



**Massachusetts Department of Housing and Community Development
Division of Housing Stabilization**

To: DHCD Field Staff
From: Robert Pulster, Associate Director *Robert Pulster*
Date: September 17, 2012
RE: Housing Stabilization Notice 2012-11, Guidance on whether to consider LIHTC units as "subsidized"

Introduction

This Housing Stabilization Notice (HSN) discusses whether, for the purposes determining EA eligibility, a housing unit subject to rent restrictions under the Low-Income Housing Tax Credit (LIHTC), 26 U.S.C. § 42, should be considered "subsidized" housing pursuant to 760 C.M.R. § 67.06 (2) (c). In summary:

- LIHTC units are considered subsidized for Emergency Assistance "EA" purposes if the tenant's portion of the rent is less than 50% of the tenant's household income.

This HSN is also applicable to determining whether housing is subsidized for purposes of EA eligibility on the basis of excused fault eviction for nonpayment of rent. 760 C.M.R. 67.06 (1) (A) 3. d. (iii). In accordance with HSN 2012-09, Guidance on Meaning of Fault in Fires, Floods, Natural Disasters, and "No-Fault" Evictions, evictions from subsidized housing do not qualify as excused fault evictions under the subcategory of nonpayment of rent due to loss of income.

Discussion

Under 760 C.M.R. § 67.06 (2), "A household shall not be eligible for EA temporary emergency shelter benefits if it became homeless: . . . (c) because it abandoned in the preceding year, without good cause, public and/or subsidized housing, or was evicted from public and/or subsidized housing for nonpayment of rent or fraudulent behavior"

"Subsidized," for the purposes of determining EA eligibility, has a program-specific definition that clearly includes Section 8/Housing Choice and Massachusetts Rental Voucher Program (MRVP) rental assistance. Thus far, however, it has been unclear what other forms of governmental rental assistance are considered subsidized for purposes of 760 C.M.R. § 67.06 (2) (c). The fact that the federal Department of Housing & Urban Development refers to LIHTC units in its program literature as "subsidized" alone is not a sufficient basis to determine that such a unit is "subsidized" under the EA eligibility definition. The broad definition of "subsidy" under Massachusetts General Laws, c. 40B, § 20, is useful in understanding the meaning of "subsidy" as used in 760 C.M.R. § 67.06 (2) (c).¹

¹ G.L. c. 40B, § 20 defines "Low or moderate income housing" to include *any* housing subsidized by the federal or state government under *any* program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization.

LIHTC rents are not calculated based on family/household-specific income-based criteria. Area median gross income (AMI), household size, and expected occupancy levels form the basis of a LIHTC rental determination. LIHTC rents are set once a year, and stay at the same rate even if there are changes in the family's income. LIHTC rents are not limited to a certain percentage of the family's income.

In most other "units" which are considered "subsidized" for EA eligibility purposes, such as Section 8/Housing Choice or MRVP, the rent is determined based on the actual family composition and income, without respect to the unit size. The rents for these types of units are adjusted as the family's income rises or falls. The rent for these types of units cannot exceed a specific percentage of that family's income and is therefore by definition affordable to the family. The subsidy in the case of LIHTC may be indirect, in that the property owner receives a tax benefit in exchange for offering the LIHTC unit for below market rents, and not directly in a regular reimbursement payment. Historic EA program practice has, nevertheless, considered LIHTC and other similar governmentally assisted project-based rental housing to be "subsidized," even if rent is not calculated solely as a percentage of income, if the adjusted rent payable by the family is affordable. The question is what level of rent is affordable for these purposes.

In a LIHTC unit, a family could conceivably end up paying rent that is well above its ability to pay, even if the rent is set at below market rates. In some circumstances, LIHTC rents could make up a major percentage of the family's income, even though HUD considers the LIHTC unit to be "subsidized."

760 C.M.R. § 5.08 (1) (e) provides guidance on what rent levels are sustainable for a family. The regulation discusses eligibility for public housing. Usually, a history of nonpayment of rent would disqualify a family for public housing. However, under 760 C.M.R. § 5.08 (1) (e), an applicant will not be disqualified by a history of nonpayment if his or her rent accounted for 50% or more of the family's income. Because of the way in which LIHTC rents are set, a situation could occur when a family in a LIHTC unit is paying a rent burden in excess of 50% of the family's income. In that case, EA would not consider the LIHTC unit affordable to the family and therefore, although technically subsidized in some sense, not "subsidized" as intended by § 67.06 (2) (c).

Conclusion

For the purpose of determining whether a family has been evicted from a subsidized unit for EA purposes, LIHTC units should be considered subsidized *unless* the rental amount exceeds 50% of the family's income.