CHAPTER 8 – UNIT-, BUILDING-, AND PROJECT-LEVEL RULES

Following is a partial listing of rules governing the eligibility of a unit to be counted as a low income housing tax credit unit. For more information regarding unit eligibility, consult Section 42 of the IRS Code or a LIHTC textbook or guide.

Section 8A - General Requirements

Part 800 Units Must Be Suitable and Available For Occupancy

Tax credits are available only for units that are suitable for occupancy. Section 42 states that "suitable for occupancy" will be determined by IRS regulations that take into account local health, safety, and building codes. Tax credits are available only for units that are suitable and available for occupancy.

Units that are being prepped for re-renting
When units are anticipated to be unavailable for occupancy (off-line) for 30 days or less due to unit turnover, no report to MSHDA is necessary. If the time will be or extends to more than 30 days, MSHDA must be notified in writing. The owner must also notify MSHDA in writing when the unit subsequently becomes available for occupancy.

Units which are temporarily unavailable for occupancy (i.e. "Off-Line")
Units which are "off-line" or unavailable for occupancy due to such circumstances as the death of a resident or the temporary use of the units for non-residential purposes cannot be vacant for more than 30 days without notifying MSHDA. For example:

> *Mary was a resident of a LIHTC unit who passed away on March 1, 2010. As of May 15, 2010, the LIHTC unit still cannot be leased to another tenant because Mary's property remains in the unit pending the outcome of probate court proceedings to determine the rightful heirs to her property. It was anticipated that the court action would take only a couple of weeks, but it has now taken more than 30 days and it is unknown how much longer the probate process will take. The owner/management agent must notify MSHDA in writing that the unit is unavailable for occupancy. MSHDA must also be notified in writing when the unit subsequently becomes available for occupancy.*

Following is a list of related topics:

- Physical Condition Standards are discussed in Part 734.
- Casualty Losses are discussed in Part 766.
- Destruction is discussed in Part 1020.
- The Vacant Unit Rule is discussed in Part 834.
- Common space (non-residential use) is discussed in Part 862.
- The Definition of a Low-Income Unit is discussed in Part 152.

Part 802 Mixed Income Projects

A mixed income LIHTC or bond project is one that has both low-income and market-rate (also termed unrestricted) units and thus has an applicable fraction of less than 100% (see Part 124 for more information about the applicable fraction). Mixed income projects have special, complex considerations, such as the 140% / Next Available Unit Rule (discussed in Part 806) and the Vacant Unit Rule (discussed in Part 820). [These rules also apply to projects that have 100% applicable fractions, but in general, are simpler to implement because all units are restricted.] Owners of mixed-income projects should have competent tax credit and bond consultants review the project's lease-up and on-going management plan to ensure rental procedures maintain compliance with the program rules.

The market rate units must be evenly distributed among bedroom types and buildings, except for elderly projects. This distribution is sometimes referred to as "equitable distribution of units" or "economic integration", as discussed in Part 220 (Michigan Qualified Allocation Plan). For a related discussion, see Part 562 (Market-Rate Tenants).

Mixed income projects should not be confused with "mixed use" projects, which are discussed in Part 878 (Commercial Space in LIHTC projects). Projects that have multiple income targeting levels for its LIHTC units are discussed in Part 832 (Overview of Deeper Targeting / Agency Covenants).

Part 804 Overview of LIHTC Rules

LIHTC Rules Regarding Income Targeting			
Rule	**Compliance Manual Part #**	**Rule Level**	**Impacted by Multiple Building Project Election (MBPE)?**
Next Available Unit (140%) Rule	806	Building	No. The rule is always applied to each individual building.
Vacant Unit Rule	820	Project	Yes. Each building is treated as a separate project unless the MBPE is/was made*.
Project Mix (Agency Covenants / Deeper Targeting)	832	Building	No. The mix must be maintained in each building, regardless if MBPE is/was made.
Transfers	848	Project	Yes. Each building is treated as a separate project unless the MBPE is/was made*.
Minimum Set-Aside	122	Project	Yes. Each building is treated as a separate project unless the MBPE is/was made*.

LIHTC Rules Regarding Income Targeting			
Rule	**Compliance Manual Part #**	**Rule Level**	**Impacted by Multiple Building Project Election (MBPE)?**
Applicable Fraction	124	Building	No. The calculation is always applied to each individual building.
Income Limits and Rent Restrictions	404	Project	Possibly, depending on the placed in service date.

**If the MBPE is made, all of the buildings collectively are considered to be a project*.

Other LIHTC Rules and Requirements			
Rule	**Compliance Manual Part #**	**Rule Level**	**Impacted by Multiple Building Project Election (MBPE)?**
Common Area Unit Rule	858	Unit	No. The rule is always applied to each individual unit.
Eligible Basis	118	Building	No. The calculation is always made for each individual building.
General Public Use	870	Project	No. All buildings in the entire project must be for use by the general public.
Non-Transient Use Requirement	868	Building	No. The requirement is always applied to each individual building.
Qualified Basis	126	Building	No. The calculation is always based on each individual building.
Student Rule	508	Unit	No.
Two-Thirds (2/3) Rule	150	Unit	No.
Totem Pole Rule	504	Unit	No.

For more information about the Multiple Building Project Election (MBPE), see Part 112 (IRS 8609).

Section 8B - Next Available Unit Rule

Part 806 | Next Available Unit (140%) Rule (NAUR)

26 CFR Part 1, Federal Register Vol. 62, No. 187, Friday, September 26, 1997, Page 50503
IRC §42(g)(2)(D)

The Next Available Unit Rule (NAUR) is sometimes termed the **140% Rule** or the **Available Unit Rule** (AUR).

Special rules apply when a household's income increases above 140% of the current applicable income limitation (i.e., 140% above either 50% AMGI or 60% AMGI, based on the minimum set-aside elected for the project). If the occupants' income increases to more than 140% of the applicable income limitation, the unit may continue to be counted as a low-income unit as long as two things happen:

(1) the unit continues to be rent-restricted and
(2) the next available unit of comparable or smaller size in the same building is occupied by a qualified low-income household.

The term "**over-income**" is used to describe a unit that is occupied by a household whose income was in excess of the maximum allowable at the time of initial occupancy (i.e. the date household became a LIHTC tenant). An "over-income" unit/household is out of compliance with LIHTC regulations.

For purposes of this discussion, the term "**creeper**" will be used to describe a unit that is occupied by a household that was income-eligible at the time of move-in but whose income, upon annual recertification, is determined to have increased (i.e., crept up) to an amount in excess of 140% of the maximum allowable income (i.e. 140% of the income limit that is in effect at the time of the annual recertification). A "creeper unit" remains in compliance with LIHTC regulations, provided the next available unit rule is properly followed.

Example #1 – Tenant's Income Has Increased
The Smith household moved into the unit on 02/05/98 and was determined to be income-eligible at that time (initial occupancy). The owner/management agent of the project has recertified the Smith household for 2001. The income limit in effect on 02/05/01 for a three-person household was $26,500. At the time of the 02/05/01 recertification, the Smith household's income was determined to be $40,000, which exceeds 140% of the current income limit ($26,500 x 1.4 = $37,100). The Smiths are a "creeper" household and the NAUR is now triggered.

Example #2 – An Additional Member Has Been Added to the Household
1 person household income limit in Year 2011 = $15,000
2 person household income limit in Year 2011 = $17,000
140% of the 2-person income limit in Year 2011 = $23,800

Tenant A is a qualified tenant living alone in a one-bedroom unit. Her income at initial certification was $10,500 at the time she moved into the unit in 2009. Eight months after completing her 2010 annual recertification, she informs management that she will be *getting married and that her soon-to-be husband, Tenant B, desires to move into the unit in two weeks. At the time of 2011 annual recertification, Tenant B earns $12,900 and Tenant A earns $10,500, for a combined household income of $23,400. The household is not a "creeper" household and the NAUR is not triggered since the household's income is below the 140% limit of $23,800. [For related discussions, see Part 502 (Changes in Household Composition) and Part 504 (The "Totem Pole Rule").]*

Note: As stated in the IRS 8823 Guide, an over-income or "creeper" unit may be returned to low-income status if the household's income subsequently decreases or if the AMGI increases to such an amount that the household's income no longer exceeds the current income limit or 140% thereof, whichever is applicable to the situation.

For a related topic, see Part 844 (Notes about Deeper Targeting/Agency Covenants).

Part 808 Comparable Unit

The term "**comparable unit**" means a residential unit in a low-income building that is of comparable size or smaller than the "creeper" unit. For purposes of determining whether a residential unit is comparably sized, a comparable unit must be measured by the same method used to determine qualified basis for the credit year in which the comparable unit became available. The method will be based on either the square footage of the units or the number of bedrooms. If the owner/management is unsure of the method used, then owner/manager should comply with both methods. In other words, the next vacant unit that has the same or less bedrooms and the same or less square footage must be made available to a low-income tenant in order to comply with the Next Available Unit Rule.

