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Transmitted via email

Jim –

On behalf of the national Preservation Working Group (PWG), thank you for the opportunity to comment on NCSHA's proposed updates to the Recommended Practices in Housing Credit Administration. We appreciate the work that NCSHA staff, task force, and board members have done to draft these proposals in light of a changing landscape for creating and preserving affordable housing.

#### **About the Preservation Working Group**

PWG is a national coalition of housing owners, developers, advocates, tenant associations, state and local housing agencies, and others dedicated to the preservation of multifamily housing for low-income families. PWG seeks to address threats to our nation's affordable housing stock – including expiring rental assistance, conversion to market rate use, deteriorating physical and financial conditions, increasing climate risk, and inequitable housing policies – and advance solutions to protect these homes and the people who live in them. In doing so, we seek to ensure that this housing remains safe, affordable, and accessible to low-income households into the future. We advocate for strong federal, state, and local program administration and increased resources, identify and disseminate best practices, and share information that protects, enhances, and preserves existing multifamily affordable rental homes to foster agency for residents. You can learn more about PWG and its members [here](#).

#### **Comments on Recommended Practices in Housing Credit Administration**

The below comments represent our collective feedback on the proposed updates to NCSHA's Recommended Practices in Housing Credit Administration. As discussed in more detail in specific proposed edits, we're pleased with NCSHA's recognition of the ongoing challenges of creating, preserving, and operating Housing Credit properties, and are especially glad to see strengthened and new language around climate risks, tenant protections, and the nonprofit right of first refusal. Our proposed edits, which appear in red text below, are intended to strengthen the existing Recommended Practices.

- **Recommended Practice #13, Sustainable Development**

**Proposed edits:** In developing Housing Credit development priorities, Agencies should consider the extent to which certain locations present greater risk of exposure to ~~natural disasters~~ **climate impacts** and the potential ~~impact effects~~ of such locations on Housing Credit residents as well as on construction materials and requirements, insurance premiums, development costs, and investor interest. **When considering the location of these properties, it is important that any restrictions apply only to new construction.**

We are glad to see NCSHA acknowledge the threats that certain locations pose to properties and residents and want to ensure that the language in the Recommended Practices encompasses all of these threats. As NCSHA knows, a significant portion of federally assisted housing, including Housing Credit properties, is at risk of being negatively impacted by a climate hazard and at a greater rate than other types of housing. While the term *natural disaster* may be interpreted to be limited to events such as hurricanes, floods, and forest fires, there is an equal threat posed by extreme weather or other climate-fueled conditions, including extreme heat. By using the term *climate impacts*, rather than *natural disasters*, NCSHA can ensure that HFAs are considering the variety of ways in which a changing climate threatens affordable properties and the people who reside in them.

When making these considerations, however, it is critical that preservation and rehabilitation projects be considered separately from new construction. The Public and Affordable Housing Research Corporation and National Low Income Housing Coalition have identified 776,000 Housing Credit units in census tracts that are at very high or relatively high risk from these hazards. Federally assisted units are more likely to be in areas that are at a very high or relatively high risk of a negative impact from climate hazards than other renter-occupied and owner-occupied housing. While we encourage Agencies to consider the climate impacts when siting new developments, existing properties should not be abandoned simply because of where they are located.

- **Recommended Practice #19, Operating and Replacement Reserves**

**Proposed Edit:** Allocating Agencies should establish operating and replacement reserve standards that consider development location, site (single or scattered), construction type, population served, projected vacancies, duration of reserves, design features, and security.

- ...
- Agencies should require reserves to stay with a development at the time of investor exit **or a sale of the property** so that the **current or future owner of the property** can access the accounts should the property require access to that capital **during or after the extended use period**, and should review partnership agreements to ensure this policy is enforced.

We're pleased that the Recommended Practice on operating and replacement reserves captures the importance of property reserves staying with the development. Our proposed changes are aimed at protecting reserves that were created and intended to benefit the property, not the investor's interest upon exit or a sale of the property.

