Baltimore Regional Fair Housing Group

c/o Baltimore Metropolitan Council ●1500 Whetstone Way ● Suite 300 ● Baltimore, MD 21230

Recommendations for 2023 Maryland QAP

March 2, 2023

The Baltimore Regional Fair Housing Group is a collaboration among the Baltimore metropolitan area's HUD entitlement jurisdictions (Cities of Baltimore and Annapolis, along with Anne Arundel, Baltimore, Harford, and Howard Counties) and the public housing agencies in those jurisdictions, with staff support at the Baltimore Metropolitan Council. We work together regionally to carry out our duty to affirmatively further fair housing. As the largest funding source for affordable housing in our region, Maryland's Qualified Allocation Plan (QAP) figures prominently in our 2020 Regional Fair Housing Action Plan.

While many of our individual jurisdictions have other comments and concerns about Maryland's QAP, it is important to emphasize that the recommendations in this letter are agreed on by all of our jurisdictions and housing authorities, speaking together with one voice.

First we want to express our appreciation for your 2022 QAP clarification that units attached to a project-based voucher count as 30% area median income (AMI) units for Maryland DHCD's income targeting purposes. That solves a significant problem we discovered as the first 34 low-income families leased through our Baltimore Regional Project-Based Voucher Program.

As we indicated in our October 2021 comments, however, we believe there is more to do so that the limited resources available can bring opportunity most equitably to our State. In addition, the voraciousness of new Low Income Housing Tax Credit (LIHTC) investors threatens affordability preservation and must be addressed. We urge you to take the following steps in the upcoming QAP:

1. **Continue to retain the five Policy Incentive points for Choice Neighborhoods developments.** We appreciate this incentive carrying from the 2020 to the 2022 QAP, and we urge you to keep it for 2023, as well. We recognize that the Perkins-Somerset-Old Town (PSO) redevelopment is a large, urgent development, and it is a critical example of both preserving deeply affordable rental homes and comprehensively bringing opportunity to a formerly redlined portion of Baltimore City. In addition, both the Housing Authority of Baltimore City (HABC) and the Housing Authority of the City of Annapolis (HACA) are planning future Choice Neighborhood initiatives, and retaining a Choice Neighborhood incentive will be critical to demonstrating the State's commitment in future applications and to ensuring success.
2. **Increase Baltimore & DC metro-area Community of Opportunity (COO) Policy Incentives points to four, and allow them to apply to the nine highest scoring proposals.** The 2022 round showed again that the existing incentives are not strong enough to have an effect on either applications or awards. State Bonus Points were

needed for the third Baltimore-area COO development to receive an award. As a result, we offer the same recommendation we did in 2021, discussed more thoroughly below. Communities of Opportunity are a well-documented housing-related tool for helping families and especially their children exit poverty. It is vital that the QAP reflect this data and be structured to incentivize at least a proportional number of developments in the metro areas.

3. **Address Looming Affordability Preservation Threats at Year 15 Investor Exit** (more detail below on this as well):
    a. Require or incentivize up-front clarity on the nonprofit Right of First Refusal.
    b. Clarify that DHCD can deny an LIHTC award and later transfer of limited partner interest based on past harmful investor behavior.
    c. Specifically require all credit applicants – 9 and 4 percent – to waive their right to a Qualified Contract, as many other states already do.

