The division will apply the criteria set forth in
15 section 2040.3(g) of this Part (except for section 2040.3(g)(1)(ii) of this Part) in determining the
16 amount for the final credit allocation.

17 (e) *Regulatory term*. The regulatory requirements of projects receiving an allocation under
18 the terms of this section is described in section 2040.5 of this Part and shall be subject to
19 compliance monitoring as described in section 2040.7 of this Part
20

21 **Section 2040.5 Regulatory agreement.**

22 (a) *Restrictive covenant*. The division shall require the owners of projects which receive a
23 credit allocation after 1989 to execute a regulatory agreement. The regulatory agreement must be

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

6 (b) *Other provisions.* The regulatory agreement shall specify, for the low-income portion of
7 the building(s) that: the agreement shall be binding on all successors of the owner; the owner
8 agrees to be bound by any regulations duly promulgated by the division or the Federal government
9 for projects receiving low-income housing credits; the owner shall disclose the restricted rent for a
10 dwelling unit to the prospective tenant prior to the execution of a lease; the owner shall secure from
11 the tenant such information as is reasonably necessary to annually verify income; the owner shall
12 address any citations for building code violations made by a municipality within 90 days of receipt;
13 the owner shall ensure that the applicable fraction, as defined in the Code, for the building for each
14 taxable year in the extended use period will not be less than the applicable fraction specified
15 therein; the owner shall consent to enforcement in any State court of the extended use requirement
16 by any income eligible person; the owner shall annually submit a certification to DHCR stating that
17 the building(s) is (are) owned and operated in compliance with the provisions of the Code and any
18 regulations promulgated thereunder, and provide such other information as the division may deem
19 necessary; and the owner shall not retaliate against any tenant who notifies the division of alleged
20 violations of the regulatory agreement. The regulatory agreement shall include an agreement to
21 waive any right to request a qualified contract and provide that the extended use period will not be
22 subject to early termination pursuant to the qualified contract provisions as defined in section
23 42(h)(6)(F) of the Code. The regulatory agreement shall contain a provision which states that the

1 agreement shall not be terminated if ownership is transferred by foreclosure or by a deed-in-lieu of
2 foreclosure as a result of any action to collect debt which is owed to any entity which at any time
3 after the issuance of a final credit allocation had any ownership interest in the project.

4 (c) *Request for a qualified contract.* This section only applies to projects in which the project
5 owner has a regulatory agreement executed by the division which specifically grants the right to
6 request a qualified contract. The owner may request only in writing, by certified mail to DHCR to the
7 attention of the LIHTC monitoring office, that DHCR produce a qualified contract from a buyer who
8 will continue to operate the building(s) for low-income use. A request for a qualified contract shall
9 be an irrevocable offer to sell during the applicable one-year period. If DHCR presents a qualified
10 contract during the above one-year period, such qualified contract shall confer upon the buyer an
11 exclusive right to purchase the project. For the purpose of determining the value of a qualified
12 contract, "cash distributions from (or available for distribution from) the project" as set forth in the
13 Code shall include management incentive fees paid or due to anyone who at any time after the
14 issuance of a final credit allocation had any ownership interest in the project. DHCR will specify the
15 checklist of items required to be submitted as part of a request for a qualified contract. A
16 nonrefundable fee, in an amount determined by DHCR, is due upon submission of a request for a
17 qualified contract. The owner shall be required to pay for any services reasonably determined by
18 DHCR to be necessary for the technical review of a request for a qualified contract by an
19 accountant, appraiser or other relevant expert.

20 (d) All projects shall at all times maintain adequate records concerning vacancies. These
21 records should be updated at least monthly and, upon DHCR' s request, provided to DHCR in order
22 to maintain the State's ability to quickly respond to natural disasters and other emergencies.

1 **Section 2040.6 Miscellaneous issues.**
2

3 (a) *Information requests.* Requests for information made under the Freedom of Information
4 Law, must be submitted pursuant to HCR’s website at <https://hcr.ny.gov/>.

5 (b) *Changes in ownership.* Any and all changes in the ownership interests or principals of
6 any project (prior to issuance of final credit allocation) for which an application has been submitted
7 to DHCR, will be subject to written confirmation by DHCR that DHCR has no objection to the
8 change(s) proposed. DHCR reserves the right to disallow any application where there have been
9 changes in the ownership interests or principals.