- **Recommended Practice # 23, Capital Needs Assessment**

**Proposed edit:** ...The assessment should consider the presence of environmental hazards, such as asbestos, lead paint, and mold, on the site. In addition, the Allocating Agency should encourage the developer to undertake a Phase I environmental study. **The assessment should, to the degree practicable, identify opportunities to improve the energy performance and/or climate resilience of the properties.**

The assessment should examine and analyze the following:

- ...
- Potential risks the property faces considering **the impact of recent natural disasters-climate impacts** in the area.

As discussed above, we are pleased to see NCSHA acknowledge the threats that certain locations pose to properties and residents and want to ensure that the language in the Recommended Practices encompasses all of these threats. By using the term *climate impacts*, rather than *natural disasters*, NCSHA can ensure that HFAs are considering the variety of ways in which a changing climate threatens affordable properties and the people who reside in them, including the extreme heat conditions currently being experienced across the country.

Furthermore, by identifying opportunities to improve the energy performance and/or climate resilience of the Housing Credit properties during the Capital Needs Assessment, there is an opportunity to connect building conditions to observed or potential environmental risks posed by climate impacts. In doing so, the assessment may better support owner in prioritizing building hazards in need of repair, replacement, and/or fortification.

- **Recommended Practice #25, Extended Use Agreements**

**Proposed edit:** none

We're pleased to see NCSHA encouraging Agencies to include language in extended use agreements that requires owners to 1) notify the Agency of any transfer of ownership, qualified contract request, or right of first refusal activity; and 2) require owners to notify tenants and the local government in which a property is located at least 12 months in advance of the expiration of a property's long-term use restrictions and consider appropriate enforcement mechanisms for this requirement. To be most impactful, it is important that these notice requirements apply to properties with existing allocations, not just those receiving a new allocation of Housing Credits. We recognize, of course, the challenges involved in amending an existing extended use agreement, and do not propose any edits to the language in this Recommended Practice. Instead, we acknowledge that language and/or proposed edits to Recommended Practices #27,

#47, and #48 protect properties with current allocations without amending existing extended use agreements.

- **Recommended Practice #26, Encouraging Preservation with the Housing Credit**

**Proposed Edit:** Assess the physical and financial condition of existing Credit developments approaching the end of the affordability period at Year 30 to identify opportunities to extend affordability with targeted preservation strategies; **for projects considering a preservation transaction, a Capital Needs Assessment (CNA) performed by a qualified third-party vendor should be performed. Agencies should consider establishing a fund to help cover the costs of the CNA.**

Performing an evaluation of the physical and financial condition of an investment property is a sound asset management practice and should be encouraged. However, most Agencies lack the capacity to conduct such evaluations in-house. Evaluations conducted by qualified vendors provide more reliable assessments of need but are expensive and have limited value unless a recapitalization or other preservation transaction is planned. Further, these evaluations have a limited shelf life. Owners planning to exit at Year-30 are unlikely to be swayed one way or another by an Agency conducted evaluation of their property. Performing these evaluations on a property that is not going to be preserved is a waste of time and resources.

Subsidizing the cost of a third-party CNA and financial evaluation of a property’s financial performance will provide more reliable assessment of need which could be used in a preservation transaction.

- **Recommended Practice #27, Qualified Contracts**

**Proposed edit:** none

We commend the continued inclusion of a recommended practice around qualified contracts in the Recommended Practices and encourage NCSHA to keep it in the final 2023 document. We are pleased to see the number of HFAs who have adopted policies to protect Housing Credit properties from exiting the program through qualified contract, but as NCSHA's own data shows, units continue to be lost. Keeping this Recommended Practice in place is an important step to protecting these valuable units in the long term. We understand that the calculation of the qualified price set by Section 42 continues to limit the number of buyers for properties with an active qualified contract request and acknowledge that Agencies are unable to change that calculation. With that in mind, we applaud that new language included in this Recommended Practice, which encourages Agencies to “consider developing strategies and identifying financial tools to actively assist developers in the acquisition and preservation of projects that have submitted qualified contract requests.” As long as qualified contract requests continue to be made, Agencies must do everything in their power to facilitate the acquisition and preservation of these properties. We encourage NCSHA to maintain the proposed new language.