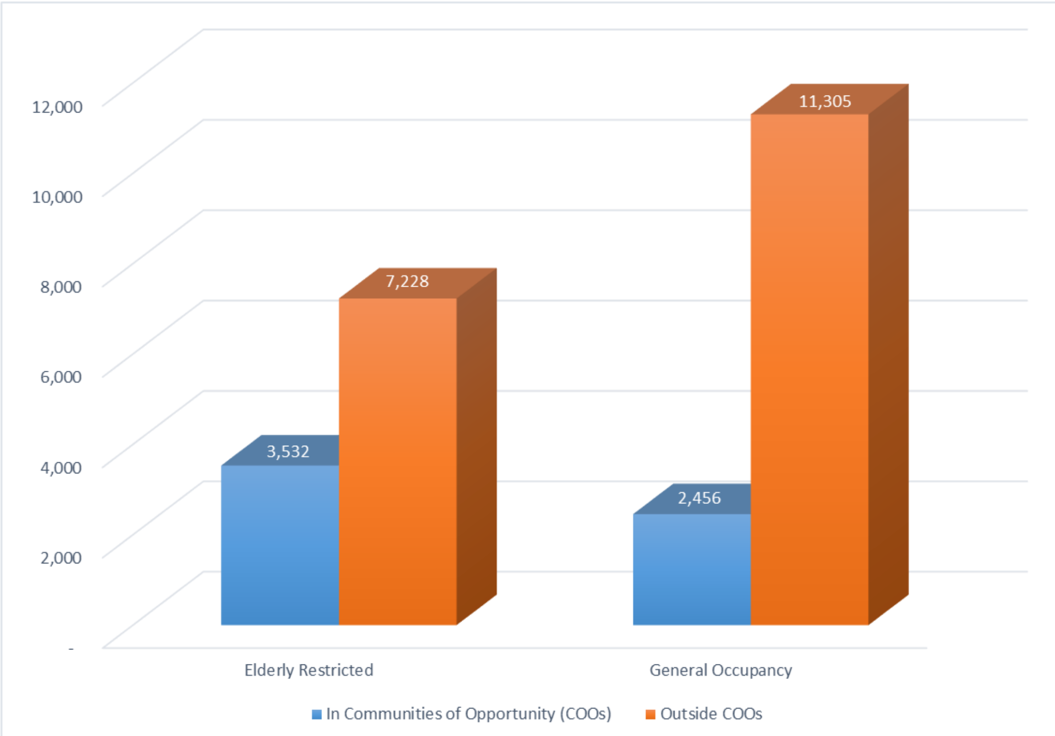
4. **Readily Available Data for Preservation:** While not relating specifically to the QAP, we urge Maryland DHCD to maintain data on affordability, including unit affordability mix, expiring extended use agreements, and other affordability restrictions, in an easily accessible format to aid local government preservation efforts. We greatly appreciate DHCD's work to provide the Baltimore Metropolitan Council much of this data on an *ad hoc* basis for use in BMC's database, but more systematized data availability would be extremely useful for our local and regional preservation efforts.

Increased Community of Opportunity Incentives

As you know, in 2017, Maryland DHCD signed a Voluntary Conciliation Agreement to resolve a 2011 fair housing complaint alleging that, in the Baltimore region, DHCD's LIHTC policies had the effect of concentrating affordable units for families in low-opportunity communities characterized by racial segregation and poverty.

Our 2020 regional fair housing analysis found that, as of DHCD's 2018 data, 44 percent of the 24,521 LIHTC-supported housing units in the Baltimore region (both 9% and 4%) were restricted to elderly residents. Of the 13,761 units open to families, only 18 percent were in Communities of Opportunity. That means only 10 percent of the entire LIHTC portfolio in this region was open to families in COOs. The following chart is from Section VI, page 32 of our 2020 Analysis of Impediments to Fair Housing Choice (AI) in the Baltimore Region. For context, 54 percent of the 961,457 total housing units in the Baltimore region are in COOs.

