A wide-angle photograph of the New York City skyline at dusk, viewed from across a body of water. The sky is a deep blue, and the city lights are beginning to glow. The water in the foreground is dark with gentle ripples. A white rectangular box is centered over the lower part of the skyline.

THE USINGER LAW PRACTICE PLLC

UGP

How and Why Condominiums are used in Affordable Housing Transactions

NYSAFAH 2022 NYC Summer Conference

3 Reasons:

1. To allow ownership flexibility
2. To structure compliance with program requirements
3. To combine otherwise incompatible subsidy and tax credit programs

#1: Ownership Flexibility

Common reasons for wanting separate ownership within one building

1. **Ground Floor Commercial Space** – developer may want to sell the unit to a third-party post-conversion
2. **Community Facility Space** – nonprofit partner may want to own its space
3. **Religious Institution Use** – A church or synagogue may contribute land in return for the construction of a new worship space
4. **Mixed Income Projects** – Separating cash flow distributions (and exit scenarios) for each of the LIHTC and non-LIHTC units
5. **Parking Facilities**, other uses

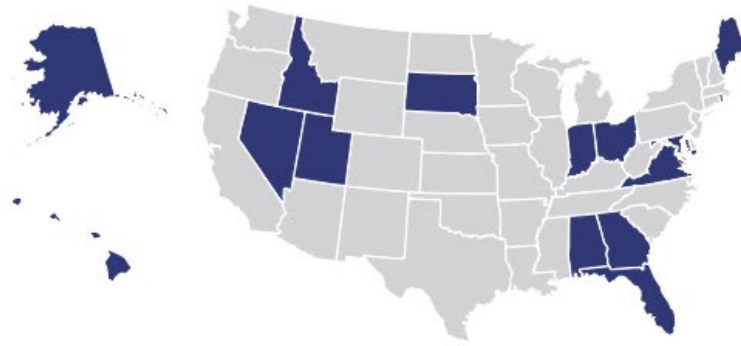


#2: Structuring & Program Compliance

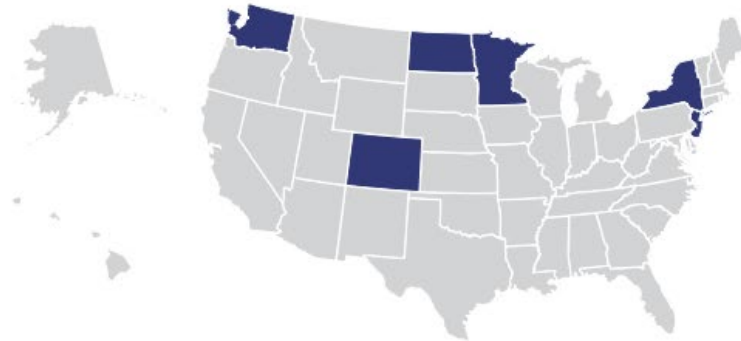
An Example: Volume Cap

States Using More Than 50 Percent of the Private Activity Bond Cap

States using
50 percent to 74 percent
of their 2018 PAB cap



States using
75 percent to 100 percent
of their 2018 PAB cap



States using
more than 100 percent
of their 2018 PAB cap



Source: Council of Development Finance Agencies (CDFA)



The 50% test

In order for a low income building to be eligible for 4% LIHTCs....

50% or more of the aggregate cost basis of any building and the land on which that building is located must be financed with tax-exempt bonds issued **under the volume cap rules of Code Section 146.**

What can affect satisfying the 50% Test?

Sources:

- Taxable bonds
- Subsidy debt
- Private bank debt
- Deferred development fee in excess of what is allowable
- Grants

Uses:

- Costs associated with market-rate units,
- commercial space,
- tenant improvement costs, and/or
- other non-residential structures

How can separating incompatible costs and uses with the condominium help with the 50% test?

Treasury Regulation Section 1.42-1T (f)

Exception to housing credit allocation requirement -

(1) Tax-exempt bond financing -

(i) ***In general.*** No housing credit allocation is required in order to claim a credit under section 42 with respect to that portion of the eligible basis (as defined in section 42(d)) of **a qualified low-income building** that is financed with the proceeds of an obligation described in section 103(a) (“tax-exempt bond”) which is taken into account for purposes of the volume cap under section 146.