Part 810 Failure to Comply with the NAUR

Noncompliance with the next available unit rule can have significant negative consequences. If any comparable unit that is available or that subsequently becomes available is rented to a non-qualified resident, all "creeper" comparably-sized or larger units within the same building lose their status as low-income units. For example:

Michigan Villas is a mixed income project with one building containing 85 tax credit units. Of the 85 tax credit units, 11 are occupied by households whose incomes have increased to above 140% of the applicable income limit. Those 11 "creeper" units consist of four three-bedroom, five two-bedroom and two one-bedroom units. Unit #202, a two bedroom unit (not one of the 11 "creeper" households), is the next unit in the building to be vacated. To comply with the Next Available Unit Rule, Unit #202 must be rented to an income-eligible household. Instead, it is leased to a market rate household. Because an ineligible household became an occupant of Unit #202, all "creeper" units for which Unit #202 was comparably or smaller-sized will lose their status as tax credit units. Thus, all four of the three-bedroom and all five of the two-bedroom units (which are those units comparably sized or larger than Unit #202) can no longer be counted as tax credit units.

Violations of the NAUR are reported to the IRS on a form 8823 (Report of Noncompliance or Building Disposition), which is discussed in Part 1000. For information about remedying NAUR violations, see Part 1036 (Methods of Correcting Noncompliance).

Part 812 NAUR Applies Separately to Each Building

In projects containing more than one low-income building, the next available unit rule is applied separately to each building in the project. For example:

A project has two buildings, each of which contains 10 identical-sized units and each of which is 60% low-income. At recertification, two low-income units in Building A are "creepers", but no units in Building B are "creepers". If a market-rate tenant moves out of Building B, that unit can be rented to another market-rate tenant without violating the NAUR, because the "creeper" units in Building A do not affect Building B.

Note: The NAUR applies separately to each building in the project, even if the owner has made the Multiple Building Project Election discussed in Part 112.

Part 814 NAUR – The Applicable Fraction of the Building Must Be Maintained

Mixed-income buildings where units are different sizes may need to increase the percentage of low-income use over time to maintain compliance with the NAUR and applicable fraction requirements. For example:

Titanium Arms Apartments consist of a single building with 20 units.

Unit Size	*Sq. Feet*	*# of Units*	*Square Footage*
One-Bedroom	*750*	*10 Units*	*7,500 sq. ft/unit*
Two-Bedroom	*1,000*	*10 Units*	*10,000 sq. ft/unit*
TOTAL		*20 Units*	*17,500 sq. ft/unit*

This project is mixed-income and 14 of the 20 units are low-income. At the end of the first credit year, the building has rented up so that there are 7 low-income one-bedroom units and 7 low-income two-bedroom units. The applicable fraction is the lesser of the unit fraction [14/20 = 70%] or the floor space fraction [((7 x 750 sq. ft.) + (7 x 1,000 sq. ft.)) / 17,500 sq. ft. total = ((12,280 / 17,500) = 70.17%], or 70%. [In this example, the square footage is the same using either calculation, but this may not always be the case in every LIHTC building.]

At recertification, it is determined that a two-bedroom unit is now a "creeper", triggering the NAUR. The next unit that becomes available for rent is a one-bedroom market rate unit. To comply with the NAUR, the owner must rent this one-bedroom unit to a qualified low-income household. However, the 70% applicable fraction would not be met because the square footage of the one-bedroom unit is less than that of a two-bedroom unit. Therefore, the two-bedroom must continue to be counted as a low-income unit (i.e. re-

main rent-restricted) until another two-bedroom unit or one-bedroom unit that was previously market-rate becomes newly occupied by an eligible household.

While the drop in Applicable Fraction shown in the above example is not a large one, it still would trigger recapture and reduction of credit if the NAUR is not properly followed. The owner must rent all comparable units that are available or that subsequently become available in the same building to LIHTC-eligible residents in order to continue treating the over-income unit as a low-income unit. Once the percentage of low-income units (or low-income square footage) in a building (excluding the "creeper" unit) equals the percentage of low-income units (or low-income square footage) on which the credit is based, the "creeper" unit may be converted to a market-rate unit (this will only be possible in a mixed-income building since projects with 100% applicable fractions are never permitted to have any market-rate units).

Part 816 NAUR – Impact on Projects that have 100% Applicable Fractions

The next available unit in a 100% low-income project must *always* be rented to a qualified low-income household. The NAUR does not change normal rental practice for a 100% low-income project: i.e., all of the units must be rented to income-eligible persons. Furthermore, unit rents may never exceed the maximum allowable rent for low-income units in 100% low-income projects, even if the tenant's income increases. Thus, units determined to be "creepers" at the time of recertification can still be counted as tax credit units provided all new move-ins are qualified LIHTC households.

If, however, a unit is rented inadvertently to a nonqualified household, all "creeper" units in the building will cease to be treated as low-income units, and the building will be subject to recapture.

> Example: *A project consists of a single building with 20 identical sized apartments, all of which are set-aside for households at or below 60% AMGI. Over time, nine units become "creepers". As long as the units remain rent-restricted, the building is counted as 100% low-income. All the "creeper" residents continue to live in the building, and two years later the property manager inadvertently leases a unit to a household earning 62% AMGI. At that time, there is recapture for the unit rented to the nonqualified household, as well as for the nine creeper units. The low-income percentage of the building drops from 100% to 50%. Even if the nonqualified tenant moves out and is replaced with a qualified low-income household, the creeper units are no longer treated as low-income units. After a NAUR violation, the building will not be able to claim the full amount of credits allocated to it until all of the creeper units become occupied by LIHTC-eligible households.*

As stated in the IRS 8823 Guide, the NAUR does not affect projects that have been approved to eliminate annual recertifications (discussed in Part 362) provided the owner/management demonstrated due diligence when completing the initial income certifications. The income reported by the household on the Self-Certification of Income Form (discussed in Part 364) is not used for purposes of the NAUR.

Part 818 NAUR – Impact of Transfers

As long as a household was qualified at initial occupancy, it will continue to be qualified if the household moves to another unit in the same building, even if the household income is above its income limit at the time of the move. The vacated unit assumes the status the newly occupied unit had immediately before the current resident occupied it. The newly occupied unit adopts the status of the vacated unit. Thus, if a resident who was initially qualified but his/her income then increased to an amount in excess of the current income limit at recertification physically moves from a "creeper" unit to a vacant unit in the same building, his/her newly occupied unit is treated as a "creeper" unit. Unit transfers within the same building are discussed in Part 850.

For important information about the impact of the NAUR and transfers to a different building, see Part 852 (Unit Transfers – to a different building).

Deeper Targeting and the NAUR

For information regarding deeper targeting and the next available unit rule, see Parts 822-830.

Section 8C - Vacant Unit Rule

Part 820 Overview of the Vacant Unit Rule

26 CFR 1.42-5(c)(ix); IRS Revenue Ruling 2004-82

The Vacant Unit Rule (also called Unit Vacancy Rule) is a corollary to the Next Available Unit Rule (NAUR). If a tax credit unit becomes vacant, it still counts as a tax credit unit as long as reasonable attempts are made to rent that unit or any available units of comparable or smaller size in the project to a tax credit qualified applicant before renting such units to an ineligible household. The Vacant Unit Rule is applied on a project-wide basis and not on a building basis. Unlike the NAUR, the Vacant Unit Rule is applied without regard to the income of existing tenants.

Failure to invoke this rule may result in a reduced applicable fraction (qualified basis violation), which may disallow owners from claiming credit on all affected units. Units cannot be left permanently vacant and still satisfy the requirements of the tax credit program. The owner or manager must be able to document attempts to rent the vacant units to eligible tenants. Reasonable attempts are discussed in Part 822.

Multiple building project election – If the owner checked “Yes” on line 8b of the IRS 8609 form, it has opted to treat the buildings as part of a multiple building project. In this situation, the vacant unit rule must be met on a project-wide basis. If the owner checked “No” on line 8b of the 8609 forms, it chose to treat each building as a separate project. In this situation, the vacant unit rule must be met on a building basis because each building is treated as a separate project. The multiple building project election is discussed in Part 112 (IRS 8609).

In addition to the topics discussed in this Section, see Part 728 (Vacancy Reporting) and Part 800 (Units Must Be Suitable and Available for Occupancy) for related topics.

Part 822 Vacant Unit Rule – Reasonable Attempts

IRS Revenue Ruling 2004-82

Reasonable attempts depend on specific market conditions in which the development is located. Reasonable attempts include posting of appropriate “for rent” banners, signage, and classified ads, and submitting notifications of availability to rental housing waiting list applicants and Section 8 public housing authorities. If these reasonable attempts to rent low-income units are made, then market rate units may be marketed and occupied prior to the rental of low income units.

For related topics, see Part 204 (Michigan Housing Locator) and Part 728 (Vacancy Reporting).

Part 824 Vacant Unit Rule – Impact of Preliminary Reservations

IRS Revenue Ruling 2004-82

If a preliminary reservation for a low-income unit has been executed as part of a legal contractual arrangement that is binding on the owner prior to the date a market rate unit in the same building is rented and occupied, the vacant unit rule has been satisfied.

Part 826 Vacant Unit Rule – Transfers

IRS Revenue Ruling 2004-82

The transfer of a currently qualified low-income family from a rent-restricted unit in one building into a "not previously occupied" rent-restricted unit in a different building causes the qualified unit in the first building to become a "not previously occupied" unit. Only the unit that the tenant actually occupies at the end of a month in the first year of the credit period and at the end of each year in subsequent years qualifies as a low-income unit. For a related topic, see Part 148 (Units That Have Never Been Occupied by a Qualified Resident) and Parts 138 - 142 (First Year of the Credit Period).