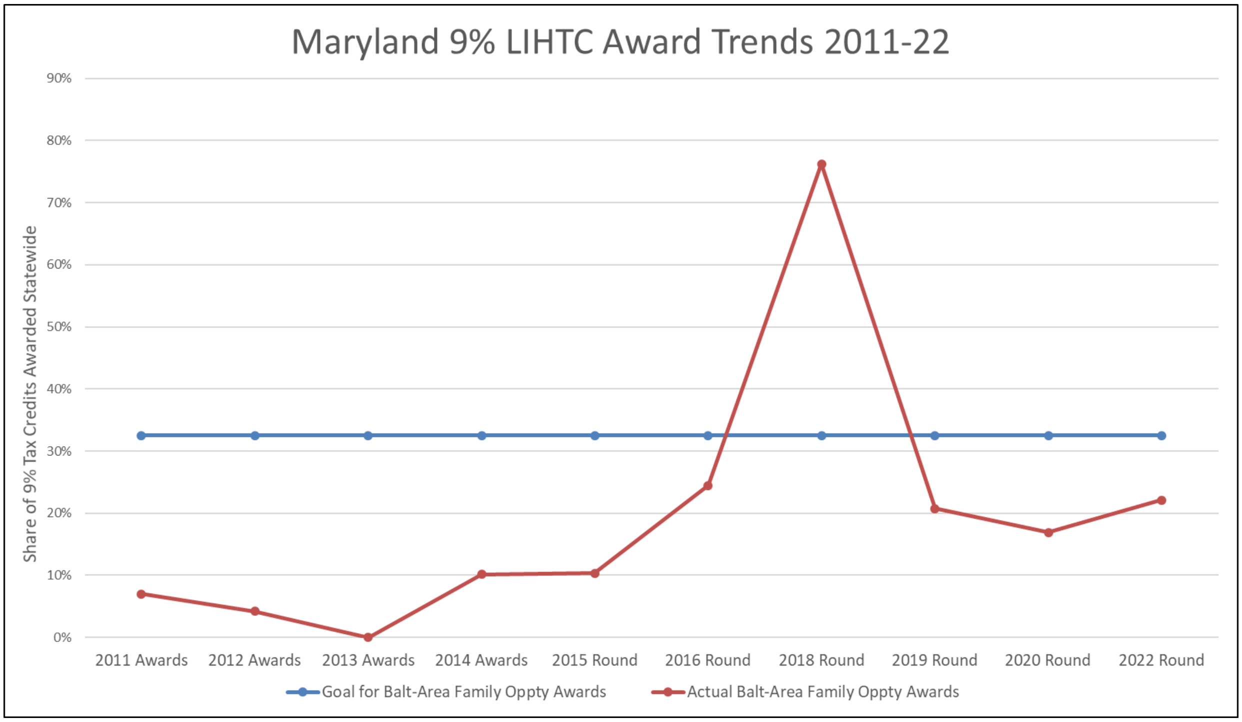
Figure VI-13
Distribution of LIHTC-Assisted Units in Baltimore Area in 2018



As a result, we set a goal in our 2020 AI of having about 65 percent of our share of Maryland LIHTC 9% awards support homes open to families in COOs. The other 35 percent should contribute to comprehensive revitalization efforts, such as the PSO redevelopment.

Since the Baltimore region is home to about half of Maryland's low-income renters, we believe that 65 percent goal should equal 32.5 percent of Maryland LIHTC awards being open to families in COOs in the Baltimore region. Achieving this goal would gradually, year-by-year start to rectify this historical imbalance.

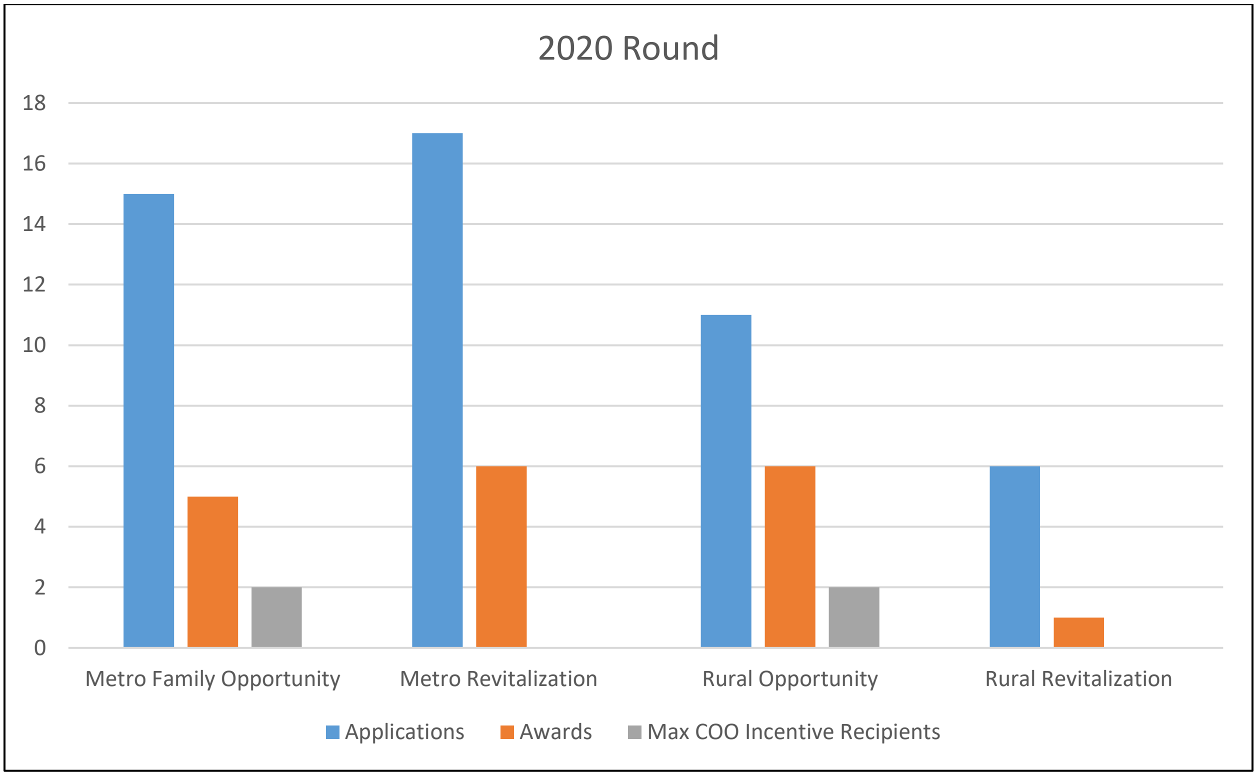
This graph shows how 9% awards have played out relative to our goal since 2011.