(ii) ***Determining use of bond proceeds.*** For purposes of determining the portion of proceeds of an issue of tax-exempt bonds used to finance (A) the eligible basis of a qualified low-income building, and (B) the aggregate basis of the building and the land on which the building is located, **the proceeds of the issue must be allocated in the bond indenture** or a related document (as defined in § 1.103-13(b)(8)) in a manner consistent with the method used to allocate the net proceeds of the issue for purposes of determining whether 95 percent or more of the net proceeds of the issue are to be used for the exempt purpose of the issue. ***

What is a “building”?

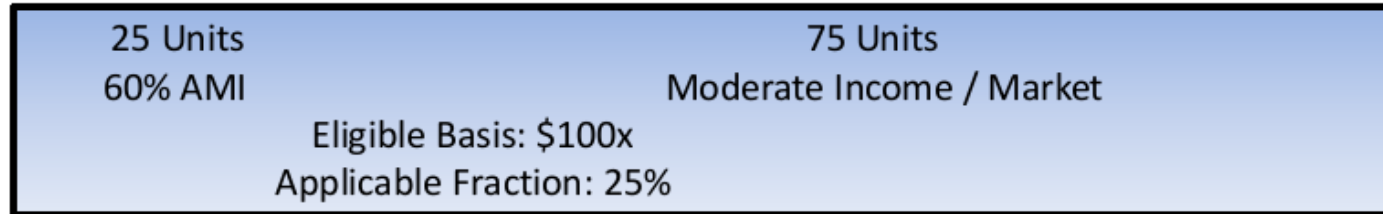
Treasury Regulation §1.103-8(b) (8) (IV) defines a "building or structure" to mean, generally, a "discrete edifice or other man-made construction consisting of an independent foundation, outer walls, and roof."

Treasury Pending Regulation Notice 88-91 explains that the term "qualified low-income building" includes residential rental property that is either an apartment building, a single family dwelling, a townhouse, a row-house, a duplex, or a condominium.

So....

- Separate condo units allow for a LIHTC project be treated separately from other non-affordable or non-residential spaces.
- Ineligible project financing sources can be allocated to the other non-affordable or non-residential spaces.
- The issuing agency can limit the use of its volume cap to the minimum needed to allow the project to qualify for LIHTCs

Illustration of Bifurcated Structure (NYC Example)



Volume Cap: $50\% \times \$100x = \underline{\$50x}$
Qualified Basis: $25\% \times \$100x = \underline{\$25x}$

Problem



Volume Cap: $50\% \times \$25x = \underline{\$12.5x}$
Qualified Basis: $100\% \times \$25x = \underline{\$25x}$

Solution

**ABA Forum on Affordable Housing
and Community Development Law**

Housing Bonds 101: Deep Dive
October 29, 2020

Another Example: Income Averaging

Internal Revenue Code Section 42

(g) Qualified low-income housing project. For purposes of this section —

(1) In general. The term “qualified low-income housing project” means any project for residential rental property if the project meets the requirements of ~~subparagraph (A) or (B)~~ subparagraph (A), (B), or (C) whichever is elected by the taxpayer:

(A) 20-50 test. The project meets the requirements of this subparagraph if 20 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 50 percent or less of area median gross income.

(B) 40-60 test. The project meets the requirements of this subparagraph if 40 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income. Any election under this paragraph, once made, shall be irrevocable. For purposes of this paragraph, any property shall not be treated as failing to be residential rental property merely because part of the building in which such property is located is used for purposes other than residential rental purposes.

(C) Average income test.—

(i) In general. The project meets the minimum requirements of this subparagraph if 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in such project are both rent restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit.

(ii) Special rules relating to income limitation. For purposes of clause (i)—

(I) Designation. The taxpayer shall designate the imputed income limitation of each unit taken into account under such clause.

