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Dated: February 28, 2007.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4889-N-09]

Statutorily Mandated Designation of Difficult Development Areas and Qualified Census Tracts for Section 42 of the Internal Revenue Code of 1986: Revision of Definition of Effective Date

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: This notice revises the definition of “effective date” in a notice published in the **Federal Register** on September 28, 2006, designating “Difficult Development Areas” (DDAs) and “Qualified Census Tracts” (QCTs) for purposes of the Low-Income Housing Tax Credit (LIHTC) under section 42 of the Internal Revenue Code of 1986 (the Code) (26 U.S.C. 42). HUD is responsible for designating DDAs and QCTs annually. The September 28, 2006, notice provided a definition of “effective date” that is revised by this notice to define “multiphase” LIHTC projects and to specify how such projects are to be treated when DDA or QCT designations change between phases.

FOR FURTHER INFORMATION CONTACT: For questions on how areas are designated, on geographic definitions, and on the new provisions for multiphase projects, contact Michael K. Hollar, Economist, Economic Development and Public Finance Division, Office of Policy Development and Research, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-6000, telephone (202) 402-5878, or send an e-mail to Michael_K_Hollar@hud.gov. For specific legal questions pertaining to Section 42, contact Branch 5, Office of the Associate Chief Counsel, Passthroughs and Special Industries, Internal Revenue Service, 1111

Constitution Avenue, NW., Washington, DC 20224, telephone (202) 622-3040. For questions about the “HUB Zones” program, contact Michael P. McHale, Assistant Administrator for Procurement Policy, Office of Government Contracting, Small Business Administration, 409 Third Street, SW., Suite 8800, Washington, DC 20416, telephone (202) 205-8885, fax (202) 205-7167, or send an e-mail to hubzone@sba.gov. A text telephone is available for persons with hearing or speech impairments at (202) 708-9300. (These are not toll-free telephone numbers.) Additional copies of this notice are available through HUD User at (800) 245-2691 for a small fee to cover duplication and mailing costs.

Copies Available Electronically: This notice and additional information about DDAs and QCTs are available electronically on the Internet at <http://www.huduser.org/datasets/qct.html>.

SUPPLEMENTARY INFORMATION:

This Document

This notice revises the definition of “effective date” in a notice published in the **Federal Register** on September 28, 2006 (71 FR 57234). That notice designated DDAs and QCTs for purposes of the LIHTC, as governed by section 42 of the Code (Section 42). HUD is responsible for designating DDAs and QCTs annually, and, at this time, is revising the definition of “effective date” provided in the September 28, 2006, notice (see 71 FR 57238) to define “multiphase” LIHTC projects and specify how such projects are to be treated when DDA or QCT designations change between phases. In addition, this notice clarifies what is meant by “certified in writing” for purposes of demonstrating compliance with effective dates for DDA and QCT designations. This notice does not change the designations of DDAs and QCTs in the September 28, 2006, notice.

Background

The U.S. Department of the Treasury (Treasury) and its Internal Revenue Service (IRS) are authorized to interpret and enforce the provisions of the Internal Revenue Code (the Code), including the LIHTC found at Section 42 of the Code. The requirement for HUD to designate DDAs and QCTs is found in Section 42(d)(5)(C) of the Code. State and local LIHTC-allocating agencies are responsible for allocating LIHTC to eligible projects according to approved Qualified Allocation Plans (QAPs). Most LIHTC-allocating agencies include in their QAPs a limitation on the amount of LIHTC that may be awarded to a particular applicant,

project, and/or location in any year. When applicants plan LIHTC-financed developments that would require amounts of LIHTC in excess of the individual allocation limits defined in the applicable QAP (or in smaller states, that are larger than the annual per capital credit allocation authority), they are forced to divide their developments, and their LIHTC applications, into phases over 2 or more years in order to obtain all the tax credits needed to complete the project. If such developments are located in DDAs or QCTs, there is a possibility that the location of the development may lose its DDA/QCT status after the first phase has been allocated LIHTC, but before subsequent phases have received their allocation or applied for LIHTC. As the financing for developments in these situations is generally predicated on the additional LIHTC available because of the developments’ location in DDAs/QCTs, the subsequent phases may become infeasible.