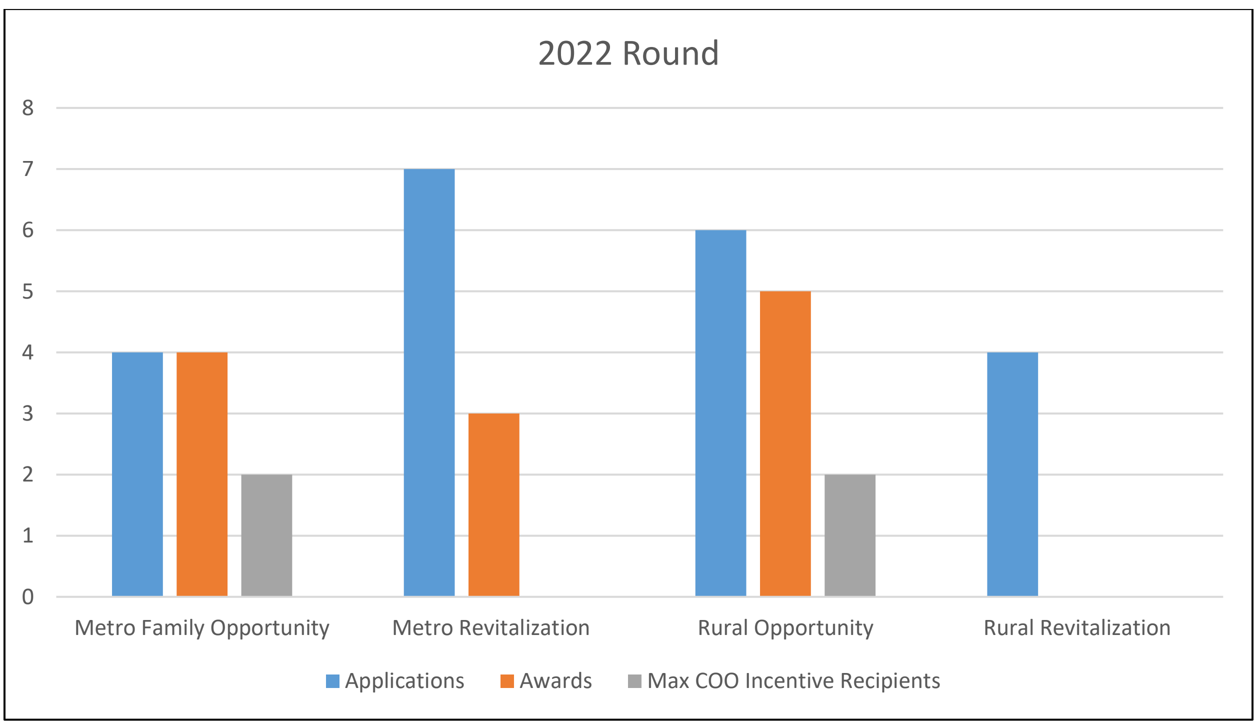
Only in 2018 – the year that Maryland was striving full-throttle to fulfill the 2017 VCA –did awards meet this mark. The 2022 round improved slightly over 2020 only because of the use of State Bonus Points.