Unit transfers within the same building swap status as discussed in Part 850 (Unit Transfers – within the same building). For important information about the impact of the Vacant Unit Rule and transfers to a different building, see Part 852 (Unit Transfers – to a different building).

Part 828 Vacant Unit Rule – Impact of Vacant Units on the Applicable Fraction

When determining which units to include as low-income units in the numerator, and total units in the denominator of the applicable fraction, note:

- Units that have never been occupied may not be included in the numerator (low-income units), but must be included in the denominator (total units).
- Units that are vacant at the end of the initial tax year which previously were qualified as low-income units may be considered to be low-income for determining the amount of credits claimed only if the units were occupied for a minimum of one month (30 days) (I.R.C. §42(f)(2)(A)(i)(1994)) and occupied before November 30 of that year;
- If a qualified low-income tenant becomes an ineligible tenant (such as in a situation when the household becomes occupied entirely by ineligible full-time students) prior to the end of the initial tax credit year, that unit may not be counted in the first year toward the minimum set-aside or the determination of the qualified basis, unless the unit is vacated and re-qualified by the end of the initial tax credit year.

For additional information and related discussions, see Part 124 (Applicable Fraction), Parts 138 - 142 (First Year of the Credit Period), and Part 148 (Units that Have Never Been Occupied by Qualified Residents). See also Part 204 (Michigan Housing Locator) and Part 728 (Vacancy Reporting).

Part 830 Treatment of Vacated Over-income, Deeper Targeted and Market Rate Units

If an over-income unit is vacated and that unit had been occupied by a household whose income exceeded 140% of the income limit at the time of last recertification, it will be treated as an over-income unit subject to the Next Available Unit Rule (NAUR) until the effective date of the tenant income certification for a newly qualified household or the date a qualified household moves into that unit. For a detailed discussion of the NAUR, see Section 8B (Next Available Unit Rule), which consists of Parts 806 – 818.

In the case of a project with deeper targeting (i.e. multiple LIHTC income targeting levels), the vacated unit can continue to be counted as the particular AMGI level of the most recent occupant until any of the following occurs:

- that AMGI level is replaced by a different physical unit;
- that unit becomes occupied by a household that is being counted as a different AMGI level;
- that unit becomes occupied by a market rate or other non-LIHTC eligible household; or
- the NAUR is violated.

If the vacated unit was last occupied by a market rate household, that unit will continue to be counted as a market rate unit (i.e. not LIHTC-eligible) until it becomes occupied by a qualified household.

Section 8D – Deeper Targeting and Agency Covenants

Part 832 Overview of Deeper Targeting and Agency Covenants

A project must achieve a minimum threshold of low income occupancy to qualify as a Low Income Housing Tax Credit (LIHTC) project. At a minimum, either 20% of the units must be occupied by residents whose annual incomes do not exceed 50% of area median gross income (AMGI) (20/50) or 40% of the units must be occupied by residents whose annual incomes do not exceed 60%(40/60) of AMGI (as determined and adjusted annually by HUD). The income level of the set-aside (either 50% or 60%) is termed the Minimum Set-Aside AMGI (discussed in Part 122). The percentage of total residential units in the project that are reserved as LIHTC units is known as the Applicable Fraction (discussed in Part 124).

Many project owners elect to target a higher percentage of units to low income persons and/or to target a percentage of the units to persons at lower income levels than the minimum set-aside. Often, projects have multiple AMGI targeting levels. For example, a project may reserve all of its units for low income persons (a 100% applicable fraction) meeting one AMGI level or it may have 100% of units targeted for low income persons, but at several different AMGI levels.

Other projects are Mixed Income projects in which a portion of the units are reserved for low income persons and the remaining units are unrestricted. Some mixed income projects (which have an applicable fraction of less than 100%) may, in addition to having market rate units, also have multiple targeting levels for its low-income units. The mixture of AMGI levels that a project is targeting is termed the Project Mix.

Both the income and rent must be restricted at the particular AMGI level. For example, if the AMGI level is 40%, the household must be income-eligible at 40% AMGI and the rent must also be restricted at 40% AMGI. In addition, all AMGI levels must be distributed among all buildings and across all unit sizes (i.e. number of bedrooms) in a project, unless an exception to this requirement is specifically stated in the project's Regulatory Agreement. For example: It would not be permissible in a building containing one and two-bedroom units to have only one-bedroom units available as 30% AMGI and no two-bedroom units available as 30% AMGI. Also, in a project containing more than one building, it would not be permissible to place all 30% AMGI households in one building and reserve all of the other buildings for households at higher AMGI and market rate levels.

An owner/manager of a LIHTC project must be aware of all tiers in the project's income limits. He or she must know what percentage of the residential units are LIHTC units and at which AMGI these units must be targeted. The owner of a project is responsible for determining which AMGI a tenant meets. To meet the 60% AMGI, a household must have an annual income that is at or below the 60% AMGI **at time of move-in** and be rent-restricted at the 60% AMGI. A household which meets the 60% criteria is deemed a "60*% household"*. A household which meets the 50% AMGI, is deemed a "50*% household"*, etc.

Income changes are important. In addition to certifying a household's eligibility at move-in, family income must be re-examined (recertified) at least annually. If the income of the occupants of a qualifying unit increases to more than 140% of the Minimum Set-Aside AMGI, the unit may continue to be counted as a low-income unit as long as the unit continues to be rent-restricted and the next unit of comparable or smaller size in the building is occupied by a qualified low income tenant (this is known as the Next Available Unit Rule or the 140% Rule). The Next Available Unit Rule applies separately to each building in the project. In 100% LIHTC projects, because the next available unit is always leased to an income-eligible household, the need to replace a household only occurs when the household vacates the unit.

This policy is to clarify MSHDA's position regarding the treatment of household income increases for projects that have deeper targeting and multiple income levels.

Part 834 Projects with a 100% Applicable Fraction and One AMGI level

As stated previously, a project must meet one of the two minimum set asides. In the simplest structured project, a project has a 100% applicable fraction, targeted to persons at the Minimum Set-Aside AMGI (i.e. 100% of the units at 60% AMGI or 100% @ 50% AMGI). For example:

> *Copper Meadows is a LIHTC project consisting of 35 units and has a 100% applicable fraction. The owner elected a minimum set-aside of 20/50. The owner agreed to target 100% of the 35 units @ 50% AMGI.*

Other projects with 100% applicable fractions may have elected to target the units to persons with lower income levels (i.e. 100% @ 40% AMGI or 100% @ 30% AMGI). For example:

> *Iron Meadows is a LIHTC project consisting of 24 units and has a 100% applicable fraction. The owner elected a minimum set-aside of 40/60. To obtain additional points during the competitive LIHTC allocation application process, the owner agreed to target 100% of the 24 units @ 45% AMGI.*

A household's eligibility must be determined before moves-in. In projects with a 100% applicable fraction and only one income targeting level, a unit continues to qualify as a LIHTC unit even if the household's income rises above the applicable AMGI level (so long as the rent remains restricted) and still qualifies even after it rises to more than 140% of the applicable AMGI level and the Minimum Set-Aside AMGI because the next available unit is always leased to an eligible household. The need to replace a household only occurs when the household vacates the unit. When the household vacates the unit, another household meeting the applicable AMGI level must replace it.

In summary, once a household is deemed as a *"60% household"*, for example, it is always eligible as a *"60% household"*. A *"60% household"* must be replaced by a *"60% household"*.

Part 836 Projects with a 100% Applicable Fraction and Multiple AMGI Levels

In a second type of LIHTC project, all units are LIHTC units but the project has multiple income levels at which its units are targeted. For example, a 100% LIHTC project may target a portion of its units to households at the 60% AMGI level, a portion at 50% AMGI level, and a portion at 30% AMGI level. For example:

Golden Meadows is a LIHTC project consisting of 50 units and a 100% applicable fraction. The owner selected the minimum 40/60 election. The owner set aside 20 units for residents at 60% AMGI, 20 units for residents at 50% AMGI, and 10 units for residents at 30% AMGI.

As in all 100% LIHTC projects, because the next available unit is always leased to an eligible household, the need to replace a household only occurs when the household vacates the unit. Thus, for example, if a *"30% household's"* income increases to above 140% of the Minimum Set-Aside AMGI, nothing must be done. This unit can continue to be counted as a "30*% household"* as long as the gross rent remains restricted at the 30% AMGI. When this or any other "30*% household"* vacates a unit, it must be replaced by a "30*% household"* (though not necessarily in the same physical unit and not necessarily in the next available unit). The project owner, however, must pay close attention to the AMGI levels of its tenants to ensure that enough units are occupied by/reserved for the appropriate income levels to meet the required percentage of units that must be targeted at each AMGI level. In other words, if 50% of the units must be targeted to persons at or below 40% AMGI and 50% at 60% AMGI, the project cannot have 51% of the units at 60% AMGI.

In summary, once a household is deemed as a *"30% household"*, for example, it is always eligible to be a *"30% household"*. A *"30% household"* must be replaced by a *"30% household". However, the owner has the option of changing a household's AMGI level, as discussed in Part 842.*

Part 838 Mixed Income Projects with one AMGI level

In mixed income projects, a portion of the residential units are LIHTC units and a portion of the units are market rate (unrestricted income levels and rent amounts).

