CHAPTER 9 – THE EXTENDED LOW-INCOME HOUSING USE PERIOD

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Section 9A – The Extended Use Period

Part 900 The Extended Use Period

Per IRC Section 42(h)(6) buildings are eligible for the tax credits only if there is a minimum long-term commitment to low-income housing. To receive a tax credit allocation in 1990 and later, the Owner must record an extended low-income housing commitment. The IRC requires a property owner to commit to the low-income housing program for a minimum of 30 years. Developments are required to comply with low-income use requirements for a minimum additional period of 15 years beyond the end of the Compliance Period (Years 1-15 after a project is placed-service), creating a total Extended Use Period of at least 30 years. Owners may/may have agree(d) to a longer extended use period (beyond the minimum 30 years) to qualify for preference in the award of credits. The document that evidences this Extended Use commitment is evidenced in a Regulatory Agreement (discussed in Part 164).

The Regulatory Agreement is a restrictive covenant against the property and is recorded against the property as a deed restriction governed by state law. Commonly known as “extended use agreements”, these covenants are agreements *between the Owner and state agency.* The agreement may be enforced through a civil court proceeding. However, when a building or project leaves or is removed from the program, state agencies have discretionary authority to release the extended use agreement and remove the deed restriction.

To reiterate, the term “Extended Use Period” means the period:

A. Beginning on the last day in the compliance period on which such building is part of a qualified low-income housing project, and
B. Ending on the later of the date:
    1. Specified by the agency in the Regulatory Agreement.
    2. Which is 15 years after the end of the Compliance Period.

The Regulatory Agreement is recorded with the respective County Recorder or Registrar of Deeds and “runs with the land”, regardless of subsequent changes in ownership.

Part 902 Terminating the Extended Use Period

The Extended Use Period will terminate at the end of the Compliance Period (discussed in Part 160), which is comprised of the initial 15-year federal compliance period plus a mandated additional minimum 15 years of low-income housing use.

The extended use period may also be terminated by foreclosure and under certain other circumstances as set forth in United States Code Title 26, Subtitle A, Chapter 1, Subchapter A, Part IV, Subpart D, Section 42(h)(6)(E). The Regulatory Agreement may limit the availability of these provisions. In general, IRC Section 42(h)(6)(E) provides exceptions to the Extended Use Period:

1. In the case of a legitimate **foreclosure** or deed in lieu of foreclosure; or
2. If the agency is **unable to present a Qualified Contract** pursuant to IRC Section 42(h)(6)(F).

The “Three-Year Tenant Protection Period” discussed in Part 904 is applicable to all projects that terminate the Extended Use Period. Foreclosures are discussed in Part 1018. Qualified Contracts are discussed in Part 906.

Part 904 The Three-Year Tenant Protection Period

IRC §42(h)(6)(E)(ii); Rev. Proc. 2005-37

As discussed in Part 156 (Important Periods for LIHTC Projects), the *Three-Year Tenant Protection Period* (3YP) is the period during which no low-income tenant can be evicted except for good cause (discussed in Part 626) and rents must remain at the restricted level (discussed in Part 412). The 3YP begins after the date the LIHTC Regulatory Agreement (discussed in Part 164) is discharged, whether due to foreclosure or because a purchaser was not located, as discussed in Part 906 (Qualified Contract), because the owner has voluntarily withdrawn, the Compliance Period has ended, or for any other reason the project has ceased participating in the LIHTC program. The 3YP is intended to allow a transition of use of the project following the low-income use under the program.

In summary, under IRC §42(h)(6)(E)(ii), there are two requirements that must be met when an extended use agreement is terminated:

1. No eviction or termination of tenancy (other than for good cause) of an existing tenant of any low-income unit during the 3-year period following the termination of the extended use agreement.

2. No increase in the gross rent of any unit occupied by an existing tenant during the 3-year period following the termination of the extended use agreement, not otherwise permitted under IRC §42. In other words, units occupied by income-qualified tenants continue to be rent restricted for three years, or until the tenants vacate the units.

The good cause requirement and the restriction on rent amounts during the 3YP applies only to persons who reside in an LIHTC unit at the time of the event ending the LIHTC status of the project. Persons who move into the development after the effective date of the end of the project's LIHTC extended use period (i.e. on or after the date the 3YP begins) are not subject to the good cause requirement or to the rent limitation.

The Owner must continue to provide MSHDA with tenant data (including rent amount and utility allowance figures) for all households that are subject to the 3YP.