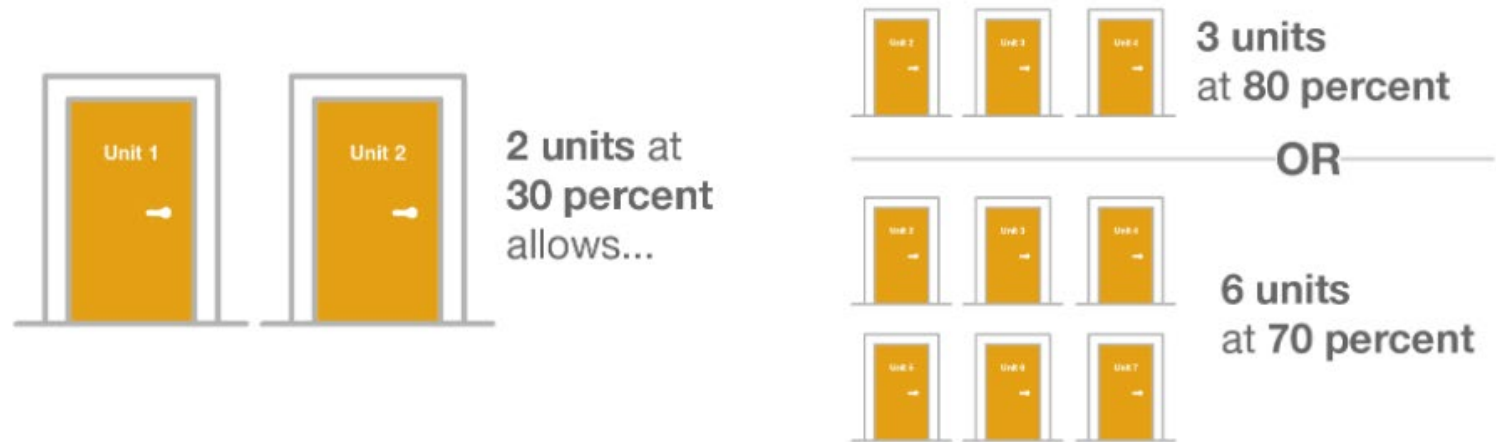
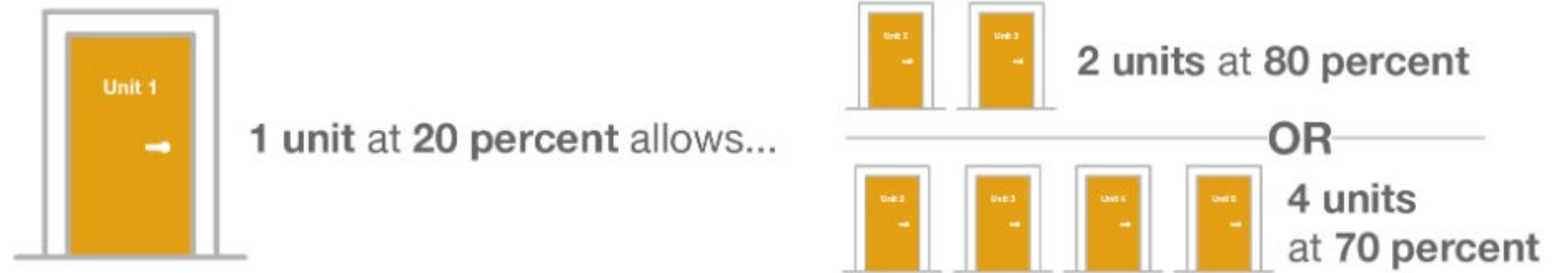
(II) Average test. The average of the imputed income limitations designated under subclause (I) shall not exceed 60 percent of area median gross income.

(III) 10-percent increments. The designated imputed income limitation of any unit under subclause (I) shall be 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of area median gross income.

The Minimum Set Aside for LIHTCs

Note: The 25/60 test applies in lieu of the 40/60 test in New York City.

How Income Averaging Works



Source: Novogradac & Company LLP

§ 1.42-15 Available unit rule.