Platinum Meadows is a LIHTC development comprised of 100 units, an applicable fraction of 55% (55/100), and a minimum set-aside of 20/50. To obtain extra points in the allocation scoring process, the owner elected to target the 55 LIHTC units at 50% AMI. The project mix is therefore 55 units @ 50% AMI and 45 units are unrestricted.

Owners of mixed income projects must pay close attention to the NAUR. As in 100% LIHTC projects, when a "40*% household"* simply vacates a unit (and its income did not increase to more than 140% of the Minimum Set-Aside AMGI), it must be replaced by a "40*% household"* (though not necessarily in physically the same unit) in order for the project mix and applicable fraction to be maintained. The NAUR is not triggered when a household vacates a unit.

Unlike 100% LIHTC projects, however, in mixed income projects, if a "40*% household's"* income increases to above 140% of the Minimum Set-Aside AMGI (and the household remains in the building), the next available unit in the building must be occupied by a low income household.

In summary, in mixed income projects, once a household is deemed a *"40% household"*, it is eligible as a *"40% household"* until its income increases to above 140% of the Minimum Set-Aside AMGI, at which time the NAUR is triggered.

Part 840 Mixed Income Projects with Multiple AMGI Levels

In mixed income projects, a portion of the residential units are LIHTC units and some are market rate (unrestricted) units. Often, mixed income projects contain multiple AMGI for the LIHTC units. For example:

> *Silver Arms Apartments consists of 75 units, of which 40 are low-income units and 35 are market rate (unrestricted) units. The owner selected a minimum set-aside of 40% @ 60%. It has an applicable fraction of 40/75 (53.333%). Of the 40 LIHTC units, 20 are reserved at 60% AMGI, 10 are reserved at 40% AMGI, and 10 are at 30% AMGI.*

The owner of the project must pay close attention to ensure that the project mix is maintained. When a "40*% household"* simply vacates a unit (and its income did not increase to more than 140% of the Minimum Set-Aside AMGI), it must be replaced by a "40*% household"* (though not necessarily in physically the same unit and not necessarily in the next available unit). When a "40*% household's*" income increases to above 140% of the Minimum Set-Aside AMGI, the next available unit in the building must be rented to a low income household (of any AMI level, not necessarily at 40% AMI). See Part 844, Item (2)(140% Rule takes Precedence) for information about the relationship between deeper targeting and the NAUR.

In summary, in mixed income projects, once a household is deemed as a "40% household", it is eligible as a "*40% household*" until its income increases to above 140% of the Minimum Set-Aside AMGI, at which time the next available unit rule is triggered. The "*40% household*" must be replaced by a "*40% household*" to maintain the project mix. This is true for all other AMGI levels a project is targeting.

Part 842 Changing a Household's AMGI Designation

AMGI changes are optional. Changing a household's AMGI level is optional and is not mandated by MSHDA. The 140% income limit is not used in determining whether or not the household can be converted to a different AMGI limit.

Re-designating a Household to a Lower AMGI Level - The AMGI level of a household is made at the time of certification. Once designated, the AMGI cannot be lowered unless the household is recertified. For example, a "50*% household"* cannot be designated as a "40*% household"* unless it is recertified as meeting the 40% income restriction, since the proposed new AMGI level is lower than the AMGI level the household qualified for at move-in. In contrast, the AMGI level of a household can be changed to a higher AMGI level at any time and no recertification is required. For additional information about recertification, see Part 352 (Overview of Annual Recertifications).

Physical Move to A Different Unit Is Not Required - MSHDA does not require that a household physically move to a different unit in order to be eligible for a lower AMGI level. However, an owner/management may, as part of its AMGI designation policies and tracking procedures, require that the household physically move.

Changing to Market Rate - A household can be designated a market rate unit at recertification (provided the project is a mixed income project with unrestricted units), regardless of its income amount and regardless of whether or not it would qualify at the AMGI the project is targeting. MSHDA has no requirement that a specific household be made or retained as a LIHTC household. If a household is changed to a market rate tenant, it may have to be replaced by a household meeting the household's prior AMGI level in order to maintain the project mix and/or applicable fraction. Owners should not use this option for unfair, unjust or retaliatory purposes.

Part 844 Notes about Deeper Targeting/Agency Covenants

(1) MSHDA's position regarding the point at which the Next Available Unit Rule (NAUR) is triggered - IRS regulations indicate that the Next Available Unit Rule is triggered when a household's income increases to more than 140% of the qualifying income level. Since "Deeper Targeting" options are state policies, not federal policies, and since a household can qualify (in general, based on IRS policy) for a LIHTC unit if its income is less than the project's Minimum Set-Aside AMGI, MSHDA has deemed this as the point at which the NAUR is triggered. The NAUR is not triggered until "40% *household's"* income, for example, increases to more than 140% of the 60% Minimum-Set-Aside AMGI, not when it increases to more than 140% of the 40% AMGI. The Minimum Set-Aside AMGI is used as the triggering point for the NAUR so that the project mix can be maintained and so that a project will not have to make more than the required number of units a particular AMGI level.

(2) 140% Rule takes Precedence - If a household vacates a unit, but there is another household whose income has increased to more than 140% of an AMGI level, the next available unit is triggered at that time. For example, if a "60*% household"* vacates a unit, but there is a "30*% household"* that is above 140% of the Minimum Set-Aside AMGI, the 140% rule takes precedence. The next available unit must be rented to a low income person. This new tenant must be LIHTC-eligible and ideally be a *"30% household"*. However, the new tenant can be any AMGI level (except market rate). The over-income household can continue to be counted as a "*30% household"* (as long as every next available unit in the future continues to be rented to a low income household) or it can be made a market rate unit or other AMGI level that it qualified for at recertification. The owner should pay close attention to ensure that the Project Mix is being maintained.

Note: Once the "*30% household*" discussed above is replaced with another 30% household, that first creeper "*30% household*" can be made a higher AMGI level or, if a mixed income project, a market-rate/unrestricted unit.

For a detailed discussion of the NAUR, see Section 8B (Next Available Unit Rule), which consists of Parts 806 – 818.

(3) One AMGI level only - To meet a particular AMGI, a household must have a certified annual income that is less than or equal to that amount. Therefore, a household at 30% AMGI could also meet the 40% AMGI, 50% AMGI, and 60% AMGI. A household, however, can be deemed as one AMGI only. A household cannot, for example, be simultaneously deemed or counted as a "30*% household"* and a "40*% household"*.

(4) Waiting Lists are Strongly Encouraged – It is not uncommon for the demand for the lower AMGI levels to exceed the number of units available at each AMGI level. MSHDA

strongly encourages owners/managers to use waiting lists in determining which households will be designated at the lower AMGI levels. The order of the waiting list should take into account the length of time that the household has resided at the development, the date on which the lower AMGI level was requested, and the household's income amount. Existing tenants who qualify for lower AMGI levels should be given preference for the lower AMGI levels over new move-ins.

For related discussions, see Part 352 (Overview of Annual Recertifications) and Part 366 (Review of Documents with Self-Certification of Income).

(5) Unit Transfers – When a household relocates from one unit to another unit in the same building, the household's AMGI level transfers with it and the units swap status. The new unit that the household moves into takes the status and AMGI level of the former unit. The unit the household moved out of takes the status of the new unit (i.e., the status of the household that most recently moved out of it). As discussed in Part 850 (Unit Transfers – within the same building), no new income certification is required.

Transfers to a different building must meet the guidelines discussed in Part 852 (Unit Transfers – to a different building). When transferring to a different building (for reasons other than reasonable accommodations), the household's income must be at or below the income level for the particular AMGI that it will be designated at in the new unit.

(6) Other Financing Programs - If the project has government financing other than LIHTC, project owners should check with its financing sources to determine if there are additional restrictions on agency covenants (deeper targeting).

Part 846 Scenarios

The following sample project has 70 units, of which 45 are LIHTC units and 25 are unrestricted/market rate units.

Minimum Set-Aside = 40% @ 60%; Applicable Fraction = 50%. Next Available Unit (140%) Rule is triggered at $25,200 (18,000 x 1.4).		
Number of Units	**Area Median Gross Income**	**Current Max. Allowable Income for One Person**
25 units	Market Rate	N/A
15 units	60% AMGI	$18,000
15 units	50% AMGI	$15,000
10 units	40% AMGI	$12,000
5 units	30% AMGI	$9,000

Scenario A: Tenant's income increases, but is still under the 140% limit. Tenant A moved in to Unit #25 as a "30*% household"*. One year later at recertification, its income had increased to $13,500 (Note: the next available unit rule is not triggered until $25,200). At the time of completion of the recertification, the tenant in Unit #25 can continue be counted as a "30*% household"* as long as its rent is restricted at 30% AMGI ($225 maximum). As an alternative, Tenant A can be designated as either a *"40% household",* a *"50% household"* or a "60*% household"* or it can be made a market rate unit. If the AMGI level of Tenant A is changed, it must be replaced by another *"30% household"* in order to maintain the project mix.

Scenario B: Tenant's income increases to over 60% AMGI limit and over the 140% limit. Tenant B moved into Unit #38 one year ago as a "40*% household"*. Upon annual recertification, it is determined that Tenant B's income has now increased to $26,000 (more than 140% of the Minimum Set-Aside AMGI, which is $25,200). The Next Available Unit rule is therefore triggered. Tenant B can continue to be counted as a "40*% household"* as long as its rent is restricted to the 40% AMGI, however, the next available unit must be rented to a "40*% household"*. After the next available unit is rented to a "40% *household"*, Tenant B can be converted to a market rate unit. The owner/manager should review the number of units that are designated at each of the AMGI levels to ensure that the project mix is maintained, with special attention to the lower AMGI levels.