Important Note: All LIHTC projects (including those which are still active and have not yet ended their participation in the LIHTC program) are subject to the Good Cause requirement throughout the entire Extended Use Period. The Good Cause requirement is applicable to all LIHTC tenants. The Good Cause requirement is further discussed in Part 626. The level that rents must remain restricted at is discussed in Part 422. Foreclosures are discussed in Part 1018.

The 3YP begins on the date specified by MSHDA in a written notification to the Owner that MSHDA has approved the termination of the Extended Use Period. Until the Owner receives the written notice, the project remains bound by its Regulatory Agreement.

Part 906 Qualified Contract

IRC 42(h)(6)(F); IRC Section 42(h)(6)(E)(i)(II)

The initial Compliance Period for a project receiving an allocation of LIHTC is fifteen years. For LIHTC allocations made in 1990 and later, an extended use agreement, as required by Section 42(h)(6) of the Internal Revenue Code of 1986, as amended (the Code), extends the Compliance Period for a minimum of fifteen additional years, also referred to as the Extended Use Period. Section 42(h)(6)(E)(i)(II) of the Code provides that the Extended Use Period shall terminate, however, if a housing credit agency is unable to present a "Qualified Contract" (QC) to a taxpayer who has requested such a contract within one year following the request.

A **Qualified Contract** is defined as a contract to buy the low income portion of the building for an amount no less than the applicable fraction times the sum of outstanding debt plus adjusted investor equity, plus other capital contributions, minus cash distributions. Adjusted investor equity includes those capital contributions reflected in basis – that is, not including syndication expenses – plus a cost of living adjustment not to exceed 5% annually.

If no QC is presented within one year after the request is made, the low income building(s) may be sold or converted to market rate, subject to a 3YP during which existing low income tenants may not be evicted (except for good cause) and the rent restrictions must stay in place.

The request for a QC may not occur until after year 14 of the Compliance Period. The request for a QC is a request that the housing credit agency find a qualified purchaser, or a buyer who makes an offer to purchase the property for a qualified contract price (calculated pursuant to IRS regulations and described briefly above) and who will continue to operate the property as a

qualified low-income property. Once an offer is made by a qualified purchaser at the qualified price, the housing credit agency has satisfied its obligation, whether or not the offer is accepted by the owner. If the housing credit agency is unable to find a qualified purchaser within one year, the Extended Use Period as set forth in the Regulatory Agreement is terminated after the 3YP required by the Internal Revenue Code.

Many projects, particularly those allocated in 1994 and beyond, elected to extend the number of low-income use restriction years (some into perpetuity) in order to receive additional points in the scoring process. The option of requesting a QC is not available to owners who agreed to longer compliance periods or to owners of project allocated credit in or after 2005.

The Internal Revenue Code contains some of the basic provisions for handling QC requests. A number of important questions, however, have not been answered through federal regulation or other guidance. MSHDA has created a **Qualified Contract Procedures Guide** to set forth the procedures that govern QC requests. The Guide is available on the MSHDA website.

Section 9b – Compliance Requirements After Year 15

This Section discusses LIHTC compliance requirements following the initial 15 year compliance period (Year 0 through Year 15 after a project is placed in service). All projects, including those which have completed the initial 15-year compliance period, become subject to the Three-Year Tenant Protection Period, discussed in Part 904, when their extended use period terminates.

Part 908 Lease Agreement and Good Cause Requirement

IRS Revenue Ruling 2004-82, IRS Revenue Procedure 2005-37, IRC Section 42(h)(6)(E)(ii)

Lease Agreements and Lease Terms – ***No Change***. During the Extended Use Period, the lease requirements, including a minimum six-month lease term at the time of move-in, remain the same as the forms required during Years 1 - 15. See Part 622 for more information lease agreements.

Lease Terminations, Non-renewals and Evictions – ***No Change***. The requirements for lease terminations and evictions are discussed in Part 626 (Good Cause). Important: The ***Good Cause*** requirement applies throughout the entire life of the LIHTC project, including the initial 15-year compliance period and throughout the extended use period.

Part 910 Income Limits, Rent Restrictions, and Utility Allowances after Year 15 of the Extended Use Period

No Changes. Elections that continue to be in effect during the Extended Use Period include those made by the Owner at the time of allocation (or, if applicable, at the time amendment or modification was authorized by MSHDA during the compliance period). These elections, which remain the same during the Extended Use Period as they were during Years 1 through 15, include the following:

- Minimum set-aside (sometimes termed “federal minimum set-aside”).
- 40/50 HOME Set-aside.
- Applicable fraction.
- Income restrictions.
- Deeper targeting/agency covenants (sometimes termed “state set-asides”).
- Rent restrictions.
- Utility allowances.