(b) General section 42(g)(2)(D)(i) rule. Except as provided in **paragraph (c)** of this section, notwithstanding an increase in the income of the occupants of a low-income unit above the applicable income limitation, if the income of the occupants initially met the applicable income limitation, and the unit continues to be rent-restricted -

(1) The unit continues to be treated as a low-income unit; and

(2) The unit continues to be included in the numerator and the denominator of the ratio used to determine whether a project satisfies the applicable minimum set-aside requirement of section 42(g)(1).

(c) Exception. A unit ceases to be treated as a low-income unit if it becomes an over-income unit and a nonqualified resident occupies any comparable unit that is available or that subsequently becomes available in the same low-income building. In other words, the owner of a low-income building must rent to qualified residents all comparable units that are available or that subsequently become available in the same building to continue treating the over-income unit as a low-income unit.

* Note: While the available unit rule applies on a building basis for tax credit purposes, it applies on a project basis for tax-exempt bond purposes.

2022 New York City Area Affordable Monthly Rents

How do I use this chart?

1. Find your percent of AMI in the chart above.
2. Locate your percent of AMI in this chart to see the *maximum* affordable rent for each apartment size listed in the column under "Unit Size."

Unit Size	30% AMI	40% AMI	50% AMI	60% AMI	70% AMI	80% AMI	90% AMI	100% AMI	120% AMI
Studio	\$700	\$934	\$1,167	\$1,401	\$1,634	\$1,868	\$2,101	\$2,335	\$2,800
One-bedroom	\$750	\$1,001	\$1,251	\$1,501	\$1,751	\$2,002	\$2,252	\$2,502	\$3,002
Two-bedroom	\$900	\$1,201	\$1,501	\$1,801	\$2,101	\$2,402	\$2,702	\$3,002	\$3,602
Three-bedroom	\$1,040	\$1,387	\$1,734	\$2,081	\$2,428	\$2,775	\$3,121	\$3,468	\$4,161

Why the “Next”
Available Unit
Rule Matters

Source: <https://www1.nyc.gov/site/hpd/services-and-information/area-median-income.page>

Treasury Regulation § 1.42-15 Available unit rule.

(b) General section 42(g)(2)(D)(i) rule. Except as provided in **paragraph (c)** of this section, notwithstanding an increase in the income of the occupants of a low-income unit above the applicable income limitation, if the income of the occupants initially met the applicable income limitation, and the unit continues to be rent-restricted -

(1) The unit continues to be treated as a low-income unit; and

(2) The unit continues to be included in the numerator and the denominator of the ratio used to determine whether a project satisfies the applicable minimum set-aside requirement of section 42(g)(1).

(c) Exception. A unit ceases to be treated as a low-income unit if it becomes an over-income unit and a nonqualified resident occupies any comparable unit that is available or that subsequently becomes available in the same low-income building. In other words, the owner of a low-income building must rent to qualified residents all comparable units that are available or that subsequently become available in the same building to continue treating the over-income unit as a low-income unit. ***

(e) Available unit rule applies separately to each building in a project. In a **project** containing more than one low-income building, the available unit rule applies separately to **each building**.

What is a “building”?

Treasury Regulation §1.103-8(b) (8) (IV) defines a "building or structure" to mean, generally, a "discrete edifice or other man-made construction consisting of an independent foundation, outer walls, and roof."

Treasury Pending Regulation Notice 88-91 explains that the term "qualified low-income building" includes residential rental property that is either an apartment building, a single family dwelling, a townhouse, a row-house, a duplex, or a condominium.

What is a “project”?

Treasury Regulation § 1.103-8(b)

Residential rental project.

(i) ***In general.*** A residential rental project is a building or structure, together with any functionally related and subordinate facilities, containing one or more similarly constructed units -

(a) Which are used on other than a transient basis, and

(b) Which satisfy the requirements of paragraph (b)(5)(i) [occupancy requirements] of this section and are available to members of the general public in accordance with the requirement of paragraph (a)(2) [public use requirements] of this section.