Scenario C: Tenant's income increases to above 60% AMGI limit, but is still under 140% limit. Tenant C moved into a LIHTC unit with an annual income of $5,675 and was designated as a *"30% household".* At recertification, the household's income increased to $20,000. Since $20,000 is less than $25,200 (which is 140% of the Minimum Set-Aside AMGI), the next available unit rule is not triggered. The household can continue to be counted as a *"30% household"* as long as its rent is restricted at that level or it can be made a *"40%, 50%, or 60% household"* or it can be made a market rate unit. The owner/manager should review the number of units that are designated at each of the AMGI levels to ensure that the project mix is maintained, with special attention to the lower AMGI levels.

Scenario D: Tenant's income decreases. Tenant D has an annual income of $17,000 and was designated as a "*60% AMGI household"*. One year later, Tenant D lost her job and her household's income has decreased to $11,800. If a full-recertification (including third party verification of income) is conducted, Tenant D's AMGI designation (and rent amount) could be lowered to 50% AMGI (which has a max income of $18,000) or 40% AMGI (max income of $12,000). If no full-recertification was conducted, Tenant D's AMGI level could not be changed.

Section 8E - Unit Transfers and Temporary Relocations

Part 848 Overview of Transfers

Before transferring or relocating a tenant to a different unit, there are several rules that owners and managers should take in to account. In addition to the topics discussed in this Section of the Compliance Manual, topics related to transfers are included in the following:

- Next Available Unit Rule – Impact of Transfers (see Part 818)
- Deeper Targeting/Agency Covenants – the impact of transfers (see Part 844)
- Transfer fees imposed on residents (see Part 432)
- Vacant Unit Rule – Transfers (see Part 826)

Part 850 Unit Transfers – within the same building

26 CFR 1.42-15

Transfers within the same building are permissible without regard to the income status of the transferring resident, the applicable fraction of the project, or whether the owner has made the multiple building project election. When an existing household moves to a different LIHTC restricted unit in the same building, the newly occupied unit adopts the status of the vacated unit. For example:

> *The Miller household resided in Unit #12 and the Smith household resides in Unit #38. The Miller household was a market rate/unrestricted tenant, but moved out of the property on September 1, 2010. The Smiths are a 30% AMGI household and desire to transfer to the now vacant Unit #12. After the Smith household transfers, Unit #12 will be treated as a 30% AMGI household (because the Smith household transfers its status with it) and Unit #38 will be treated as a market rate/unrestricted unit*.

Thus, if an over-income resident transfers to a vacant unit in the same building, his/her newly occupied unit is treated as an over-income unit. The vacated unit assumes the status the newly occupied unit had immediately before it was occupied by the transferring resident. This provision applies only to households under leases entered into or renewed after September 26, 1997 (as stated in 26 CFR 1.42-15) and is not retroactive. For prior leases, all transfers, including those within the same building, must have been treated as new move-ins and all of the initial certification requirements discussed in Part 300 must have been completed prior to moving in to the new unit.

MSHDA does not require that interim recertifications be conducted for tenants who are transferring within the same building. However, the date of the transfer must be clearly identified in the tenant file. The household must continue to be recertified on the anniversary of its original move-in date.

Important information about transfers during the first year of the credit period is discussed in Part 854.

Part 852	Unit Transfers – to a different building

To determine whether a transfer between buildings is permissible, there are three important factors:

1. Whether the owner has made the **multiple building project election** (discussed later in this Part);
2. The **applicable fraction of the project** (discussed in Part 124); and
3. The **current income of the transferring household** (discussed later in this Part).

Overview of Unit Transfers to a Different Building		
Multiple Building Election Made	**100% Applicable Fraction (A/F)**	**Mixed Income Project (less than 100% A/F)**
No.	No transfers between buildings are permissible.	No transfers between buildings are permissible.
Yes.	Transfers are permissible, regardless of the current income of the transferring household. [See **BOX #1** below]	The permissibility of a transfer to a different building depends on the current income of the transferring household. [See **BOX #2** below]

Multiple Building Project Election

- In order for any unit transfer from one building to another building to be permissible, both buildings involved must be considered to be part of a multiple building project, as elected by the owner on line 8b of the IRS 8609 forms (discussed in Part 112). If the owner checked "**Yes**" on line 8b of both forms, it has opted to treat the buildings as part of a multiple building project.

- If the owner checked "**No**" on line 8b of the 8609 forms, it is choosing to treat each building as a separate project. In this situation, transfers between the two buildings cannot take place. If an existing household requests to move from one building to another and both buildings are treated as separate projects, the existing household must initially qualify under the Section 42 income limits currently in effect. The move would not be a "transfer". Rather, it would be a move-out from the old unit and a move-in to the new unit. It must be treated as a new move-in and meet initial eligibility qualifications on the date of move to the new unit. The owner/agent will need to complete a new TIC, obtain third-party verification of household income and assets, and initiate a new lease for the new unit.

BOX #1 {100% Applicable Fraction Project}

MSHDA does not require that an interim recertification of income be conducted in projects with a 100% applicable fraction. Special considerations regarding transfers during the first year of the credit period are discussed in Part 854. The owner should be aware of potential NAUR implications, as discussed in Part 816 (NAUR – Impact on Projects that have 100% Applicable Fractions). The date of transfer along with the unit number and address of the previous rental unit must be clearly identified in the tenant file.

BOX #2 {Mixed Income Project}

The permissibility of a transfer to a different building within a multiple building project that is Mixed Income (i.e. has less than a 100% applicable fraction) depends on the current income of the household. For each prospective transfer, all application, certification, and verification procedures must be completed for the transferring residents, as if they were new, first-time occupants. The date of transfer along with the unit number and address of the previous rental unit must be clearly identified in the tenant file.

Current Income of the Transferring Household - The household's income must be evaluated based on the number of members and income amounts in effect on the transfer date, as follows:

a. Income is less than the current applicable LIHTC limit - The transfer is permissible (provided the owner has made the "multiple building project" election discussed above).

b. Income exceeds the LIHTC limit, but is less than 140% over the current applicable limit – The transfer is generally permissible (provided the owner has made the multiple building project election discussed above). The vacated unit and the newly occupied unit swap status, with the newly occupied unit becoming an over-income unit.

   Owners should be aware that if the Next Available Unit Rule (NAUR) has already been triggered in the new building (because another unit in the new building is occupied by a household whose income exceeds 140% of the applicable income limit), the transferring in of an over-income household could result in a NAUR violation in that new building.

   Further, because the units swap status, if the new unit to be occupied by the transferring household was last occupied by a household whose income exceeded 140% of the income limit, the NAUR rule could be triggered in the old building. If the NAUR was already triggered in the old building (because another unit in the old building is occupied by a household whose income exceeds 140% of the applicable income), a NAUR violation could occur in the old building if a "creeper" unit is transferred (or swapped) into it.

   Transfers are never permissible if the purpose of the transfer is solely to avoid or remedy the NAUR. For related information about this topic, see Part 818 (NAUR – Impact of Transfers) and Part 810 (Failure to Comply with the NAUR).

c. Income exceeds the current LIHTC limit by 140% or greater – The transfer is not permissible (regardless of whether the owner has made the "multiple building project" election). An owner/manager cannot transfer a household to a different building for the purposes of avoiding the need to address the NAUR in the vacated building. Only after the over-income unit is made a market rate/unrestricted unit (which would only be permissible in a mixed income project as discussed in Part 802), would it then be permissible to transfer it to another market rate/unrestricted unit in a different building. Note: As a limited exception, the transfer would be permissible if due to a need covered under Fair Housing, ADA or reasonable accommodations or if due to a casualty loss that necessitates relocation of the household, whether temporary or permanent.

The date of transfer along with the unit number and address of the previous rental unit must be clearly identified in the tenant file.

Similar to those of the NAUR, Vacant Unit Rule implications could arise with transfers to a different building, as discussed in Part 820 (Overview of the Vacant Unit Rule) and Part 826 (Vacant Unit Rule – Transfers).

(This is BOX #2 continued)

For information regarding initial (move-in) certification procedures, see Part 300 (General Overview of Tenant Certification Procedures).

Important information about transfers during the first year of the credit period is discussed in Part 854.

Part 854 Transfers during the First Year of the Credit Period

During the initial credit period, the relocation of existing tenants will not qualify more than one LIHTC unit for the minimum set-aside or applicable fraction. Under no circumstances can one household be used to initially qualify more than one Tax Credit unit in the project. If, for any reason, a tenant(s) moves from a qualified unit to an unqualified unit during the first year of the credit period, the units swap status. The unit the household moved from is considered an unqualified unit and the unit they moved into becomes a qualified unit.

For related discussions, see Part 820 (Vacant Unit Rule) and Part 856 (Temporary Relocation of Tenants). For information about the initial qualifying period, see Parts 138 - 142 (First Year of the Credit Period).