Income limits, rent restrictions, and utility allowances during Years 1 through 15 are discussed in Chapter 4 (Income Limits, Rent Restrictions, and Utility Allowances).

Part 912 Certifying Tenant Eligibility after Year 15 of the Extended Use Period

The procedures for certifying tenant eligibility during Years 1 through 15 are discussed in Chapter 3 (Qualifying Tenants for Restrictive Units). During the Extended Use Period, the

policies and procedures listed in Chapter 6 remain applicable, with the exceptions/modifications listed below:

1. **Initial (Move-in) Certifications** – ***No Change***. An initial (move-in) certification for all new residents is required. An initial certification is required for any existing household that is being newly designated as a LIHTC-household. Initial Certification requirements are discussed in Part 300.

2. **Annual Recertifications** – ***Revised***. The certification and recertification requirements for all LIHTC projects will be the same as those required of projects that have been approved to eliminate annual recertifications (as discussed in Part 362). With pre-approval from MSHDA, owners/management agents are no longer required to third party verify income and income from assets at annual recertification, except for the first anniversary of move-in and a review of documents for projects that have multiple income targeting levels for its LIHTC units. An annual self-certification by the tenant household is required in order to satisfy the annual certification requirement and a review of documents is required for projects with multiple income targeting levels for LIHTC units. The Annual Self-Certification of Income form is discussed in Part 364.

    - Projects with a 100% Applicable Fraction - **Revised**. Owners may request approval from MSHDA to eliminate the recertification requirement for 100% Tax Credit properties. With pre-approval from MSHDA, the recertification requirements are the same as for those projects approved to eliminate annual recertifications (discussed in Part 362).

    - Mixed-income tax credit properties – **Revised**. Mixed-income tax credit projects are projects with less than 100% applicable fraction, with some units that are tax credits and others that are unrestricted or market-rate. To the extent that there is not some other financing (such as tax-exempt bonds, HOME, etc) or rental subsidy program such as Section 8 or Rural Development, mixed-income tax credit properties are now eligible to request approval from MSHDA to eliminate third-party verification of income and assets at recertification.

3. **Forms for Certifying Tenant Eligibility** – ***No Change***. The certification forms required during the Extended Use Period remain the same as the forms required during Years 1 - 15. See Part 612 for more information about forms for certifying tenant eligibility.

Part 914 Tenant Demographics and Household Composition after Year 15 of the Extended Use Period

1. **Availability to the General Public** – ***No Change***. General Public Use requirements are discussed in Part 868.

2. **Changes in Household Composition** – ***No Change***. Housing composition guidelines are discussed in Part 502.

3. **Citizenship/Legal Residency Requirements** – ***No Change***. Citizenship/legal residency is discussed in Part 542.

4. **Elderly Definition and Requirements** – ***No Change***. Elderly guidelines and requirements are discussed in Part 532.

5. **Section 8/Housing Choice Voucher Participants** – ***No Change***. As stated in the IRC, "*projects shall not refuse to lease to the holder of a voucher or certificate of eligibility under Section 8 of the United States Housing Act of 1937 because of the status of the prospective tenant as such a holder.*" See Chapter 11 for information about Housing Choice Voucher and Section 8 participants.

6. **Student Status** – ***No Change***. The student rules under IRC Section 42 remain applicable throughout the entire Extended Use Period and throughout the entire tenancy of the LIHTC household. Student guidelines are discussed in Part 508.

7. **Tenant Data Collection and Reporting** – ***No Change***. Tenant data collection and reporting requirements are discussed in Part 700.

8. **Transient Persons** – ***No Change***. Transient persons are discussed in Part 546.

Part 916 Unit, Building, and Project Level Rules after Year 15 of the Extended Use Period

Unit, Building, and Project level rules during Years 1 through 15 are discussed in Chapter 8 and remain applicable during the Extended Use Period, with the exceptions/modifications discussed below:

1. **Common Area Units** – ***No Change***. See Part 856 for information about common areas.

2. **Deeper Targeting / Agency Covenants** – ***No Change***. See Part 818 for information.

3. **General Public Use** – ***No Change***. See Part 866 for information about general public use requirements.