(ii) ***Multiple buildings.***

(a) Proximate buildings or structures (hereinafter “buildings”) which have similarly constructed units are treated as **part of the same project** if they are owned for Federal tax purposes by the same person and if the buildings are financed pursuant to a common plan.

(b) Buildings are proximate if they are located on a single tract of land. The term “tract” means any parcel or parcels of land which are contiguous except for the interposition of a road, street, stream or similar property. Otherwise, parcels are contiguous if their boundaries meet at one or more points.

(c) A common plan of financing exists if, for example, all such buildings are provided by the same issue or several issues subject to a common indenture.

**Low-Income Housing Credit Allocation
and Certification**

► Go to www.irs.gov/Form8609 for instructions and the latest information.

OMB No. 1545-0988

Part I Allocation of Credit

Check if: ☐ Addition to Qualified Basis ☐ Amended Form

A Address of **building** (do not use P.O. box) (see instructions)

B Name and address of **housing credit agency**

C Name, address, and TIN of **building owner** receiving allocation

D Employer identification number of agency

E Building identification number (BIN)

TIN ►

1a Date of allocation ►	b Maximum housing credit dollar amount allowable	1b	
2 Maximum applicable credit percentage allowable (see instructions)		2	%
3a Maximum qualified basis		3a	
b Check here ► <input type="checkbox"/> if the eligible basis used in the computation of line 3a was increased under the high-cost area provisions of section 42(d)(5)(B). Enter the percentage to which the eligible basis was increased (see instructions)		3b	1 %
4 Percentage of the aggregate basis financed by tax-exempt bonds. (If zero, enter -0-.)		4	%
5a Date building placed in service ►			
b Check here ► <input type="checkbox"/> if the date of allocation on line 1a is in calendar year 2021 or 2022 and the building is located in a qualified disaster zone (see instructions).			
6 Check the boxes that describe the allocation for the building (check those that apply):			
a <input type="checkbox"/> Newly constructed and federally subsidized	b <input type="checkbox"/> Newly constructed and not federally subsidized	c <input type="checkbox"/> Existing building	
d <input type="checkbox"/> Sec. 42(e) rehabilitation expenditures federally subsidized	e <input type="checkbox"/> Sec. 42(e) rehabilitation expenditures not federally subsidized		
f <input type="checkbox"/> Allocation subject to nonprofit set-aside under sec. 42(h)(5)			

Signature of Authorized Housing Credit Agency Official—Completed by Housing Credit Agency Only

Under penalties of perjury, I declare that the allocation made is in compliance with the requirements of section 42 of the Internal Revenue Code, and that I have examined this form and to the best of my knowledge and belief, the information is true, correct, and complete.

Signature of authorized official	Name (please type or print)	Date
----------------------------------	-----------------------------	------

Part II First-Year Certification—Completed by Building Owners with respect to the First Year of the Credit Period

7 Eligible basis of building (see instructions)	7	
8a Original qualified basis of the building at close of first year of credit period	8a	
b Are you treating this building as part of a multiple building project for purposes of section 42 (see instructions)?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
9a If box 6a or box 6d is checked, do you elect to reduce eligible basis under section 42(i)(2)(B)?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
b For market-rate units above the average quality standards of low-income units in the building, do you elect to reduce eligible basis by disproportionate costs of non-low-income units under section 42(d)(3)(B)?	<input type="checkbox"/> Yes <input type="checkbox"/> No	

Instructions for Form 8609

(Rev. February 2022)



Department of the Treasury
Internal Revenue Service

Low-Income Housing Credit Allocation and Certification

Line 8b. Each building is considered a separate project under section 42(g)(3)(D) unless, before the close of the first calendar year in the project period (defined in section 42(h)(1)(F)(ii)), each building that is (or will be) part of a multiple building project is identified by attaching the statement described below.

The statement must be attached to this Form 8609 and include:

- The name and address of the project and each building in the project,
- The BIN of each building in the project,
- The aggregate credit dollar amount for the project, and
- The credit allocated to each building in the project.