- **Recommended Practice #37, Utility Allowances**

**Proposed Edit:** To provide flexibility for Housing Credit owners to utilize the optimal utility allowance for each development and to encourage utility allowances that accurately reflect anticipated utility consumption, Agencies should:

- ...
- **Consider establishing a fund to help cover the costs of hiring a third-party professional or engineer.**

We're pleased to see the update to this Recommended Practice incorporates the energy consumption model utility allowance. We also recognize that most Agencies do not have the expertise necessary to complete the recommended energy and water consumption analysis in-house. Hiring a third-party professional or engineer, as suggested in the Recommended Practice, requires that the Agency have funds available to contract with them. To facilitate this, we suggest the Recommended Practice encourages Agencies to reserve funds for this use.

- **Proposed Recommended Practice #47, Housing Credit Tenant Protections**

**Proposed Edit:** Allocating Agencies should require or incentivize owners **of new and existing Housing Credit developments, and their** property managers, to implement the following tenant protection policies in Housing Credit developments. **Additionally, sanctions for noncompliance of these provisions by the owner should be established and enforced.**

We are pleased to see NCSHA's Recommended Practices recognize the need for strong tenant protections and the role that allocating agencies can play in securing these protections for residents. A recent analysis conducted by NHT identified that at least 12 allocating agencies are already encouraging low-barrier tenant screening practices by limiting the use of eviction or criminal records. The Indiana Housing & Community Development Authority, for example, incentivizes applicants to "[commit] to low-barrier tenant screening to minimize the impact of previous evictions on a household's ability to secure future housing," requesting that applicants agree that the tenant selection plan for the project "will not screen out applicants for evictions that occurred more than 12 months prior to the date the household applies for a unit." Florida Housing Finance Corporation, meanwhile, prohibits the arrest record of a household member from being considered when determining any household's application for tenancy. NHT's analysis also found that additional agencies include language limiting the use of credit reports in the tenant screening process, promote language access for individuals with limited English proficiency, and include good-cause eviction policies. The fact that allocating agencies are already including this language highlights the importance of protecting tenants when administering the Housing Credit program, regardless of the lack of formal guidance from the

IRS. We strongly encourage NCSHA to keep this new Recommended Practice in its entirety, while strengthening it with the proposed edits.

As currently written, the language is unclear as to whether these recommended tenant protection policies should be applied to existing projects or limited to new Housing Credit projects when placed in service. To protect the millions of existing tenants residing in Housing Credit properties, we encourage NCSHA to clarify that the recommendation applies to both existing Housing Credit properties and those receiving a new allocation.

To give even greater strength to these recommendations, Agencies should consider adopting a means of enforcing compliance with any adopted tenant protection provision. Several states have preservation statutes that include tenant protections and sanctions for noncompliance of those provisions. For example, Massachusetts Chapter 40T, California (GC) Section 56863 and Oregon ORS 456.250 - 456.265, include sanctions for noncompliance of preservation notice and safe harbor provisions. Under these statutes, sanctions for failure to issue required notices on a timely basis include extension of project use restrictions by the length of time the notices were late.

Some enforcement methods may require legislation, while others could be based on policies such as limiting an owner-developer from receiving a new Housing Credit reservation or other funding award.

## Proposed Recommended Practice #48, Nonprofit Right of First Refusal

**Proposed Edit:** Agencies should support the long-term preservation of properties by assisting nonprofit Housing Credit sponsors to exercise the statutory allowance that partnership agreements may include a right of first refusal (ROFR) to purchase applicable properties after the close of a building's 15-year initial compliance period.