We appreciate that, in the 2020 and 2022 QAPs, DHCD recognized the important difference between Communities of Opportunity in core metropolitan areas and those in more rural areas, establishing the geographic metro-area/rural distinction used in the following charts. Unfortunately, the point incentives accompanying that distinction have two shortcomings:

1. **Too Small:** The two-point incentive is far smaller than COO incentives used in 2016 and 2018, as well as the Choice Neighborhoods incentive in 2020 and 2022.
2. **Unbalanced and Capped Too Low:** Capping the points at just two applications in both metro and rural areas respectively does not recognize that the Baltimore & DC areas include four times as many low-income renting households as the more rural portions of the State. Capping this mild incentive at the two highest-scoring applications in each area also ensures that it does not influence awards anywhere in the State, since those projects would have won regardless of the incentive points, as shown in following graphs:



In 2020, rural COO awards exceeded metro area COO awards <u>despite having far fewer applications</u>. The 2022 QAP yielded both fewer applications and fewer awards in the metro areas of the State with four times the need:



As we did last year, we urge DHCD to offer a bolstered incentive of four points to more applicants, either in the Baltimore region only or in both the Baltimore and core Washington DC areas.

32.5% of the average statewide 9 percent awards 2016-2022 – our Baltimore-area goal – is six awards. DHCD could restrict the geography of this bolstered incentive (4 points) to the Baltimore region and allow the six top-scoring family COO proposals to receive it.

Alternatively, 65 percent of 80 percent of the Statewide awards – the share of the State's low-income population living in the Baltimore region and Montgomery and Prince George's Counties – is 52 percent of Statewide awards, or 9. DHCD could keep the metro-area geography designated in the last two QAPs and allow a bolstered incentive (4 points) to apply to the top-scoring nine family COO proposals in the Baltimore and DC areas.

Address Looming Affordability Preservation Year 15 Threats

Finally, as local jurisdictions and housing authorities who often contribute to and participate in local LIHTC developments, we have an interest in structuring those developments to facilitate long-term affordability preservation. Preservation of existing affordable housing has been part of both our 2012 and 2020 Regional Fair Housing Action Plans.

Unfortunately, across the nation new extractive LIHTC investors have been acquiring control of existing limited partnerships with the goal of demanding payments from general partners to exit the partnership or otherwise extracting resources from LIHTC properties and owners. These extractive investors do not recognize the Right of First Refusal held by a nonprofit, claiming that the federal statute and limited partnership agreement do not confer special rights on the nonprofit owner. These practices rarely come to the attention of credit allocating agencies unless litigation is pursued, as it has been more than 45 times in other states. More often, demands for cash payments not contemplated in the partnership agreement are made and the general partner quietly pays off the investor to get them to exit the partnership. Such practices generate new sources of profit that make long-term preservation more difficult. In some cases, this has resulted in expensive, time-consuming litigation that also undermines long-term quality affordable housing.

As a result, we urge you to take straightforward steps in the QAP to set up new LIHTC developments as well as possible for long-term affordability. Several housing finance agencies around the country have already stepped up to protect housing developments, including Virginia and the District of Columbia. Specifically, we urge you to:

1. Require or incentivize up-front clarity on the nonprofit Right of First Refusal (ROFR).
    a. This would involve either requiring or offering points for agreements that explicitly recognize the ROFR for the nonprofit partner and establish the methodology for executing the ROFR.
    b. This methodology should also make clear that this Section 42 ROFR is not a common law ROFR.
    c. The New York City Dept. of Housing Preservation and Development 2022 QAP, which was negotiated by many stakeholders, has required ROFR language like this that can serve as a model (attached).
    d. Alternatively, Virginia Housing has developed model ROFR language that must be included in every limited partnership agreement involving a nonprofit sponsor.
2. Specify that DHCD can disqualify an investor and deny a transfer of limited partner interest to an investor that has demonstrated a pattern or practice of challenging the

execution of the nonprofit right of first refusal or acting to remove a general partner absent fraud or serious mismanagement.

3. Explicitly require all credit applicants to waive their right to a Qualified Contract, an option in Section 42 to void the affordability restrictions in the Extended Use Agreement. Despite clear Extended Use commitments, such as those required in Maryland, owners in other states have tried to execute a Qualified Contract option, arguing that they did not explicitly waive that right in receiving their tax credits. In Alaska this resulted in two rounds of litigation against the state agency, as the owner appealed. The National Housing Trust has documented that many states already require this waiver (fact sheet attached), and we urge you to require this in Maryland as well.