Two or more qualified low-income buildings may be included in a multiple building project only if they:

- Are located on the same tract of land (including contiguous parcels), unless all of the dwelling units in all of the buildings being aggregated in the multiple building project are rent restricted units (see section 42(g)(7));
- Are owned by the same person for federal tax purposes;
- Are financed under a common plan of financing; and
- Have similarly constructed housing units.

A qualified low-income building includes residential rental property that is an apartment building, a single-family dwelling, a town house, a row house, a duplex, or a condominium.

The Solution

3 Condo Units:

Low Income Unit (60% AMI and below)

Middle Income Unit (60% to 80% AMI)

Market Rate Unit (80% AMI and above)

And tax counsel said.....

“The designation of a unit in an income band should not change with the tenant’s income, and an increase in such tenant’s income should not cause the project to be out of compliance.

The Code allows a taxpayer to aggregate separate buildings to be treated as **a single project** for purposes of the minimum set-aside test.

Each of the condominium units should be **treated as separate buildings**, but the company can **elect** to treat each of these separate buildings as a single project.

Each of the low-income buildings should be treated as being 100% low-income, and, as a result, that the “available unit rule” should not apply.”

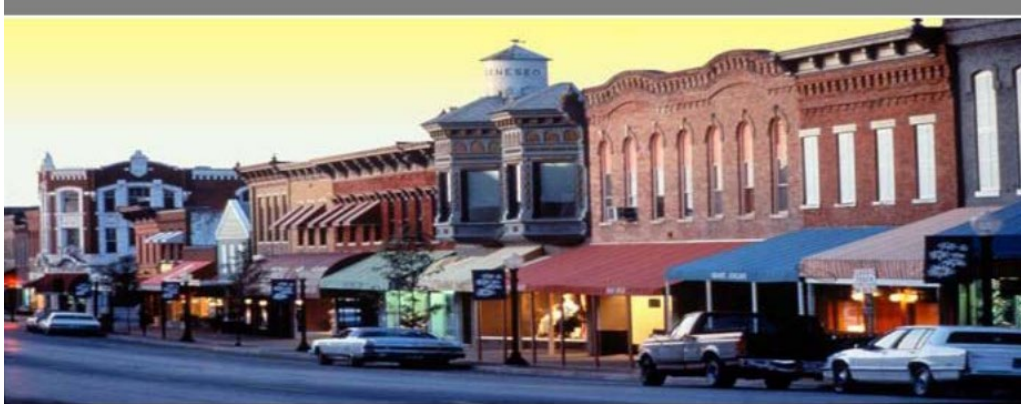
#3: Combining Incompatible Programs

New Market Tax Credits and Low Income Housing Tax Credits Don't Mix

LIHTC: A LIHTC project's eligible basis is calculated only upon the portion of a project that is "residential rental property".

NMTC: The rental of improved real estate qualifies as a NMTC eligible business only if the property is not depreciable as "residential rental property".

Both programs refer to Section 168(e)(2)(A) of the IRC which defines residential rental property as "**any building or structure if 80 percent or more of the gross rental income from such building or structure is rental income from dwelling units.**"