Part 856 Temporary Relocation of Tenants

A temporary relocation differs somewhat from a transfer. A **temporary relocation** involves a short-term move from one unit (the original, permanent place of residence) to another unit, with the intent of moving the household back to the original, permanent unit of residence. A **transfer** involves a permanent move to a different unit, with no intent of moving back to the original unit. A relocation that is originally intended to be temporary, but which ends up being permanent or which results in a move to a third unit that was not the original place of residence, must be treated as a transfer or as a new-move in.

<u>Temporary Relocation During Rehabilitation</u>
It is permissible to temporarily relocate an eligible resident to a different unit within the same building while the household's permanent unit is being rehabbed. Provided the resident has been certified as LIHTC-eligible, there is no requirement to recertify the tenant upon moving to the temporary unit or upon moving back to the permanent unit. The next available unit rule is not triggered by the temporary move.

For information about the initial qualifying period, see Part 140 (First Year of the Credit Period - Acquisition/Rehabilitation Projects). A permanent move to a different unit would be considered a transfer, as discussed in Part 854 (Transfers during the First Year of the Credit Period) or would require completion of an initial eligibility certification at the time of the move to the new, permanent unit.

[The permissibility of a temporary move to a different building within the same project would depend on whether the Owner intends to (and follows through with) electing to treat the buildings as part of a multiple building project, as discussed in Part 852.]

Temporary Relocation Due to Unit Damage

It is permissible to move an eligible household to a different unit for a temporary, short-term basis (i.e. a reasonable amount of time needed to repair the unit) while the household's permanent unit is being repaired resulting from damage due to a catastrophe such as a fire or flooding. There is no requirement to recertify the tenant upon moving into the temporary unit or upon moving back to the permanent unit. The next available unit is not triggered by the temporary move. (Note: A permanent move to a different building or within the same building is permissible if necessary due to a casualty loss or destruction, provided the owner has made the multiple building project election. No new initial eligibility certification or recertification would be required in this situation.)

For additional information about unit damage see Part 766 (Casualty Losses) and Part 1032 (Destruction).

Section 8F - Common Areas and Spaces – Residential and Non-Residential

[Note: There are differing interpretation of IRS procedures and regulations within the LIHTC industry regarding the treatment of common space and common area residential units. MSHDA recommends that Owners consult with an attorney or other professional with expertise in the LIHTC Program and tax law prior to completing and filing tax returns involving common space and common area residential units.]

Part 858 Common Area Residential Unit

Revenue Ruling 92-61; Page 157 of the Blue Book (General Explanation of the Tax Reform Act of 1986)

It may be permissible for a manager, assistant manager, or other employee of the Owner to reside in a unit within a project. An employee of the owner or management agent can reside in a unit that is designated as common area or in a rental unit. A **"common area residential unit"** is a unit used for residential purposes, and does not include any units or space used as an office, storage, model apartment, or for any other non-residential purpose. It supports and/or is reserved for the benefit of all the rental units.

A resident manager's (or maintenance personnel's) unit may be considered in one of two ways: as a common area unit or as a rental unit.

1. **Common Area Unit**
   - A manager's unit can be considered as common area in that it supports and/or is reserved for the benefit of all the rental units.
   - The Owner must document that the on-site residency of the manager (or maintenance personnel) is reasonably required for the smooth operation of the development, based on such considerations as the location, type, and size of the development.
   - Persons who are employed less than full-time and persons who are employed at multiple projects (such as regional managers) are generally not eligible to reside in a common area unit. However, a person who performs a substantial amount of a particular project's typical site management duties (such as leasing, maintenance or coordination of such, responding to after-hours emergencies, etc.) may be eligible to reside in a common area unit even if that individual performs other functions within the management company if the project can document that there is a need for that person to reside at that particular project. Two examples are as follows:

     Marvin is a regional manager for XYZ Corporation, which owns and manages 75 LIHTC projects in Michigan. Marvin oversees eight properties in the northwest region of Michigan, including Cherry Lane Apartments. As part of his job duties, he conducts weekly site visits to each of the properties in his portfolio, spending an average of three hours per week at each site. Marvin is not eligible to reside in a common area residential unit at

Cherry Lane Apartments since he works at multiple sites and does not perform the majority of the typical on-site managerial activities for Cherry Lane Apartments.

Sue is a property manager for JKL Corporation, which owns and manages several LIHTC developments, including Apple Grove Apartments, a 32-unit senior development. Sue is the sole site manager for Apple Grove Senior Apartments, performing 100% of the typical on-site functions as collecting rents, coordinating management, responding to emergencies, etc. In addition to Apple Grove Senior Apartments, JKL Corporation owns six single family rental properties located nearby. While the vast majority of her job duties are at Apple Grove Apartments, Sue also manages the six single family rental units. JKL has established that there is a need for an individual to reside at Apple Grove Senior Apartments in order to handle emergencies that arise there during off-hours (evenings, nights, and week-ends). Sue may be eligible to reside in a common area unit at Apple Grove Apartments, based on the sufficient size (32 units) of Apple Grove Apartments and the amount of duties she conducts at that development.

- A manager's common area unit is excluded from the low-income occupancy calculation and the unit can be used without concern as to the income level of the manager. The unit occupied by the resident manager is included in the building's eligible basis, but is excluded from the applicable fraction for the purposes of determining the building's qualified basis.
- The value of a rent concession does not have to be counted as income for purposes of determining LIHTC-eligibility since the employee can reside in the common area unit without regard to the income of the household.
- It is not permissible for a development to collect rent for a manager's use of a common area residential unit, though it is permissible for a development to factor it's value as part of the compensation paid to a manager.
- If the common area manager's unit is not occupied by a full-time manager, maintenance or security personnel, as represented by the Owner, it will be deemed as noncompliance.
- In a project with multiple area median income targeting levels for its LIHTC units (i.e. deeper targeting), the lower level(s) of income requirements must be satisfied with non-common area tenants. For example:

  Michigan Villas has a total of 100 residential units. Of those 100 units, 70 must be occupied at 60% AMGI and 30 units at 20% AMGI. If the project includes a common area unit, it must be one of the 60% AMGI units. Thirty units must always be maintained at the 20% AMGI level

2. **<u>Rental Unit</u>**

- The manager's unit may be treated as a <u>rental unit</u> and the unit may be included in the low-income occupancy percentage calculation for the LIHTC building. Under this option, the income level of the manager and the rent charged will affect the low-income occupancy percentage calculation for the building.
- All tenants, including employees of the development, occupying restricted units that are not "common area" must be certified as income-eligible, be rent-restricted, and be under a lease with an initial term of at least six months.

- For example:

  The project contains one building. This building has 25 units, one of which is a manager's unit. At the end of the first year of the credit period, all units are rented except the manager's unit which remains unoccupied. The building's applicable fraction would be 96% (24/25 assuming all units are the same size). Therefore, if the building's eligible basis is $700,000, its qualified basis would be only $672,000.

  If the manager's unit were considered as common area, it would not be included in either the numerator or the denominator in calculating the applicable fraction. If not included, the building's applicable fraction would be 100% (24/24) and its qualified basis would be $700,000.

For additional information regarding managers/employees as tenants, see Part 550.

Part 860 Common Area Units – Impact on the Applicable Fraction

There is no tax credit penalty for having a Common Area Unit in a project. When the percentage of low-income use is calculated, the Common Area Unit is ignored. Example:

Assume a building in a 100% low-income project has 100 units, and one unit is the manager's unit. Calculate the low-income use of that building (based on Unit Fraction) as follows:

Low-Income Units:	*99 units*
Total Residential Units:	*99 units*
Low-Income Percentage:	*99/99 = 100%*

If at a future time, a common are unit is no longer used as a manager's unit, and it is then rented as a qualified low-income unit, the low-income use stays at 100%:

Low-Income Units:	*100 units*
Total Residential Units:	*100 units*
Low-Income Percentage:	*100/100 = 100%*

The same analysis is used in calculating the Floor Space Fraction – disregard the area of the Common Area Unit in both the denominator and numerator. Again, assume a building has 100 units, all 2-bedroom units at 10,000 square feet each. The low-income use based on the Floor Space Fraction would be:

Area of low-income units:	*10,000 sq. ft/unit x 99 units = 99,000 sq. ft*
Total area of all units:	*10,000 sq. ft/unit x 99 units = 99,000 sq. ft*
Low-income percentage:	*99,000 sq. ft / 99,000 sq. ft = 100%*

All changes in common unit designations must be approved by MSHDA prior to implementing the change, as discussed in Part 862 (Designating a Unit as Common Area).

The applicable fraction and the floor space fraction are discussed in Part 124.

Part 862 Common Space (Non-Residential) and Tenant Facilities

[There are slightly differing interpretations of IRS procedures and regulations within the LIHTC industry regarding the treatment of common space and common area residential units. MSHDA recommends that Owners consult with an attorney or other professional with expertise in the LIHTC Program and tax law prior to completing and filing tax returns involving common space and common area residential units.]

Non-residential common space includes hallways, leasing offices, community recreation rooms, utility rooms, community laundry space, and model units. Common space (non-residential) is included in the square footage calculation for purposes of determining the eligible basis and qualified basis of the project. It is not counted in either the numerator or the denominator of the unit fraction for purposes of determining the applicable fraction. Common space (non-residential) does not include commercial space (which is discussed in Part 876), which is not eligible for tax credits. No separate fee can be charged to LIHTC tenants for the use of the common space.