Thank you for your consideration of our recommendations, which we believe are crucial for effective deployment of the State's affordable housing resources. Please feel free to contact us if you have any questions or would like to discuss these recommendations further.

Sincerely,

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2022 Qualified Allocation Plan

City of New York Department of Housing Preservation and Development (HPD)

(Worth four of maximum 21 points under Project Characteristics)

Not-for-profit credit applicants must submit a letter of intent from a tax credit investor that clearly grants to a qualified not-for-profit organization a right of first refusal to purchase the project for a below-market purchase price (the "ROFR Purchase Price"), following the expiration of the tax credit compliance period, in accordance with Section 42(i)(7) of the Code (the "ROFR").

The letter of intent must specify the ROFR Purchase Price and identify any amounts due in excess of the minimum purchase price permissible under Section42(i)(7)(B) of the Code.

In addition, the letter of intent must provide that the operating or partnership agreement (the "Agreement") of the owner of the project (the "Owner") will:

a) grant the not-for-profit organization the ROFR at the ROFR Purchase Price and provide that all amounts to be included in the ROFR Purchase Price will be calculated in accordance with the Agreement;

b) provide that the general partner of the Owner (the "General Partner") may elect to do any of the following:

    (i) subject to the consent of one or more limited partners of the owner (each, a "Limited Partner"), which consent may not be unreasonably withheld, conditioned or delayed, sell the project to the ROFR grantee in connection with the ROFR grantee's exercise of the ROFR;

    (ii) at its discretion, without the consent of any Limited Partner, sell the project to the ROFR grantee in connection with the ROFR grantee's exercise of the ROFR following the General Partner's receipt of a bona fide third party offer to purchase the project; or

    (iii) offer the project for sale publicly at any time following the expiration of the tax credit compliance period and thereafter accept an offer from the highest bidder to purchase the project, as long as the sale price is not less than the minimum purchase price permissible under Section 42(i)(7)(B) of the Code, and provided that such acceptance is subject to the ROFR grantee's rights to exercise the ROFR and purchase the project at the ROFR Purchase Price;

c) authorize and direct the General Partner to execute all documents necessary to effect the sale of the project pursuant to the ROFR;

d) provide that, unless prohibited by binding legal precedent, the Limited Partners waive all legal rights to challenge (i) the sale of the project by the General Partner to the ROFR grantee even if the ROFR grantee is affiliated with the General Partner and (ii) the General Partner's acceptance of an offer from the highest bidder in response to the General Partner's public offer of the project for sale and/or the exercise of the ROFR by the ROFR grantee after any such acceptance;

e) provide that the term of the ROFR shall expire not less than 36 months after the General Partner's public offer of the project for sale;

f) provide that in the event that Section 42(i)(7) of the Code is amended to permit a qualified not-for-profit organization to hold a purchase option after the expiration of the tax credit compliance period, and only to the extent permitted under such revised Section 42(i)(7), the ROFR grantee shall be entitled to purchase the project, or at its option, all of the interests in the Owner, in either case at the ROFR Purchase Price, in lieu of exercising the ROFR;

g) provide that the ROFR will not be adversely affected or limited by any other rights of the Limited Partners, or any owner of any interest in any Limited Partner, such as forced sale rights, and there are no conditions to the exercise of the ROFR except as explicitly identified in the Agreement or required by binding legal precedent applicable to Section 42(i)(7) of the Code; and

h) prohibit, without the prior written consent of HPD, any amendment that would modify any term or condition related to the ROFR. A true and complete copy of the Agreement shall be provided to HPD as of both the closing of the financing for the construction of the project and the submission of an application for a Form 8609, in each case for HPD's review to confirm that the Agreement includes the terms set forth in the letter of intent or terms that HPD determines are equivalent

A true and complete copy of the operating or partnership agreement of the owner of the project shall be provided to HPD as of both the closing of the financing for the construction of the project and the submission of an application for a Form 8609, in each case for HPD's review to confirm that such agreement includes the terms set forth in the letter of intent or terms that HPD determines are equivalent.