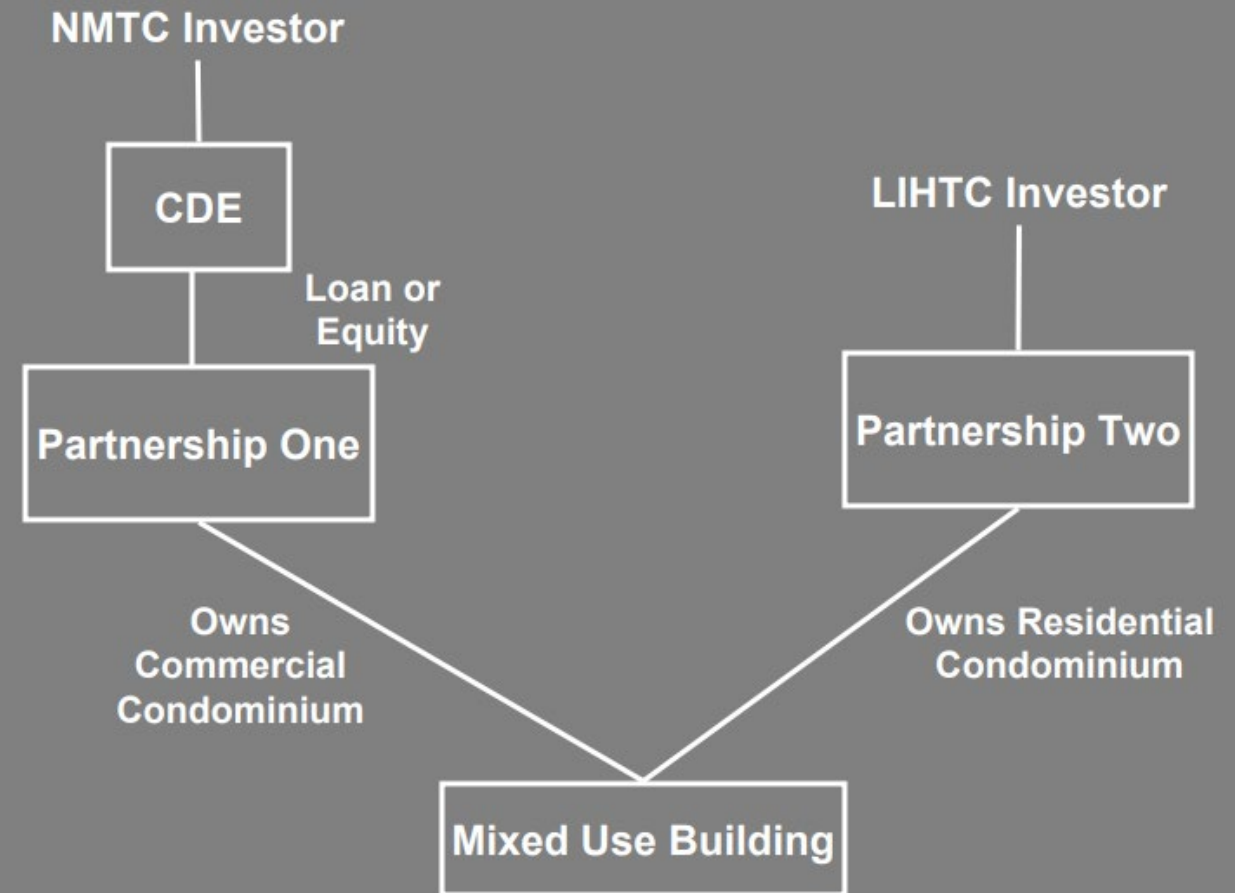


Combining NMTCs with LIHTCs

NH&RA 2008 Summer Institute

NIXON PEABODY_{LLP}
ATTORNEYS AT LAW

Condo Structure: NMTCs and LIHTCs



4% LIHTC Bond-Financed and 9% LIHTC Allocation Projects Don't Mix

I.R.C. § 42(b)(1)(B) Method Of Prescribing Percentages — The percentages prescribed by the Secretary for any month shall be percentages which will yield over a 10-year period amounts of credit under subsection (a) which have a present value equal to—

- (i) — 70 percent of the qualified basis of a new **building** which **is not federally subsidized** for the taxable year, and
- (ii) — 30 percent of the qualified basis of a **building** not described in **clause (i)**.

I.R.C. § 42(i)(2) Determination Of Whether Building Is Federally Subsidized

(A) In General — Except as otherwise provided in this paragraph, for purposes of subsection (b)(1), **a new building shall be treated as federally subsidized** for any taxable year **if**, at any time during such taxable year or any prior taxable year, **there is or was outstanding any obligation the interest on which is exempt from tax under section 103** the proceeds of which are or were used (directly or indirectly) with respect to such building or the operation thereof.