Further, under IRS rules, all tenant facilities included in the eligible basis for any building in a LIHTC project must be available on a comparable basis, without charge, to all tenants in the building. Tenant facilities include such amenities as swimming pools, recreational facilities, and parking areas.

For information about the applicable fraction, see Part 124. For related discussions, see Part 432 (Additional Fees and Charges in LIHTC Projects), Part 876 (Commercial Space in LIHTC Projects), and Part 870 (Community Service Facilities).

<u>Model Units and Leasing Offices</u>

In some developments, the floor space layout of the leasing office or model unit is similar (or perhaps identical) to that of its residential rental units. These spaces are still considered to be "common space" as opposed to "common area units" because they are not being used for residential purposes (unless, as discussed below, those spaces are being used for non-residential purposes only on a temporary basis). The costs (construction or acquisition/rehabilitation) associated with these spaces can be included as part of LIHTC basis.

1. <u>Temporary use of a rental unit for non-residential purposes</u>

   a. <u>During the Lease-up Period (i.e., generally, the Initial Year of the Credit)</u> - In some situations, such as for marketing purposes, a model unit is utilized during the initial lease-up period and is then rented to a qualified household. Such use is generally permissible, provided the use is temporary and the unit will be made available to qualified households by the end of the project's lease-up period. The Two-Thirds (2/3) Rule (discussed in Part 150) could be triggered if the model unit does not become occupied by a qualified household by the end of the initial year of the credit.

b. In Year 2 or later in the Compliance Period - In some situations, a qualified unit becomes vacant and is utilized as a model unit on a temporary basis to market the project to prospective tenants. This use is generally permissible with pre-approval by MSHDA and does not affect the building's applicable fraction or eligible basis. The model unit must remain available for occupancy by qualified rental applicants who are interested in leasing that particular unit.

2. Permanent use of Model (or leasing office) throughout the lease-up period and the remainder of the Compliance Period

If a model unit is never rented as a LIHTC unit, then, the model unit should not be included in either the numerator or denominator of the applicable fraction. The model unit is "common space" as opposed to a "common area unit." The cost of the model unit should be included in the building's eligible basis and resulting qualified basis calculation. For example:

ABC Apartments has 100 residential rental units plus one model unit. The 100 residential units are all designated as LIHTC units and had a construction cost of $850,000. The project's common space had a construction cost of $150,000 (of which $50,000 is for the model unit). ABC Apartments' eligible basis (EB) is $1,000,000, the applicable fraction (A/F) is 100% (100/100), and the qualified basis (QB, which is EB x A/F) of $1,000,000.

3. Permanent conversion of model unit (or leasing office) to a residential rental unit

MSHDA generally does not authorize any permanent conversions unless the owner can demonstrate a compelling need for the conversion. If nevertheless converted by the owner/management agent without pre-approval from MSHDA, ABC Apartments (see example above) would become a mixed income project, the A/F would be reduced to 100/101 (99.01%) and the QB would be reduced to $990,099. (These reductions would occur even if the unapproved unit were occupied by a household that would otherwise be LIHTC-eligible). Since the A/F would now be less than 100%, the project now has potential NAUR implications (as discussed in Part 808) and there is an automatic and immediate revocation of any approval to eliminate recertification (discussed in Part 362).

If the conversion had been pre-approved by MSHDA, the applicable fraction of the project would be 101/101 (100%) and the eligible basis would remain at $1,000,000 and the qualified basis remains at $1,000,000 (provided the new unit was rented to a LIHTC-eligible household). [Note: The Two-Thirds (2/3) Rule discussed in Part 150 could be triggered if the model unit is not leased to a qualified household until some time after the end of the first year of the credit period.]

4. Permanent conversion of a rental unit to a non-residential purpose (such as a model unit or leasing office)

JKL Apartments originally had 100 residential rental units and no model unit. The 100 residential units were all designated as LIHTC units and had a construction cost of $700,000. The per-unit cost of the residential *units was $70,000. JKL Apartments' eligible basis (EB) was $700,000, the applicable fraction (A/F) was 100% (100/100), and the qualified basis (QB, which is EB x A/F) of $700,000.*

MSHDA generally does not authorize any permanent conversions unless the owner can demonstrate a compelling need. If nevertheless converted without pre-approval, *the A/F of JKL Apartments would be reduced to 99/100 (99.00%) and the QB would be reduced to $693,000*. Since the A/F would now be less than 100%, the project now has potential NAUR implications (as discussed in Part 808) and there is an automatic and immediate revocation of any approval to eliminate recertification (discussed in Part 362). The unit now being used for non-residential purposes would be treated as a permanently vacant (thus not LIHTC-eligible) unit. (If it were being used as commercial space or for a purpose other than to benefit the low-income residents, the $70,000 cost associated with that space would have to be subtracted from eligible basis.)

If the conversion were pre-approved by MSHDA, the applicable fraction of the project would be 99/99 (100%). The EB would remain at $700,000 and the QB would remain at $700,000, provided the space is being used to benefit the low-income residents. If the space were being used for non-LIHTC eligible purposes, the $70,000 cost associated with the space would be subtracted from the EB (reducing it from $700,000 to $630,000) and the QB would be $630,000.

Model units and other uses of units for purposes other than residential use that are converted to a LIHTC rental unit (or vice versa) must be pre-approved by MSHDA using the Common Area Unit Designation Statement (discussed in Part 862).

Part 864 Designating a Unit as Common Area

When completing the final allocation (Placed in Service) application, the Owner must indicate whether or not the project will contain a common area unit(s). MSHDA reviews the unit configuration and determines whether or not to approve the common area unit. The Regulatory Agreement/Restrictive Covenant is then prepared and recorded indicating the unit configuration. The Owner must designate a specific unit(s) as common area. The designation is made by completing a Resident Manager's / Employee Occupied Unit Designation Statement Form. This form is completed and submitted with the first annual certifications prepared for the project. The Owner must identify the unit number (along with the square footage and number of bedrooms) and the address of the building in which the common area will be. If the option to designate the employee unit as a low-income rental unit is selected, the appropriate monitoring fee must be paid for this unit(s). Once designated, the project's configuration cannot be changed without prior written approval from the LIHTC Section of MSHDA and the completion of a revised Common Area Unit Designation form.

If a change in the location of a common area unit from one building to another would result in a reduction in the low-income use of any building in the project, the move will not be allowed. This rule (per Revenue Ruling 92-61) applies only to developments that placed in service or received an allocation of credits on September 9, 1992, or thereafter. For all developments that placed in service or received allocations prior to September 9, 1992, this ruling will not apply unless the Owner files or has filed a tax return that is consistent with this ruling.

One Change Per Six (6) Month Period - Requests to change the number of or location of the common area unit(s) in the project must be submitted to the Compliance Monitoring Section of MSHDA in writing by the Owner (not the management agent) of the project. Along with the request, a revised Common Area Unit Designation Statement must be submitted. Requests to change the designation may be made at any time during the year (not solely as part of the annual compliance certification submission process). However, only one change in the common unit(s) designation will be considered by MSHDA during any six (6) month period for any one project. For example:

> *Michigan Villas is a LIHTC project that contains three buildings and two common area units. The Owner of the project requests that the location of one of the common area units be changed to a different building. MSHDA reviews the request and approves it in writing to the Owner in a letter dated June 21, 1998. The project will not be eligible to make any other designation changes (of any type) to any units in the project until January 21, 1999 or after.*

For information regarding managers as tenants, see Part 550. For information regarding annual compliance certifications, see Part 706. For more information regarding monitoring fees, see Part 650.

Part 866 Full-time Security Officer's Unit

IRS Revenue Ruling 2004-82 allows a unit to be occupied by a security officer (a/k/a courtesy officer) if it is reasonably required by the development. The security officer unit is not included in the numerator or in the denominator when calculating the building's percentage of low-income units.

Full-time security officer units are permissible as common space in LIHTC projects provided a full-time security officer is needed at the development due to the level of crime in the area. The security officers unit is included in the eligible basis of the project and is excluded from the applicable fraction. The security officer must be employed at the site on a full-time basis. Documentation (crime reports, statistics, etc.) must be included in the project's Development File (discussed in Part 214) demonstrating the need for a security officer's unit.

Items to be considered by an owner representative seeking to rely upon this letter ruling are:

a. The security officer may be a local law enforcement officer who lives on-site and performs safety and security services. Security officer responsibilities include:
   - (1) Performing safety and security services
   - (2) Being on-site during the evening and nighttime hours to respond to resident requests for assistance, including complaints, unauthorized visitors, improper parking, and unauthorized use of community facilities
   - (3) Organizing criminal background investigations, neighborhood watch programs, and educational activities for primary school age residents
   - (4) Providing a daily log of activities to the development manager

b. General Instructions

(1) Developments having a set-aside requirement totaling less than 100 percent must place the security officer unit in the non-set aside portion of its units.

(2) Developments having a set-aside requirement totaling 100 percent of the units in the development must follow the process described below:

(a) The owner representative may request units to be exempted from income certification for security officers who are required to live on-site.

(b) The owner representative must make the initial request to MSHDA, in writing, prior to occupancy by the officer and provide the following:

(i) Documentation to justify the need for an officer to live on-site including a criminal activity report for the Development and/or the surrounding neighborhood

(ii) A list of duties to be performed by the officer

(c) MSHDA will approve or deny the initial request and respond in writing.