Qualified Contracts in the Housing Credit Program

Recent survey research shows us that thousands of Housing Credit units are being lost annually as a result of the Qualified Contract (QC) provision in the program's underlying statute, by which owners can "opt out" of use restrictions during the 15-year extended use period if a state Housing Finance Agency is unable to identify a Qualified Buyer.

As of the end of calendar year 2021, more than 100,000 Housing Credit homes have been lost from the affordable housing inventory because of Qualified Contracts.

Recognizing this potential loophole in the Housing Credit program, NCSHA's Recommended Practices state that "Agencies should require all applicants to waive their right to submit a qualified contract as a condition of receiving an allocation. The waiver requirement should apply to applicants for both 9 percent Credits and 4 percent Credits financed with tax-exempt multifamily bonds."[1]

WHAT IS THE QUALIFIED CONTRACT PROVISION?

Housing Credit properties are subject to a minimum 30-year affordability commitment: a 15-year initial compliance period, plus a minimum 15-year extended use period per a deed restriction recorded against the property. A number of states either require or incentivize longer affordability periods. The qualified contract provision was added to Section 42 of the Internal Revenue Code in 1989 as a compromise measure designed to prevent owners from obtaining windfall returns from appreciation in the value of the Housing Credit property. The contract price limiting the growth in the value of the property to the rise in inflation on the equity contribution was thought to be a significant limit on returns. However, because the statutory formula price is typically in excess of market value, the provision has emerged as a means of enabling owners to remove properties from the extended low-income use commitment, thus permitting higher rents and likely displacement of low-income residents. As owners raise rents after completing the qualified contract process, there is a loss of affordable housing.

Research conducted by the National Housing Trust (NHT) shows that many states already require or incentivize applicants to waive their right to a QC, either indefinitely or for a specified number of years, in both the competitive 9% and non-competitive 4% Housing Credit programs, ensuring that properties remain affordable.

[1] "Recommended Practices in Housing Credit Administration," National Housing of State Housing Agencies, December 2017.

NATIONAL HOUSING TRUST
1130 30TH ST NW
WASHINGTON DC 20007

202-333-8931
www.nationalhousingtrust.org

In the competitive 9% Housing Credit program*:

- At least 32 states or jurisdictions require applicants to waive their right to a QC.
- At least 16 states or jurisdictions provide an incentive for applicants to waive their right to a QC.

In the non-competitive 4% Housing Credit program:**

- At least 13 states require applicants to waive their right to a QC;
    - Of these, all 13 require an applicant to waive their right for 15+ years.
- At least 4 states provide an incentive*** for applicants to waive their right to a QC*;
    - Of these, 1 state incentivizes waiving the right for 15+ years.
    - Of these, 3 states incentivize waiving the right for fewer than 15 years.

* Statistics for the 9% program were updated in January 2022
** Statistics for the 4% program were updated in January 2018
*** While the 4% Housing Credit program is non-competitive, some states require that developers seeking the Credit score a minimum number of points in the scoring process used to rank applications for the 9% program. In some of these cases, developers, in earning the minimum required score to receive 4% Credits, may choose to claim points available for waiving their right to a QC.

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QUALIFIED CONTRACT WAIVERS IN QAPS BY STATE (9% PROGRAM):

State	QC Waiver Required	QC Waiver Incentive
AK		X
AL	X	
AR		X
AZ		X
CA	X	
CO	X	
CT	X	
DC	X	
DE	X	
FL	X	
GA		X
HI	X	
IA		X
ID		X
IL	X	
Chicago	X	
IN	X	
KS	X	
KY	X	
LA	X	
ME	X	
MI	X	
MN	X	
MS		X

State	QC Waiver Required	QC Waiver Incentive
MT		X
NC	X	
ND	X	
NE		X
NH	X	
NJ		X
NM	X	
NV	X	
NY	X	
NYC	X	
OH	X	
OK	X	
OR	X	
PA		X
RI	X	
SC		X
SD	X	
TN		X
UT	X	
VA	X	
VT	X	
WA		X
WI		X
WV		X

States that do not specify a requirement or provide incentive to waive a Qualified Contract: MA, MD, MS, TX, WY
Note: The Montana Board of Housing (MBOH) does not require or provide incentive to waive a Qualified Contract, however, MBOH may reject any Application containing a Development Team member involved in a request for a qualified contract in Montana.