Agencies should consider adopting policies to protect the ROFR for future properties, such as:

- A requirement that partnership agreements include language **clarifying confirming** that the ROFR outlined in Section 42(i)(7) is not the same as a right of first refusal under common law practices;
- A requirement that the **minimum** purchase price (“ROFR purchase price”) is calculated as the minimum purchase price permissible under Section 42(i)(7) and: **(a) the ROFR purchase price does not automatically include unpaid fees or loans; and (b) the ROFR purchase price should be calculated by an independent accountant with experience in the Housing Credit Industry and deemed final other than due to manifest error;**
- A requirement that partnership agreements include language clarifying that a ROFR cannot be conditioned upon receipt of a bona fide offer from any party, including a third party, and that **they have the nonprofit or tenant collective organization has** the authority to trigger the ROFR and **thereafter** close on the sale of the property through the **ROFR without the consent of any other party, including an investor;**
- A requirement that a ROFR term shall begin on the first day following the end of the initial Compliance Period and shall remain open for exercise for a period of time that is **no less than 36 months, with closing to occur on or before 12 months thereafter;**
- Investor transfer policies that require agency approval of the transfer of investor interests and a letter of intent to vet investor eligibility;
- Incentivizing applications including a ROFR for the minimum statutory purchase price and with minimal restrictions on transfers to ROFR holders;
- Rejecting or discouraging Housing Credit applications from entities **or individuals that are principals in entities** with a record of refusing to recognize nonprofit ROFR requirements **or having sought to prevent nonprofit execution on ROFRs;**
- Requiring that reserves and escrows, including replacement reserves, tenant deposit accounts, operating reserves, property tax escrows, and insurance escrows, remain with the property after its sale under the ROFR;
- A requirement that partnership agreements include language that automatically converts the ROFR to a purchase option as proposed in pending federal legislation or future Internal Revenue Service guidance, that would amend Section 42(i)(7), the ROFR safe harbor in the Internal Revenue Code.

Agencies should also consider implementing investor transfer policies that require agency approval of the transfer of investor interest and a letter of intent to vet investor eligibility to assist nonprofits and tenant collective organizations seeking to exercise the ROFR for existing properties.

**Proposed edits to the Discussion:** Congress amended the Housing Credit statute in 1989 to allow nonprofits and tenants (in a cooperative form or otherwise) to include a right of first refusal to purchase a Housing Credit property after the close of a building’s 15-year initial compliance period in partnership agreements. This Housing Credit ROFR functions differently than a common law right of first refusal by specifying a minimum below-market purchase price that includes assumption of any outstanding debt exit taxes.

Focus on the ROFR provision has increased significantly in the past few years as some **organizations**—so-called “**Aggregators**”—have made efforts to take ownership **or** control of Housing Credit developments by disputing the previously contemplated transfer of the property to a nonprofit through the statutory ROFR provision with the explicit intent of maximizing profits and ending affordability restrictions.

Challenges to ROFRs have resulted in the unintended transfer of hundreds of millions of dollars from Housing Credit properties to **Aggregators**, leaving those properties vulnerable without sufficient reserves and causing nonprofit owners to have to raise rents, cut services, or even sell their properties. While courts have ruled on cases involving individual transactions, anecdotal evidence suggests the practice could imperil long-term affordability. Some Agencies have responded with policies to curtail ROFR challenges, and the recommended practice is designed to encourage more widespread adoption of these policies.

