

Chapter 6

Category 11c

Violation(s) of the UPCS or Local Inspection Standards

Definition

This category is used to report noncompliance when rental units, building exteriors and systems, common areas, *or* the property site in a project are not suitable for occupancy. State agencies should assess whether low-income housing tax credit properties are in safe, decent, sanitary condition and in good repair, according to either the Uniform Physical Conditions Standards¹ (UPCS) established by HUD², or local inspection standards. The standards to be used should be identified in the Qualified Allocation Plan³ (QAP).

1. State agencies are not required to use the *Real Estate Assessment Center* (REAC) protocol in using the UPCS.
2. State agencies cannot combine selected portions of the UPCS with portions of local standards; only one inspection standard can be selected and used.

Identifying Noncompliance

Certification Reviews

Noncompliance may be identified when the agency reviews an owner's annual certification that the buildings and units in an LIHC project were suitable for occupancy. (See Treas. Reg. §1.42-5(c)(1)(vi).) The owner must also certify that state or local authorities responsible for making inspections did not issue a violation report for any building or low-income unit in the project. If a violation notice or report was issued, the owner must attach a statement summarizing the violation report/notice (or a copy) to the annual certification submitted to the state agency. The owner must also state whether the violation was corrected.

Physical Inspections

State agencies must inspect LIHC properties to ensure that LIHC buildings and units are suitable for occupancy.⁴ Under Treas. Reg. §1.42-5(C)(2)(ii)(B), on-site inspections must be made at least once every three years.

HUD's Uniform Physical Condition Standards (UPCS)

The UPCS requires housing to be decent, safe, sanitary and in good repair. The major areas of consideration include:

1. Site: The site components such as fencing and retaining walls, grounds, lighting, mailboxes/project signs, parking lots and driveways, play areas and equipment, refuse disposal, roads, storm drainage, and walkways must be free of health and safety hazards and in good repair. The site must not be subject to material adverse conditions, such as abandoned vehicles, dangerous walks or steps, poor

¹ The Uniform Physical Conditions are available at www.gpoaccess.gov. On the main page, select the "Code of Federal Regulations" option and then enter "24CFR5.703" into the search feature using the quotes ("...").

² Department of Housing and Urban Development

³ See IRC §42(m)(1)(B)(iii).

⁴ See Treas. Reg. §1.42-5(d)(2)

drainage, septic tank back-ups, sewer hazards, excess accumulations of trash, vermin or rodent infestation, or fire hazards.

2. Building Exterior: Each building on the site must be structurally sound, secure, habitable, and in good repair. Each building's doors, fire escapes, foundations, lighting, roofs, walls, and windows, *where applicable,* must be free of health and safety hazards, operable, and in good repair.
3. Building Systems: Each building's domestic water, electrical systems, elevators, emergency power, fire protection, HVAC, and sanitary system must be free from health and safety hazards, functionally adequate, operable and in good repair.
4. Dwelling Units: Each dwelling unit within a building must be structurally sound, habitable, and in good repair. The dwelling unit must be free from health and safety hazards, functionally adequate, operable and in good repair. This includes all areas and aspects of the dwelling unit; i.e., bathroom, call-for-aid (if applicable), ceiling, doors, electrical systems, floors, hot water heater, HVAC, kitchen, lighting, outlets/switches, patio/porch/balcony, smoke detectors, stairs, walls and windows.

Where applicable, the *dwelling* unit must have hot and cold running water, including an adequate source of *potable* water. If the unit includes its own sanitary facility, it must be in *proper* operating condition, usable in privacy and adequate for personal hygiene and the disposal of human waste. The unit must include at least one battery-operated or hard-wired smoke detector in proper working condition on each level of the unit.

