Important Elements of Low-Income Housing Tax Credit Leases

Submitted By: AJ Johnson

With the exception of having at least a six-month initial term when a household moves into a Low-Income Housing Tax Credit (LIHTC) property, the IRS has no specific requirements regarding leases. In many ways, LIHTC leases mirror the leases for conventional apartment communities. However, the LIHTC program differs from conventional housing in that LIHTC leases should have certain clauses that reflect these differences. The following presens some of the major elements that should be considered when preparing a LIHTC lease.

1. List every member of the household in the lease. While the lease should be signed by the head, co-head, and spouse, every person living in the unit should be listed on the lease. If a person will not be signing the lease, they should be listed as an "occupant." Unless a person age 18 or over is a full-time student, it is recommended that anyone age 18+ also sign the lease. Keep in mind that everyone age 18 or older – including full-time students – should sign the Tenant Income Certification (TIC).

2. Never show a live-in aide on a lease. Live-in aides should never appear on a lease – not even as an occupant. A recent court case in Arkansas found that since a live-in aide was not shown on the lease of a Section 8 property, the aide had no right to remain in the unit after the death of the resident. Listing the aide on the lease could make it more difficult to remove the aide in case of the death or move-out of the resident for whom the aide was providing care.

3. Specify which utilities the tenant will pay, and which will be paid by the landlord.

4. Clearly separate optional charges from rent. For example, pet fees should be shown as optional fees instead of rent.

5. Include a clause making it clear that residents must comply with the rules of the Section 42 program, including the requirement to recertify and the rules that relate to student status.

6. Require notification whenever there is a change in household composition.

7. Include a clause that allows the Owner (or representative) and staff of the State Housing Finance Agency (HFA) to inspect the units.

8. At move-in, make sure the initial lease term is at least six months. Failure to meet this six-month lease requirement could result in the State considering the unit to be "transient," meaning that it is not intended as a permanent residence. Please note that Single Room Occupancy (SRO) and Transitional Housing for the homeless may have a month-to-month lease at move-in.

9. There are no IRS required leases. LIHTC leases should comply with state and local law and leases of other programs present at the property (e.g., HUD Section 8).

10. Add lease clauses that increase efficiency and cash flow.
    a. Prohibit subletting, and specify that there may be no "Airbnb."
    b. Include a "rent acceleration" clause, allowing for an increase in rent prior to the end of the lease term when income limits increase, or utility allowances decrease.

Finally, the lease should be reviewed by a local attorney for compliance with state and local laws. It is a good idea to give the HFA an opportunity to review the lease as well. Clauses such as those outlined here will improve the operation of a LIHTC property.