We strongly support and appreciate the inclusion of the Nonprofit Right of First Refusal (ROFR) as a potential Recommended Practice. We urge NCSHA and its Board to include this Recommended Practice in the final version of the 2023 Recommended Practices. We appreciate NCSHA’s acknowledgement that challenges to the ROFR have a negative impact on the long-term preservation of Housing Credit properties as “challenges to ROFRs have resulted in the unintended transfer of hundreds of millions of dollars from Housing Credit properties to aggregators, leaving those properties vulnerable without sufficient reserves and causing nonprofit owners to have to raise rents, cut services, or even sell their properties”. Finally, we support the, at least, 21 allocating agencies that have already responded to challenges to the ROFR and adopted policies to further strengthen and protect the ROFR. These policies reflect those in the Recommended Practice to both strengthen and protect the ROFR in addition to agency oversight to ensure investor parties are well aligned. We hope that this potential Recommended Practice will encourage more widespread adoption of these policies.

Our proposed changes to Recommendation 48 are intended to broaden the Recommendation to more fully address the “Aggregator” tactics we have witnessed in recent years, which have spilled over to some other organizations participating in the Housing Credit program who may not otherwise commonly be thought of as an Aggregator. The specific reasoning for the changes include:

- As to the second bullet point, a common Aggregator tactic is to object to the calculation of the ROFR price as a means of stalling consummation of the ROFR and leveraging a

higher payment than is otherwise intended. The amended language would preserve that right while removing a point of leverage such that an independent accountant skilled in the Housing Credit program can provide the calculation of the ROFR purchase price.

- As to the third bullet point, policies already in place in New York City and Maine provide options that allow a transfer of ownership to be triggered by any of the following:
  - subject to the consent of one or more limited partners of the owner (each, a “Limited Partner”), which consent may not unreasonably be withheld, conditioned or delayed, sell the project to the ROFR grantee in connection with the ROFR grantee’s exercise of the ROFR;
  - 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
  - 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 such acceptance is subject to the ROFR grantee’s rights to exercise the ROFR and purchase the project at the ROFR Purchase Price.
- As to the fourth bullet point, the changes are intended to provide sufficient time to qualified parties to exercise their ROFR under the most advantageous conditions and disincentivize dilatory tactics used by Aggregators to run out the clock on the exercise of the ROFR.
- As to the seventh bullet point, the changes are intended to prevent “aggregators” from altering their corporate structure to avoid application of these Recommendations and any policies adopted by Agencies. We also encourage agencies to require that any dispute arising from the exercise of a ROFR be disclosed to the Agency within 30 days of the dispute to provide a mechanism for Agencies to be notified of ROFR challenges, which in turn further dissuades Aggregators from raising unjustified challenges in first instance.
- As to the eighth bullet point, it was added to expand the similar policy in Recommendation 19 to ensure property reserves and escrows remain with the property after its sale under the ROFR. When equity providers refuse to leave a Housing Credit partnership, many may negotiate for a large monetary payout in exchange for their exit. Equity providers who drain resources from a property are directly undermining the mission of a nonprofit and its ability to serve its residents and provide safe, stable, affordable housing. Therefore, ensuring property reserves and escrows remain with the property ensures that these funds continue to be used to maintain the property and serve residents, rather than pay out a combative equity provider.
- As to the ninth bullet point, the changes are intended to allow qualified parties to take advantage of any future changes in the law that are intended to make the exercise of their rights easier and more favorable.

Finally, revisions were made to the discussion section to accurately reflect the changes made in the recommendation.

Thank you again for your consideration and the opportunity to comment on NCSHA's proposed updates to the Recommended Practices in Housing Credit Administration. To discuss our suggestions in more detail, please reach out to Laura Abernathy, Senior Director of Housing Policy at National Housing Trust ([labernathy@nhtinc.org](mailto:labernathy@nhtinc.org)).

Signed,

Leaders and Organizers for Tenant Empowerment (LOFTE)

LeadingAge

National Housing Law Project (NHLP)

National Housing Trust (NHT)

National Low Income Housing Coalition (NLIHC)

Network for Oregon Affordable Housing (NOAH)

Preservation of Affordable Housing (POAH)