5. Common Areas: The common areas must be structurally sound, secure, and functionally adequate for the purposes intended. The basement/garage/carport, restrooms, closets, utility, mechanical, community rooms, day care, halls and corridors, stairs, kitchens, laundry rooms, office, porch, patio, balcony and trash collection areas, if applicable, must be free from health and safety hazards, operable, and in good repair. All common area ceilings, doors, floors, HVAC, lighting, outlets/switches, smoke detectors, stairs, walls, and windows, *to the extent applicable,* must be free of health and safety hazards, operable, and in good repair.
6. Health and Safety Concerns: All areas and components of the housing must be free of health and safety hazards. These areas include, but are not limited to, air quality, electrical hazards, elevators, emergency/fire exits, flammable materials, garbage and debris, handrail hazards, infestation and lead based paint.

For example, buildings must have fire exits that are not blocked and have hand rails that are not damaged, loose, missing portions, or otherwise unusable. The housing must have no evidence of infestation by rats, mice, vermin, *or garbage and debris.* The housing must have no evidence of electrical hazards, natural hazards, or fire hazards. The dwelling units and common areas must have proper ventilation and be free of mold as well as odor (e.g., propane, natural, sewer or methane gas) or other observable deficiencies. The housing must comply with all

⁵ As defined in Subpart J of 24 CFR part 35.

requirements related to the evaluation and reduction of lead-based paint hazards and have available proper certifications of such.⁵

Local Standards

Although there is considerable variability among local codes, inspection of the LIHC property using local codes should entail an inspection of the project site, building exteriors, building systems, common areas, dwelling units, and health and safety concerns.

Differences between Local Codes and the Uniform Physical Condition Standards (UPCS)

The UPCS do not supersede or preempt⁶ local health, safety and building codes; i.e., a low-income housing project under IRC §42 must satisfy the local standards and the state agency must report known violations to the IRS. However, if the state agency uses the UPCS to conduct inspections and determines that they are met, the state agency is not required to determine *by inspection* whether the project meets local standards.

There will be situations when using the UPCS for the state agency's inspection standard may result in a conflict with the local standards. For example, the local code may require bars on windows to prevent children from falling out whereas the bars may be viewed under the uniform physical condition standards as blocking access/exists in case of emergencies. The conflict should be brought to the attention of the state agency by a governmental entity or individual such as a fire marshal's office or municipal building inspector who must provide a written submission explaining the nature of the conflict. When conflicts are presented in this manner, the local code will be evaluated by the state agency in determining whether the project or unit is in compliance.

In Compliance

A building is in compliance if, during an inspection of the building, it meets the requirements of the UPCS or local code. Exhibit 6-1 is a sample checklist that may be useful (it is not required) in helping document physical inspections of LIHC properties. Owners should be notified of the state agency's findings. Exhibit 6-2 is a sample letter that may be used.

Out of Compliance

An LIHC unit, building and/or entire project is out of compliance if:

1. The owner discloses violations of local standards or incorrectly certifies that the buildings and units in an LIHC project were suitable for occupancy, taking into account local standards (or other habitability standards). See Treas. Reg. §1.42-5(c)(1)(vi).
2. During a physical inspection by the state agency, the property had elements that failed to meet the requirements.

⁶ In other words, the UPCS do not replace or preempt local health, safety, and building codes.

3. Otherwise fails to comply with the requirements of the UPCS or local codes at any time.

To ensure consistent evaluation of the property's physical condition, the definitions of physical deficiencies used for the *REAC system,* by the Department of Housing and Urban Development (HUD) will be used to determine whether noncompliance has occurred.*⁷* The dictionary is divided into six sections:

1. Site Inspection
2. Building Exterior Inspectable Items
3. Building Systems Inspectable Items
4. Common Areas Inspectable Items
5. Unit Inspectable Items
6. Health and Safety Inspectable Items

Each section identifies specific components, which are then defined in ascending levels of severity (level 1, level 2 or level 3), and a fourth category is health and safety hazards and fire safety hazards. All levels of deficiencies must be reported. State agencies using local codes as their inspection standard may find the UPCS levels of violation helpful in categorizing reported violations.

Level 1 Violations of UPCS

Examples of Level 1 violations include:

1. At least one screen door or storm door is damaged or is missing screens or glass. The noncompliance would be evidenced by an empty frame or frames.
2. The roofs of a project where up to one square (100 square feet) of surface material or shingles is missing from roof areas.
3. In one room in a dwelling unit, a permanent lighting fixture is missing or not functioning, and no other switched light source is functioning in the room.