4. **Next Available Unit Rule (140% Rule)** – ***Revised***. The available unit rule continues to be applied on a building-by-building basis. However, as revised, it provides that if a household's income goes over 140% of the applicable income limit, a currently vacant unit or the next unit in the same building must be rented to a qualifying household (the "comparable or smaller" requirement no longer applies). This is essentially a one-for-one unit replacement. See Part 804 for more information about the Next Available Unit Rule.

5. **Non-transient Use Requirement** – ***No Change***. See Part 866 for information.

6. **Unit Transfers** – ***Revised***. Unit transfers from building to building in the same project are allowed without triggering noncompliance regardless of whether a household's income is over the applicable limit at the time of transfer. This revised provision does not apply if the Owner elected to make each building a separate project on form 8609. See Part 846 for more information about transfers.

7. **Unit Vacancy Rule** – ***Revised***. The Unit Vacancy Rule will be applied on a building basis during the extended use period. This differs from Years 1 to 15 in which the Unit Vacancy Rule was applied on a project basis. For additional information, see Part 834 (Vacant Unit Rule).

Part 918 Monitoring Activities after Year 15 of the Extended Use Period

Monitoring activities during the Years 1 through 15 are discussed in Chapter 6 (Compliance Monitoring Procedures and Forms), Part 700 (On-line Tenant Data Reporting), Part 708 (Overview of Tenant File Audits) and Part 732 (Overview of Physical Inspections). During the Extended Use Period, the policies and procedures discussed throughout the Michigan Compliance Manual remain applicable, with the exceptions/modifications listed below:

1. **Annual Reporting Requirements** – ***No Change***. Submission of the annual Owner Certification of Continuing Compliance, the Utility Allowance Documentation form, and the Common Area Unit Designation Statement continue to be required. Annual Compliance Certifications are discussed in Part 704.

2. **On-Going Reporting** – ***No Change***. Tenant data and leasing/certification activity must continue to be entered on-line into the MSHDA's On-line Tenant Data Reporting System, as discussed in Part 700.

3. **Tenant Data Collection and Reporting** – ***No Change***. HUD's and MSHDA's tenant data collection requirements for LIHTC projects are discussed in Part 700.

4. **Tenant File Audits** – ***Revised***. Audits will be conducted at least once every five years rather than on a three-year basis for 100% LIHTC projects with no additional funding sources. All other aspects remain unchanged. Tenant file audit frequencies are discussed in Part 712. Note: Projects with audit findings, complaints or concerns, or unresolved compliance issues may be audited more frequently.

5. **Physical Condition Standards** – ***No Change***. Physical Condition Standards are discussed in Part 734.

6. **Physical Inspections** – ***Revised*.** Physical inspections will be conducted at least once every five years rather than once every three years for 100% LIHTC projects with no additional funding sources. All other aspects remain unchanged. Physical inspections are discussed in Part 730. Note: Projects with inspection findings, complaints or concerns, or unresolved compliance issues may be inspected more frequently.

7. **Record Keeping and Retention** – ***No Change***. Record keeping and retention requirements are discussed in Part 208 and Part 210.

Part 920 QAP and Allocation Considerations

No Change. The Qualified Allocation Plan (QAP) is discussed in Part 220.

Part 922 Consequences of Noncompliance after Year 15 of the Extended Use Period

In addition to other remedies allowed by law, MSHDA may designate the Owner of, and any party responsible for, properties in noncompliance as not being in good standing with MSHDA.

1. **Building Disposition** – ***No Change***. The Owner must not permit the disposition of any portion of a building to which the Restrictive Covenant applies. The Owner must not demolish any part of the project or substantially subtract from any real or personal property of the project; or permit the use of any residential rental unit for any purpose other than rental housing during the term of the Regulatory Agreement.

2. **Casualty Loss** – ***No Change***. Casualty losses are discussed in Part 766.

3. **Correction Period for Noncompliance** – ***No Change***. The correction period is discussed in Part 1036 (Overview of The Noncompliance Process).

4. **IRS 8823 (Report of Noncompliance)** – ***Revised***. After year 15, MSHDA no longer issues 8823 forms to the IRS to report noncompliance.

5. **Penalties for Noncompliance** – ***Revised***. Uncorrected noncompliance and/ or the failure to correct noncompliance on a timely basis may result in the issuance of ***negative points*** in future LIHTC funding rounds for applicants, their partners or members, management agents or related entities.