HUD’s intent in revising designations of DDAs and QCTs is to direct scarce public resources, in the form of additional LIHTC subsidy, to projects in those locations with the greatest need for this additional subsidy as defined by statute. However, HUD does not intend for these changes in designations to ultimately prevent the development of affordable housing, particularly in cases where developments have been required to be done in phases by LIHTC-allocating agency limits on annual allocation amounts to individual applicants.

HUD, therefore, is establishing in this notice a definition of “multiphase projects” and specifying how effective dates in its notices designating DDAs and QCTs are to be applied to such projects. In addition, HUD is clarifying what is meant by “certified in writing” for purposes of demonstrating compliance with effective dates for DDA and QCT designations.

Definition of “Multiphase Projects” and Applicability of Effective Date

For purposes of this notice, a “multiphase project” is defined as a set of buildings to be constructed or rehabilitated under the rules of the LIHTC and meeting the following criteria as certified in writing by the applicable LIHTC-allocating agency:

(1) In the first application for tax credit, the applicant must include an indication of the multiphase nature of the project (*i.e.*, the applicant’s intent to make future applications for LIHTC because of QAP limitations, or agency allocation authority ceilings, for buildings located on a site, as defined

below). For purposes of applications made in calendar year 2007 only, the preceding sentence will be met if an applicant who previously submitted a complete application for an earlier phase of a multiphase project (when such earlier phase was in a QCT or DDA), but failed to properly identify all phases of the multiphase project in the earlier application, submits a complete application for the present phase of the same project and all phases of the project occur on a contiguous parcel of land;

(2) At the time credits are allocated to the first phase of the project, there must be common control (ownership, leasehold, or option to buy or lease) of all land where the buildings shall be constructed or rehabilitated (the site);

(3) The aggregate amount of LIHTC applied for on behalf of, or that would eventually be allocated to, the buildings on the site exceeds the one-year limitation on credits per applicant, as defined in the QAP of the LIHTC-allocating agency, or the annual per capita credit authority of the LIHTC-allocating agency, and is the reason the applicant must request multiple allocations over 2 or more years; and

(4) All applications for LIHTC for buildings on the site are made in immediately consecutive years.

In the case of a multiphase project, the applicable DDA or QCT status of the site of the project for all phases of the project is that which was applicable when the project received its first allocation of LIHTC, as certified in writing by the LIHTC-allocating agency. For purposes of Section 42(h)(4)(B) of the Internal Revenue Code, the applicable DDA or QCT status of the site of the project for all phases of the project is that which was applicable when the building(s) in the first phase were placed in service or when the bonds were issued as certified in writing by the LIHTC-allocating agency.

For purposes of demonstrating that the effective date provisions in HUD DDA and QCT notices are met, "certified in writing" means that the LIHTC-allocating agency has provided a signed letter to the applicant stating that the LIHTC-allocating agency has found that the applicant meets the conditions set forth in HUD's notice.

Under this definition and application of effective date, a multiphase project located in a DDA or QCT when the first allocation of credit is made would be treated as if in a DDA or QCT throughout all phases of the project even if the DDA or QCT designation were subsequently changed. Under clause one of the definition, the applicant's first application notice must

include the multiphase nature of the project. If the applicant failed to identify all phases of the multiphase development in the first application, then solely for purposes of applications made in 2007, a project that otherwise meets clauses 2 through 4 will qualify if all phases of the development occur on a contiguous parcel of land.

Applications made by a different applicant after the DDA or QCT status of the site has been removed would not be eligible even if the applicants had obtained control of part of a site that would otherwise be eligible under the definition. Under clause 2 of the definition of a multiphase project, any buildings on land where control was obtained after the allocation of credit to the first phase of the project would not be eligible for treatment as in a DDA or QCT. Under clause 3 of the definition, if a project is built in phases to accommodate the capacity of the developer or some other reason, and not because the aggregate amount of credit required to fund the development exceeds annual limitations specified in the QAP (or the annual per capita credit authority of the LIHTC-allocating agency), the project is not eligible for continued treatment as in a DDA or QCT. Under clause 4, if an intervening year passes between application phases, the subsequent phase(s) of the project is (are) not eligible for continued treatment as in a DDA or QCT.