Level 2 Violations of UPCS

Examples of Level 2 violations include:

1. Evidence of water stain, mold, or mildew, such as darkened areas, over a small area of floor (1-4 square feet). Water may or may not be visible. The affected area is estimated to be less than 10% of the floors.
2. In two rooms in a dwelling unit, a permanent lighting fixture is missing or not functioning, and no other switched light source is functioning in the rooms.

Level 3 Violations of UPCS

Example of Level 3 violations include:

1. A common area where a large portion of one or more floors –more than 4 square feet- has been substantially saturated or damaged by water, mold, or mildew. Cracks mold, and flaking are visible and the floor surface may have failed.

⁷ *66 FR, 59102-59124, Public Housing Assessment System Physical Condition Scoring Process Interim Scoring, Corrections and Republication.*

2. A sink or other related hardware in a kitchen may be missing, which creates unsanitary living conditions.
3. A permanent light fixture in more than two rooms is missing or not functioning, and no other switched light sources are functioning in the rooms.

Health and Safety Violations and Fire Hazard Violations of UPCS

Health and safety violations can be divided into non-life threatening and exigent, life threatening conditions.

Non-life threatening events include items such as pavement and walkway problems that create the potential for tripping and falling; missing or non-functioning sinks and bathroom components in individual units that impair human sanitation; missing exterior doors; and floor covering damage.

Exigent health and safety and fire hazards require immediate attention because of their life-threatening potential. Exigent health and safety violations include exposed electrical wires or water leaks on or near electrical equipment; propane /natural gas/methane gas detected; emergency/fire exits that are blocked; unusable fire escapes; gas or oil fired hot water heaters with missing or misaligned chimneys that pose carbon monoxide hazards. Fire safety hazards include missing or inoperative smoke detectors; fire extinguishers expired or window security bars preventing egress from a building.

Casualty Losses

A casualty loss is defined as the damage, destruction, or loss of property resulting from an identifiable event that is sudden, unexpected, or unusual. A sudden event is one that is swift, not gradual or progressive. An unexpected event is one that is ordinarily unanticipated and unintended. An unusual event is one that is not a day-to-day occurrence and that is not typical for low income housing credit properties. Casualty losses may result from a number of different sources: e.g., car accidents, fires, government-ordered demolitions, hurricanes, mine cave-ins, sonic booms, storms, tornadoes, vandalism, etc. Property damage is not considered a casualty loss if the damage occurred during normal use, the owner willfully caused the damage or was willfully negligent, or was progressive deterioration such as damage caused by termites.

Physical damage to LIHC properties caused by casualty events and which render LIHC residential rental units or buildings, or common areas associated with the property, unsuitable for occupancy is reported as noncompliance with the UPCS or local standards.

Vacant Units

*Vacant low-income units must also be suitable for occupancy; i.e., prepared for immediate occupancy. Depending on the facts, state agencies should allow a reasonable period to clean a vacated unit or repair damages caused by a prior tenant.

Example 1: Vacant Units not Suitable For Occupancy

The state agency determined that some vacant LIHC residential units were not suitable for occupancy by new tenants when they conducted a physical inspection of the property. The owner explained that because of the high vacancy rate, there were a sufficient number of empty units suitable for occupancy. All vacant LIHC units that are not suitable for

occupancy are out of compliance. The out of compliance date is determined for each unit based on the date that particular unit was vacated. *

**Date of
Noncompliance**

The reportable “out of compliance” date is the date the property failed to meet the inspection standard, if known; otherwise, at the earliest documented date that the standard was not met.

***Example 1: Factual Determination**

A frozen pipe burst and flooded two vacant units in a low-income building. The owner timely repaired the pipe but did not adequately clean the damaged floors, rugs and walls in the two affected units. Upon inspection, the state agency discovered mold damage resulting from the flooding in both units. The date of noncompliance is the date the frozen pipe burst.*

Example 2: Noncompliance Date Identified by Inspection

The state agency inspected the property site and determined that a dilapidated wooden fence on the exterior of the property represented a UPCS violation because it was about to fall down and nails were protruding out of the boards. The date of noncompliance is the date of the inspection.