10
11 **Section 2040.7 Monitoring and administration.**
12

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

16 (b) *LIHTC monitoring office.* All HCR administrative functions related to the operation of
17 qualified low-income buildings shall be the responsibility of the monitoring office which, shall be
18 HCR’s Office of Housing Operations/Statewide Asset Management or their designee. The
19 monitoring office will be responsible for enforcing all regulatory agreements and reporting
20 noncompliance to the IRS. All correspondence and/or legal notices should be addressed to the
21 attention of HCR’s Office of Housing Operations/Statewide Asset Management.

22 (c) *Administrative fees.* The division may establish reasonable and necessary fees to
23 effectively administer the program including, but not limited to, an annual monitoring fee, as set forth
24 in the project regulatory agreement, the capital programs manual and/or other agency guidance.
25

1 (d) *Required staff training:*

2 (1) The Agency mandates applicants to require management staff administering any
3 project which may receive an allocation of LIHTC to complete a certification program from a
4 nationally recognized entity on Low-Income Housing Credit compliance before the project is
5 placed in service.

6 (2) All project management plans must include a requirement that appropriate staff
7 administering any project containing low-income units shall receive sufficient training prior to or
8 at the commencement of employment, and refresher training in LIHTC compliance as
9 necessary, not less than every five years.

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

14 (1) the total number of residential rental units in each building, including the number of
15 bedrooms and size in square feet of each residential rental unit;

16 (2) the percentage and location of residential rental units that are low-income units in
17 each building;

18 (3) the rent charged for each residential rental unit, including any utility allowances;

19 (4) the number of occupants in each low-income unit, if the rent is determined by the
20 number of occupants in each unit pursuant to section 42(g)(2) of the Code (as in effect before
21 the amendments made by the Revenue Reconciliation Act of 1989);

22 (5) the low-income unit vacancies in the building and information that shows when, and
23 to whom, the next available units were rented;

1 (6) all income certifications, including recertifications, submitted by each past and present
2 tenant of low-income units;

3 (7) documentation to support the income certification and recertification made by each
4 tenant of a low-income unit (for example, verifications of income from third parties such as
5 employers or unemployment compensation), in accordance with the requirements of the Code;

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

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

13 (10) fiscal documentation to include annual budgets, certified financial audits and all
14 financial records pertaining to the project including, but not limited to bank statements, and all
15 records related to the operation and maintenance of the project and any other reporting
16 requirements as deemed necessary by the agency;

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

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

19 (13) utility allowance; and

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

22 (f) *Record retention.* The owner of a low-income housing project shall retain the above records
23 for each building in the project for at least six years after the due date (with extensions) for filing the

1 Federal income tax return for that year. The records for the first year of the credit period, however,
2 must be retained for at least six years beyond the due date (with extensions) for filing the Federal
3 income tax return for the last year of the compliance period of the building.

4
5 **Section 2040.8 Annual certification.**
6

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

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

15 (1) project and ownership data;

16 (2) certification that:

17 (i) the project meets the requirements of whichever minimum set-aside test is applicable
18 to the project;

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

23 (b) after initial income certifications have been completed for all units in a
24 project, the annual income recertification required by this subparagraph
25 shall not be required for projects in which 100 percent of the residential

1 units are LIHTC qualified low-income units, unless:

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

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

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

9 (4) the division, at its discretion, chooses to continue requiring annual
10 income recertifications, or to reinstate annual recertification requirements;

11 (iii) each low-income unit in the project is rent restricted under code section
12 42(g)(2);

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

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

19 (vi) each building in the project is suitable for occupancy, taking into account local
20 health, safety, and building codes and the State or local government unit responsible
21 for making local health, safety, or building code inspections did not issue a violation
22 report for any building or low-income unit in the project. If a violation report or notice
23 was issued by the governmental unit, the owner must attach a statement summarizing

1 the violation report or notice or a copy of the violation report or notice to the annual
2 certification submitted to the DHCR. In addition, the owner must state whether the
3 violation has been corrected;

4 (vii) there has been no change in the eligible basis (as defined in code section
5 42(d)) of any building in the project; or if there has been such a change(s), the owner
6 shall certify to the nature of the change(s) (e.g., a common area has become
7 commercial space, or a fee is now charged for a tenant facility formerly provided
8 without charge) on a building-by-building basis;

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

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

16 (x) when and if a low-income unit in the project became vacant, reasonable
17 attempts were being or will be made to rent that unit or the next available unit of
18 comparable or smaller size to tenants having a qualifying income, before any units in
19 the project were or will be rented to tenants not having a qualifying income;