(B) Election To Reduce Eligible Basis By Proceeds Of Obligations — A tax-exempt obligation shall not be taken into account under **subparagraph (A)** if the taxpayer elects to exclude from the eligible basis of the building for purposes of subsection (d) the proceeds of such obligation.



bellwetherenterprise 🏠 · 2 days ago · 2 min read



Bellwether Enterprise closes on unique LIHTC structure

Updated: 1 day ago

Vesta Corporation and its nonprofit partner, Lifelong Learning Corporation, are redeveloping Cleveland's historical Henry W. Longfellow elementary school into 80 units of affordable senior housing. The Ohio Housing Finance Agency (OHFA) awarded the project both 4% and 9% low-income housing tax credits (LIHTC), and these credits were purchased by Key Community Development Corporation. While twinning tax credit projects with both credits has become a trend in affordable housing finance, what makes this project innovative is its single FHA mortgage.



In most twinning deals, the 4% and 9% credits are owned by two separate legal entities as the underlying investors usually have different ownership in each. This double ownership structure leads to separate mortgages. While having one investor, KCDC, purchase both the 4% and 9% credits made this transaction a bit simpler, the structure could be replicated for multiple investors too.

For Longfellow, the whole 221(d)4 loan is \$3.6 million. Separating it into two loans would have been cost prohibitive and created a development gap. In order to make a permanent mortgage work, **the solution was to split the parcel into 3 condominium units**. One unit was the historical school building where 30 units of 9% LIHTC housing will be developed. The other two condominiums were a split in the new construction building. One condominium will be 28 units of 9% housing and the other 22 units of 4% housing. In order to properly segregate the basis for each tax credit allocation, the two 9% condominiums will share one building identification number (BIN) and the 4% condominium will have its own BIN. The FHA mortgage will encumber all 3 condominium units as well as the land.

It is creativity like this, that will help us build new affordable units and use all of our financial resources to their maximum potential.

For more information on the Longfellow structure or other unique structures, please contact Tony Love at tony.love@bwe.com.

Source: <https://www.bwe.com/post/bellwether-enterprise-closes-on-unique-lihtc-structure>

80/20 Projects and LIHTC Investments Don't Mix

The Problem with Syndicating Tax Credits on 80/20 Projects: Ownership

To qualify for LIHTCs, an investor must have an ownership interest in the project.

Valuable 80/20 project owners are not going to sell 99.99% of their ownership interests in a project simply to generate tax credits on the 20% of units that are low income.

Why not just use the condo structure? If a “condominium unit” is a “building”, is it still a “project” if each “building” has separate ownership?

IRS Private Letter Ruling
PLR-153101-04

Question: Will ownership by multiple taxpayers of a multi-family housing project cause the project to fail to qualify as a qualified residential rental project under § 142(d) of the Internal Revenue Code (the “1986 Code”)

A building or structure, under § 1.103-8(b)(8)(iv), is defined as a discrete edifice or other man-made construction consisting of an independent foundation, outer walls, and roof. All residential units of the Project will be similarly constructed, and the Low-Income Units and the Market-Rate Units will not be separated but rather will be interspersed throughout the Building. Finally, as a further indication that the Low-Income Units and the Market-Rate Units are part of **a single, integrated project**, all residents of the two set of units will share and use on an equal basis the parking garage and parking lot, as well as all Building entrances, lobbies and elevator banks, and Project common areas.

Conclusion

Based on the facts and representations submitted, **we conclude that ownership of the Project by Partnership A and Partnership B does not cause the Project to fail to qualify as a qualified residential rental project** under §142(d).

Our Proprietary Structure

LICENSED BY RKCM – PATENT PENDING



Bifurcating the subject mixed-income project (a “Project”) by implementing a condominium regime whereby the low-income units (on the one hand) and the market-rate and moderate-income units (on the other hand) are organized into separate condominium units allows for the syndication to investors of LIHTC from the affordable-units without sacrificing ownership, control, depreciation deductions, or the economics of the remainder of the Project. RKCM’s proprietary structure has been approved by most major multifamily lenders and many of the largest housing agencies, and will not disrupt financing, tax abatements, or regulatory restrictions.

An investment partnership sponsored by RKCM (the “Investment Partnership”) will acquire a membership interest in the LIHTC Syndication Entity. The Investment Partnership will contribute cash in exchange for a 99.99% share of the LIHTC and losses generated by the LIHTC Syndication Entity.

For more information:

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