Example 3: Noncompliance Date Identified by Documentation

HUD performed an inspection and determined that there were significant safety hazards on an LIHC property site. The owner was notified, but when HUD revisited the property six months later, the hazards had not been corrected. HUD provided the state agency with a copy of their report. The state agency conducted an inspection and confirmed HUD’s information. The date of noncompliance is the date of HUD’s initial inspection.

**Notice to
Owner**

The state agency is required to provide prompt *written* notice to the *owner* of a low-income housing project if the state agency discovers that the project is not in compliance with the state agency’s inspection standard, or the annual certification is inaccurate. Notification letters establish and document the beginning of the correction period for any “out of compliance” issues. See Exhibit 6-3.

When state agencies determine that the violations involve life-threatening problems, a critical notification letter requiring immediate corrective action should be sent to the owner. *To ensure prompt correction of exigent, life threatening health and safety deficiencies*, the project representative should be provided a list of every observed life threatening violation and fire safety hazard that needs immediate attention or remedy, before the inspector leaves the project site. See Exhibit 6-4. To document receipt, the project representative should sign the state agency’s copy of the list of deficiencies.

Back in Compliance

Property is back in compliance when noted violations are corrected. The correction date is the date of the repair, the date of the inspection at which the repair was observed, or the date of the certification that the repair had occurred; whichever evidenced the correction to the agency's satisfaction.

Acceptable evidence of the corrected violations includes items such as a certification from an appropriate licensed professional that the item now complies with the inspection standard, or other documentation demonstrating that the violation has been corrected. Alternatively, the state agency may determine that the owner is back in compliance by visual inspection.

Reporting Noncompliance

Under Treas. Reg. §1.42-5(a), state agencies are required to report any noncompliance of which the agency becomes aware.⁸ State agencies must file Form 8823 no later than 45 days after the end of the correction period (including permissible extensions), whether or not the identified noncompliance is corrected. See Chapter 2.

Example 1: Extenuating Circumstances

A state agency conducted a physical inspection of an LIHC building on October 3, 2004. When inspecting the laundry room located in the basement, the state agency noted that water pipes to three of the six washing machines had frozen and burst during a recent snow storm. The correction period started on October 6, 2004, the date on which the notice of noncompliance was sent to the owner. The correction period ends 90 days later on January 5, 2005.

The damage was extensive and could not be repaired immediately because the ground was frozen, so the owner requested an extension of time. The state granted the maximum extension of an additional 90 days (180 days total), so that the correction period ended April 5, 2005. At that time, the ground was still frozen and the repair had not been completed.

The state agency must file form 8823 within 45 days of the end of the correction period, or May 17, 2005, noting the noncompliance. A second Form 8823 should be filed when the noncompliance is corrected.

Submitting Documentation to the IRS

Documenting noncompliance with the physical inspection standards with sufficient detail to support IRS audit adjustments is particularly important because, at the time of a subsequent IRS audit, there may be no visible indication that the noncompliance ever occurred. Narratives describing the cause, nature and extent of the violations are helpful and should also clarify if the issue is a unit, common area, building exterior or system, or site problem.

⁸ In addition to information submitted as part of the owner's annual certification and the physical inspection of the property, information may be received from other sources such as (but not limited to) governmental agencies, tenants affected by the noncompliance, or public documents such as newspaper articles.

Copies of reports summarizing unit-by-unit noncompliance originally given to the owner and electronic pictures are adequate when documenting noncompliance even though the violations may have been corrected after the filing of the report of noncompliance. Note: do not include photocopies of photographs; they are not useful.

References

1. 24 CFR 5.703, HUD's Uniform Physical Condition Standards
2. IRC §42(i)(3)(B)(i)
3. Treas. Reg. §1.42-5
4. Dictionary of Deficiency Definitions