Revisions to the September 28, 2006, Notice

The section entitled "Effective Date" of the notice designating DDAs and QCTs for 2007 published in the **Federal Register** on September 28, 2006 (71 FR 57234), is hereby revised to read as follows:

For DDAs designated by reason of being in areas determined by the President to warrant individual or individual and public assistance from the federal government under the Stafford Act by reason of Hurricanes Katrina, Rita, or Wilma (the GO Zone Designation), the designation is effective:

(1) For housing credit dollar amounts allocated and buildings placed in service during the period beginning on January 1, 2006, and ending on December 31, 2008; or

(2) for purposes of Section 42(h)(4)(B) of the Internal Revenue Code, for buildings placed in service during the period beginning on January 1, 2006, and ending on December 31, 2008, but only with respect to bonds issued after December 31, 2005.

The 2007 lists of QCTs and the 2007 lists of DDAs that are not part of the GO *Zone Designation* are effective:

(1) For allocations of credit after December 31, 2006; or

(2) for purposes of Section 42(h)(4)(B) of the Code, if the bonds are issued and the building is placed in service after December 31, 2006.

If an area is not on a subsequent list of DDAs or QCTs, the 2007 lists are effective for the area if:

(1) The allocation of credit to an applicant is made no later than the end of the 365-day period after the submission to the credit-allocating agency of a complete application by the applicant, and the submission is made before the effective date of the subsequent lists; or

(2) for purposes of Section 42(h)(4)(B) of the Code, if:

(a) The bonds are issued or the building is placed in service no later than the end of the 365-day period after the applicant submits a complete application to the bond-issuing agency, and

(b) the submission is made before the effective date of the subsequent lists, provided that both the issuance of the bonds and the placement in service of the building occur after the application is submitted.

An application is deemed to be submitted on the date it is filed if the application is determined to be complete as certified in writing by the credit-allocating or bond-issuing agency. A "complete application" means that no more than *de minimis* clarification of the application is required for the agency to make a decision about the allocation of tax credits or issuance of bonds requested in the application.

In the case of a "multiphase project," the DDA or QCT status of the site of the project that applies for all phases of the project is that which applied when the project received its first allocation of LIHTC as certified in writing by the LIHTC-allocating agency. For purposes of Section 42(h)(4)(B) of the Internal Revenue Code, the DDA or QCT status of the site of the project that applies for all phases of the project is that which applied when the first of the following occurred as certified in writing by the LIHTC-allocating agency: (a) The building(s) in the first phase were placed in service or (b) the bonds were issued.

For purposes of this notice, a "multiphase project" is defined as a set of buildings to be constructed or rehabilitated under the rules of the LIHTC and meeting the following criteria as certified in writing by the applicable LIHTC-allocating agency:

(1) In the first application for tax credit, the applicant must include an indication of the multiphase nature of the project (*i.e.*, the applicant's intent to make future applications for LIHTC because of Qualified Allocation Plan (QAP) limitations, or agency allocation authority ceilings, for buildings located on a site as defined below). For purposes of applications made in 2007 only, the preceding sentence will be met if an applicant who previously submitted a complete application for an earlier phase of a multiphase project (when such earlier phase was in a QCT or DDA), but failed to properly identify all phases of the multiphase project in the earlier application, submits a complete application for a present phase of the same project and all phases of the project occur on a contiguous parcel of land;

(2) At the time credits are allocated to the first phase of the project, there must be common control (ownership, leasehold, or option to buy or lease) of all land where the buildings shall be constructed or rehabilitated (the site);

(3) The aggregate amount of LIHTC applied for on behalf of, or that would eventually be allocated to, the buildings on the site exceeds the one-year limitation on credits per applicant as defined in the QAP of the LIHTC-allocating agency, or the annual per capita credit authority of the LIHTC allocating agency, and is the reason the applicant must request multiple allocations over 2 or more years; and

(4) All applications for LIHTC for buildings on the site are made in immediately consecutive years.

