# Sample Public Operating Subsidy Loss Regulatory Relief Language
## DISCUSSION DRAFT December 2015

Most forms of public operating subsidy that support Low Income Housing Tax Credit investments are derived from federal, state or local government funding sources. As a result, the risk of the continued availability of a particular subsidy is an uncertain function of government budgets, public policies and the political environment. This sample language outlines a process for preserving financial feasibility of a housing credit development in the event of the unexpected loss of public operating subsidies. It is designed to preserve affordable housing and protect important policy goals. This draft is intended to be a starting point for discussions with state allocating agencies.

- **LURA Sample**

Owner represents to Agency that rent and income levels will not exceed the following maximums:

| Unit Type | Number of Units | Income Limit | Operating Subsidy | Deep Skewed |
|---|---|---|---|---|
| 1BR1BA | 5 | 20% AMI | S8 LIHTC | Yes |
| 1BR1BA | 7 | 40% AMI | S8 LIHTC | Yes |
| 1BR1BA | 3 | 60% | LIHTC | No |
| 2BR2BA | 5 | 20% AMI | S8 LIHTC | Yes |
| 2BR2BA | 7 | 40% AMI | S8 LIHTC | Yes |
| 2BR2BA | 3 | 60% | LIHTC | No |
| **Total** | **30** | | | |

24 units above reflect maximum incomes and rents that assume continuation of Public Operating Subsidy (rental assistance and/or special needs operating assistance) during the Term of this Agreement. In some instances tenant-paid rent limits associated with the deep skewed income limits may apply, but Owner may be permitted to collect gross rents (including portions of rent payable as a result of a Public Operating Subsidy) in excess of any tenant-paid rent limit tied to deep skewed income targeting. Notwithstanding any provisions of this agreement to the contrary, in the event:

i) Owner has in in good faith applied for and accepted all renewals of the Public Operating Subsidy available on substantively the same terms and conditions as were originally available, and
ii) A decrease, termination, or material limitation of the Public Operating Subsidy with respect to any or all of the identified units occurs, and
iii) Project is otherwise in full compliance with the terms of this Agreement, and
iv) Such decrease, termination, or material limitation does not arise from an uncured default or other material failure by Owner to comply with applicable Public Operating Subsidy documents, and
v) Owner has in good faith pursued alternative sources to replace Public Operating Subsidy on substantially the same terms and conditions as were originally available, and

vi) Such decrease, termination, or material limitation has an adverse impact on the financial feasibility of the Project, then

Owner may request that the Agency allow Owner to increase maximum incomes and rents for the affected units up to the federally permitted maximum and/or cease to target and serve special needs populations as necessary to preserve the financial feasibility of the Project (referred to herein as "Public Operating Subsidy Loss Regulatory Relief").

Such request for Public Operating Subsidy Loss Regulatory Relief shall contain the material facts and supporting documentation substantiating Owner's request including, but not limited to, addressing the conditions listed above. Within 60 days of receipt by the Agency of the request, Agency shall review and respond in writing to the request and either confirm acceptance of the request or describe the nature of Agency objections with respect to the specific conditions listed above. The Owner shall have the right, but not the obligation, to cure or address any objections. The Agency's response shall not be unreasonably withheld or delayed, and if no objections or response have been received by the Owner within 60 days of the initial request, the request shall be deemed approved.

Upon receipt of Agency acceptance of Owner's request, Owner may convert units up to the federally permitted maximum as necessary to preserve the financial feasibility of the Project and/or cease to target and serve special needs populations. Any necessary rent increases shall be phased in as gradually as possible. Nothing herein, however, shall be construed as requiring Owner to violate S-42 limitations with respect to S-42 compliance. If the Project includes special needs populations, Owner may modify the mix of targeted households to reduce the number of or eliminate special needs units. Owner shall attempt to minimize disruption to existing special needs households in particular and transition to non-special needs households only as necessary for financial feasibility and upon vacancy whenever possible.

Nothing in this provision shall alter Owner's obligation to remain in compliance with S-42 minimum set-aside elections for the Project for the remainder of the tax credit compliance and extended use periods.

If at any time thereafter during the remainder of the tax credit compliance and extended use periods:

i) Agency determines a replacement Public Operating Subsidy ("Replacement Public Operating Subsidy") is available for Project, and
ii) Replacement Public Operating Subsidy does not adversely affect availability of the tax credits, and
iii) Replacement Public Operating Subsidy permits Project to again serve households at original rent and income levels and/or or to serve the originally targeted special needs population consistent with financial feasibility of the Project, then

Agency shall request that Owner apply for such Replacement Public Operating Subsidy.

Owner shall be reasonably obligated to make good faith efforts to apply for such Replacement Public Operating Subsidy on substantively the same terms and conditions as the original Public Operating Subsidy or notify the Agency in writing within 60 days as to why such Replacement Public Operating Subsidy is not reasonably similar in terms and conditions or is not financially feasible. If replacement Public Operating Subsidy is obtained, Owner shall again set aside such units when available for households at the originally targeted rent and income levels and/or serve the originally targeted special needs population.

- **QAP Sample**

Owners may submit tax credit applications containing rent and income restrictions that go beyond the minimum set-aside requirements contained in S-42. Underwriting for those Projects may rely on the existence of long-term Public Operating Subsidies for the financial feasibility of the Project (HAP, ACC, NAHASDA, RD, etc.) and assume that these Public Operating Subsidies remain in place through the compliance period, notwithstanding the appropriations risk inherent in some contracts. These applications may receive extra tax credit QAP points or other special considerations.

In the event Public Operating Subsidy Loss Regulatory Relief (as described in the Reservation Agreement, Extended Use Agreement, Land Use Restriction Agreement, Tax Credit Regulatory Agreement, Affordable Housing Restrictions Agreement, and/or Declaration of Restrictive Covenants) is required for such Project, Project will be deemed to have satisfied rent and income and/or targeted special needs requirements more restrictive than minimum set-aside requirements under S-42 by virtue of Owner having: i) proposed the Public Operating Subsidy-dependent restrictions in the application, ii) implemented the rent and income restrictions and/or special needs targeting during the period under which the Public Operating Subsidy functioned, iii) exercised good-faith efforts to retain Public Operating Subsidy for the duration of the compliance and extended compliance periods and (iv) obtained Agency approval or deemed approval for the Public Operating Subsidy Loss Regulatory Relief in accordance with applicable requirements.

Agency agrees that an Owner satisfied and will continue to satisfy scoring requirements regardless of whether or not Owner ultimately must deploy Public Operating Subsidy Loss Regulatory Relief to preserve Project financial feasibility.

- **Lender documents**

Owners and Agencies are encouraged to consider the extent to which lender documents, including but not limited to first mortgages, subordinate debt instruments, debt-related regulatory agreements, etc. (whether hard or soft), may require the inclusion of language similar to the LURA sample language above in order to bring the terms of those instruments into conformance with the concept of Public Operating Subsidy Loss Regulatory Relief.

In particular, loans associated with AHP, HOME, State Agency debt, HUD mortgages, FHA, etc. all may require the addition of similar notice and relief protections.