(d) The security officer unit(s) must be identified on MSHDA's On-Line Tenant Data Reporting System (see Part 700).

(e) Once a security officer unit has been approved, it is not necessary to send a letter to MSHDA when there are changes in the designated officer who occupies the unit. If a security officer unit is no longer required, the unit must be rented to an income-eligible household. Should the development desire to change the location/address of the security officer's unit, the Owner must request permission from MSHDA prior to relocating the unit.

For a similar topic, see Part 872 (Police Substation Units).

Section 8G – Non-transient Use Requirement

Part 868	Units Must Be for Non-Transient Use

IRC Section 42(i)(3)(B)(i) and (iii)

Under program requirements, a unit cannot be tax credit eligible if it is used on a transient basis. A unit is deemed to be transient if the initial lease term is less than six months. The term "transient" is not defined in Section 42 or other IRS regulations, but the legislative history of Section 42 describes a "safe harbor" which states that leases with an initial term of 6 months, which can then revert to a month-to-month tenancy, are considered "non-transient". For acquisition/rehabilitation projects, there must be at least a six-month lease at initial occupancy or a six-month addendum for in-place (existing) tenants who do not have six months left on an existing lease when the building is placed in service.

The only exceptions to the six month lease rule are single room occupancy (SRO) units, which may be month to month so long as they are transitional for homeless or other individuals seeking permanent housing. Federal Rules allow for month-by-month leases for the following types of housing:

1. SRO units in projects receiving Stewart B. McKinney Act, Homeless Assistance Act and Section 8 Moderate Rehabilitation Assistance.
2. SRO units intended as permanent housing and not receiving McKinney Act Assistance.
3. Units intended as transitional housing that are operated by a governmental or non-profit entity (as defined in IRC §42(h)(5)) and providing certain supportive services.

Single-Room Occupancy (SRO) Units Under IRC §42(i)(3)(B)(iv) - SRO units which permit the sharing of kitchen, bathroom, and dining facilities, shall not be treated as "transient" merely because units are rented on a month-by-month basis.

Buildings Used for Transitional Housing for the Homeless Under IRC §42(i)(3)(B)(iii) - Certain transitional housing for the homeless may be considered for use other than on a transient basis provided the residential rental unit contains sleeping accommodations and kitchen and bathroom facilities and is located in a building:

1. that is used exclusively to facilitate the transition of homeless individuals to independent living within 24 months, and

2. in which a governmental entity or qualified nonprofit organization provided such individuals with temporary housing and supportive services designed to assist such individuals in locating and retaining permanent housing.

For additional information, see Part 546 (Transient Persons) and Part 622 (Overview of Lease Agreements). For related discussions, see Part 548 (Primary Residence) and Part 152 (Definition of a Low Income Unit).

Section 8H – General Public Use Rule

Part 870 General Public Use Rule for LIHTC Projects

Treasury Regulation § 1.42-9

In order to be eligible for the low-income housing credit, the residential units in a qualified low-income housing project must be available for use by the general public. A project is available for general public use if:

(1) the project complies with housing non-discrimination policies including those set forth in the Fair Housing Act (42. U.S.C. 3601), and
(2) the project does not restrict occupancy based on membership in a social organization or employment by specific employers.

In addition, any residential unit that is part of a hospital, nursing home, sanitarium, life-care facility, trailer park, or intermediate care facility for the mentally or physically handicapped is not available for use by the general public.

The Housing and Economic Recovery Act of 2008 (H.R. 3221) clarifies that any LIHTC project which otherwise meets the general public use requirements listed above will not fail to meet the general public use requirements solely because of occupancy restrictions or preferences that favor tenants:

(1) with special needs; or
(2) who are members of specified group under a Federal program or State program or policy that supports housing for such a specified group; or
(3) who are involved in artistic or literary activities.

For a related discussion, see Part 880 (Owner-occupied Residences and Cooperatives).

Section 8I - Community Service Facilities

Part 872 Community Service Facilities

IRC §42(d)(4)(C) and IRS Revenue Ruling 2003-77

For credit allocations after December 31, 2000, community service facilities may be included in some tax credit properties that are located in a **qualified census tract**. These community service facilities may serve residents and non-residents, as long as these persons are primarily low-income (60 percent or less of median income). The facility must be used to provide services that will improve the quality of life of community residents; i.e., day care, career counseling, literacy training, education (including tutorial services), recreation, and out-patient clinical health care. If fees are charged for the services provided, they must be affordable to individuals whose income is 60 percent or less of the area median income. *The size and cost of the facility may not exceed 10 percent of the eligible basis of the qualified low-income housing credit project of which it is a part.*

Project Owners considering adding or converting existing space to a community service facility must comply with the rules outlined in the IRC, as amended (including the rules iterated in Section 3003 of HERA of 2008). These rules impact the permissible cost and square footage of the community service space. All community service facilities must be pre-approved by MSHDA before implementation.

Elderly Projects - Some elderly projects (as specified in the Regulatory Agreement) are required to maintain a specific amount of square footage (15 square feet per residential unit) of **community space** that is provided for use by the tenants in the project if the project qualifies for the elderly set-aside. If applicable, this requirement is/was listed in the Qualified Allocation Plan (as discussed in Part 220) under which the project applied for its allocation of tax credits and/or in the project's Regulatory Agreement. This community space is essentially non-residential common space (as discussed in Part 860).

Part 874 Police Substation

IRS Revenue Ruling 2004-82

Police Substations are permissible as common space in LIHTC projects if it is necessary due to the level of crime in the area. The police substation unit is included in the eligible basis of the project and is excluded from the applicable fraction. A market study substantiating the need for a police substation must be conducted. Documentation (crime reports, statistics, etc.) must be included in the project's Development File (discussed in Part 214) demonstrating the need for a police substation. Approval must be obtained from MSHDA before creation of a police substation unit. For a similar topic, see Part 864 (Full-time Security Officer's Unit).

Section 8J - Ineligible Facilities and Commercial Space

Part 876 Ineligible Facilities

LIHTC regulations state that hotels, motels, dormitories, fraternity and sorority houses, rooming houses, hospitals, nursing homes, sanitariums, rest homes, and trailer parks and courts are considered to be used on a transient basis and are not considered residential rental property.

Rev. Ruling 98-47, 1998-38 I.R.B. 4 describes residential rental property for purposes of IRC §§ 142(d) and 145(d). The ruling discusses three types of living accommodations in an assisted care facility:

1. Apartments with only the basic services of the facility including laundry, housekeeping, daily meals in common dining area, 24-hour emergency call service, planned social activities, and scheduled transportation;
2. Apartments with the basic services plus certain assisted-living support services; and
3. Apartments with the basic and support services plus continual or frequent nursing, medical or psychological services.

The ruling applies the standards in Treas. Reg. § 1.42-11(c) in stating that if a facility makes available continual or frequent nursing, medical, or psychiatric services, the facility will not be residential rental property under IRC §§ 142(d) or 145(d). The ruling holds that the first two of three types of apartments listed above are residential rental housing, while the third type is not.

Part 878 Commercial Space in LIHTC Projects (Mixed-Use)

Projects that contain commercial space are termed "mixed-use" projects. Commercial space is not eligible for tax credits. The owner/management agent is not permitted to use LIHTC space to generate revenue from activities that are not directly related to the operation of the rental development. Commercial activities include the operation of such businesses as daycare centers and beauty salons on the premises for which non-tenants pay a fee. Also considered to be commercial space are swimming pools, club houses, exercise facilities, and garages for which a fee is charged.

For related discussions, see Part 860 (Common Space – Non-residential) and Part 432 (Additional Fees in LIHTC Projects). The term "mixed-use" should not be confused with the term "mixed-income", which refers to projects that contain market rate/unrestricted units, as discussed in Part 802.

Part 880 Resident-operated Businesses in LIHTC Units

LIHTC regulations do not prohibit tenants from being self-employed or from operating small businesses in their individual units, provided the space is not redesigned in such a way as to attract only future business operations (e.g. doctor's office) and the unit can be re-rented on a general public use basis. The LIHTC unit must be the tenant's principal place of residence and the use of the unit must be primarily residential. Any business use of the residence must be in compliance with zoning laws or other government ordinances. As stated in the IRS 8823 Guide, it is permissible for tenants to claim associated expenses as tax deductions.

While LIHTC regulations do not prohibit the operation of a small business, it may be permissible for an owner/manager to refuse to permit such use, including the operation of a day care center, provided it complies with any equal protection, fair housing, or any other laws that are applicable to this situation.

For information about calculating household income for self-employed persons and for tenants who are business owners, see Part 390.

Part 882 Owner-Occupied Residences and Co-operatives

IRC 42(i)(3)(C) - In the case of any building which has four or fewer residential rental units, no unit in such building shall be treated as a low-income unit if the units in such building are owned by an individual who occupies a residential unit in such building, or any person who is related (as defined in subsection (d)(2)(D)(iii)) to such individual.

Note for tax-exempt projects - Under Treas. Reg.§ 1.103-8(b)(4)(iv), a residential rental project does not include any building or structure that contains fewer than five units, one of which is occupied by an owner of the units. A cooperative housing project is not a qualified residential project where half of the units are owned by the shareholders of the cooperative and the other half is rented. See Example 3 of Treas. Reg. § 1.103-8(b)(9).