For purposes of demonstrating compliance with the effective date provisions of this notice, "certified in writing" means that the LIHTC-allocating agency has provided a signed letter to the applicant stating that the LIHTC-allocating agency has found that the applicant meets the conditions set forth in this notice.

The designations of QCTs under Section 42 of the Internal Revenue Code published on December 12, 2002 (67 FR 76451) for the U.S. Virgin Islands, and on December 19, 2003 (68 FR 70982) for American Samoa, Guam, and the Northern Mariana Islands, remain in effect.

Members of the public are hereby reminded that the Secretary of Housing and Urban Development, or the Secretary's designee, has sole legal authority to designate DDAs and QCTs by publishing lists of geographic entities as defined by, in the case of DDAs, the several states and the governments of the insular areas of the United States and, in the case of QCTs, by the Census

Bureau; and to establish the effective dates of these lists. The Secretary of the Treasury, through the IRS thereof, has sole legal authority to interpret, and to determine and enforce compliance with, the Internal Revenue Code and associated regulations including **Federal Register** notices published by HUD for purposes of designating DDAs and QCTs. Representations made by any other entity as to the content of HUD notices designating DDAs and QCTs that do not precisely match the language published by HUD should not be relied upon by taxpayers in determining what actions are necessary to comply with HUD notices.

In addition, the section entitled "Interpretive Examples of Effective Date" of the notice designating DDAs and QCTs for 2007 published on September 28, 2006 (71 FR 57234) is hereby amended with the addition of the following (in each case the description applied to a DDA is equally applicable to a QCT):

(Case G) Project G is a multiphase project located in a 2006 regular DDA that is NOT a designated regular DDA in 2007. The first phase of Project G received an allocation of credits in 2006 pursuant to an application filed March 15, 2006. An application for tax credits for the second phase Project G is filed with the allocating agency by the same entity on March 15, 2007. The second phase of Project G is located on a contiguous site controlled by the applicant at the time credits were allocated to the first phase. Credits are allocated to the second phase of Project G on October 30, 2007. The aggregate amount of credits allocated to the two phases of Project G exceeds the amount of credits that may be allocated to an applicant in one year under the allocating agency's QAP and is the reason that the application contains multiple phases. The second phase of Project G is therefore eligible for the increase in basis accorded a project in a 2006 regular DDA because it meets all of the conditions to be a part of a multiphase project. (Case H) Project H is a multiphase project located in a 2006 regular DDA that is NOT a designated regular DDA in 2007. The first phase of Project H received an allocation of credits in 2006 pursuant to an application filed March 15, 2006. An application for tax credits for the second phase Project H is filed with the allocating agency by the same entity on March 15, 2008. The second phase of Project H is located on a site that was not controlled by the applicant at the time credits were allocated to the first phase. Credits are allocated to the second phase of Project H on October

30, 2008. The aggregate amount of credits allocated to the two phases of Project H exceeds the amount of credits that may be allocated to an applicant in one year under the allocating agency's QAP. The second phase of Project H is therefore NOT eligible for the increase in basis accorded a project in a 2006 regular DDA because it does not meet all of the conditions for a multiphase project as defined in this notice. Project H is not on land controlled by the applicant at the time credits were allocated to the first phase. Also, the application for credits for the second phase of Project H was not made in the year immediately following the first phase application year.

Findings and Certifications

Environmental Impact

In accordance with 40 CFR 1508.4 of the regulations of the Council on Environmental Quality and 24 CFR 50.19(c)(6) of HUD's regulations, the policies and procedures contained in this notice provide for the establishment of fiscal requirements or procedures that do not constitute a development decision affecting the physical condition of specific project areas or building sites and, therefore, are categorically excluded from the requirements of the National Environmental Policy Act, except for extraordinary circumstances, and no Finding of No Significant Impact is required.

Federalism Impact

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any policy document that has federalism implications if the document either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the document preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the executive order. This notice merely modifies the content of a previous notice designating DDAs and QCTs as required under Section 42 of the Internal Revenue Code, as amended, for the use by political subdivisions of the states in allocating the LIHTC. As a result, this notice is not subject to review under the order.

Dated: March 1, 2007.

Darlene F. Williams,

Assistant Secretary for Policy, Development and Research.

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