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

23 (xii) an extended low-income housing commitment (regulatory agreement), as

1 described in IRC section 42(h)(6), was in effect for buildings subject to section
2 7108(c)(1) of the Revenue Reconciliation Act of 1989, 103 stat. 2106, 2308-2311,
3 including the requirement that an owner cannot refuse to lease a unit in the project to
4 an applicant because the applicant holds a voucher or certificate of eligibility under
5 section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f (for buildings
6 subject to section 13142(b)(4) of the Omnibus Budget Reconciliation Act of 1993, 107
7 stat. 312, 438-439);

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

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

12 (xv) all low-income units in the project were used on a nontransient basis (except for
13 transitional housing for the homeless provided under section 42(i)(3)(B)(iii) or single-
14 room-occupancy units rented on a month-by-month basis under section 42(i)(3)(B)(iv)).
15

16 **Section 2040.9 Compliance and inspection.**

17 (a) For all buildings placed in service on or after January 1, 2001, the division shall conduct on-
18 site inspections of all buildings in the project by the end of the second calendar year following the
19 year the last building in the project is placed in service and, for at least 20 percent of the project's
20 low-income units, inspect the units for habitability and review the low-income certifications, the
21 documentation supporting the certifications, and the rent records for the tenants in those units.

22 (b) At least once every three years, the agency shall conduct on-site inspections of all
23 buildings in the project and, for at least 20 percent of the project's low-income units, inspect the units

1 for habitability and review the low-income certifications, the documentation supporting the
2 certifications, and the rent records for the tenants in those units.

3 (c) The agency shall randomly select which low-income units and tenant records are to be
4 inspected and reviewed by the agency. The review of tenant records may be undertaken wherever
5 the owner maintains or stores the records (either on-site or off-site). The units and tenant records to
6 be inspected and reviewed shall be chosen in a manner that will not give owners of low-income
7 housing projects advance notice that a unit and tenant records for a particular year will or will not be
8 inspected and reviewed. DHCR may give an owner reasonable notice that an inspection of the
9 building and low-income units or tenant record review will occur so that the owner may notify tenants
10 of the inspection or assemble tenant records for review.

11 (d) The division shall review any local health, safety, or building code violations, reports or
12 notices retained by the owner and must determine whether the buildings and units satisfy, as
13 determined by the agency, the uniform physical condition standards for public housing established
14 by HUD (24 CFR 5.703). The HUD physical condition standards do not supersede or preempt local
15 health, safety, and building codes. A low-income housing project under section 42 must continue to
16 satisfy these codes and, if the agency becomes aware of any violation of these codes, the agency
17 must report the violation to the IRS. However, provided the agency determines by inspection that the
18 HUD standards are met, the agency is not required to determine by inspection whether the project
19 meets local health, safety, and building codes.

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

1 which the RHS agrees to notify the agency of the inspection results.

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

6 7 **Section 2040.10 Notification of noncompliance.**

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

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

16 (b) The division shall file a "Low-Income Housing Credit Agencies Report of Noncompliance or
17 Building Disposition," (the "form"), and/or provide such other notification as required by the code, with
18 the IRS no later than 45 days after the end of the correction period (as described in subdivision (c) of
19 this section, including such extensions of time granted by the division for correction) and no earlier
20 than the end of the correction period, whether or not the noncompliance or failure to certify is
21 corrected; and shall explain on the form the nature of the noncompliance or failure to certify and
22 indicate whether the owner has corrected the noncompliance or failure to certify. Any change in either
23 the eligible basis or applicable fraction under section 2040.8(b)(2)(vii) and (viii) of this Part

1 respectively, that results in a decrease in the qualified basis of the project under code section 42(c)(1)
2 is noncompliance that must be reported to the IRS. If the division reports on the form that a building is
3 entirely out of compliance and will not be in compliance at any time in the future, the division need not
4 file the form in subsequent years to report that building's noncompliance. (The division shall file the
5 form with the IRS to report a sale of a project and/or building for which the low-income housing credit
6 is, or has been allow able at any time.) If the noncompliance or failure to certify is corrected within
7 three years after the end of a correction period, the division shall file the form with the IRS reporting
8 the correction of the noncompliance or failure to certify.

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

14
15 **2040.11 Agency retention of records.**

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

1 **2040.12 Delegation of authority.**

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

5
6 **2040.13 Liability.**

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