nurses are on duty for 24 hours each day; and licensed nurses' aides are available 24 hours each day. The nurses and nurses' aides are available to provide nursing care for residents' medical or psychiatric needs. Thus, continual or frequent nursing, medical, or psychiatric services are made available in Building Z.

Residents in Building X are required to move into Buildings Y or Z or another facility outside of Complex M if, because of physical or mental disability, they require additional care beyond that offered by Building X. Residents in Buildings X and Y are required to move into Building Z or another facility outside of Complex M if they require continual or frequent nursing, medical, or psychiatric services.

ANALYSIS

As set forth in the facts above, Building X, Building Y, and Building Z each contains complete living units within the meaning of Treas. Reg. §1.103-8(b)(8), all of the living units within the respective buildings are available to the general public, and all of the living units are used on a non-transient basis. Since Complex M also provides significant non-housing services to residents of the three buildings (including continual or frequent nursing, medical, or psychiatric services to the residents of Building Z), the analysis must consider the nature and extent of the non-housing services. In the case of Complex M, the analysis must examine whether the buildings of Complex M are hospitals, nursing homes, sanitariums, or rest homes rather than residential rental property. …The labels are not determinative. The focus …..is whether the facilities are, in substance, residences or health care facilities. Therefore, the nature and degree of the services provided by the facility controls.

Significant non-housing services are made available to residents of Building X and Building Y, including meals and various support services. The services available to residents of Building X and Building Y do not include continual or frequent nursing, medical, or psychiatric services although, under the lifetime lease option, certain residents are assured that they will receive continual or frequent nursing, medical, or psychiatric services in Building Z if required.

HOLDING

Thus, under the principles set forth above, Buildings X and Y would be residential rental property [and qualified as residential rental units under IRC §42(d)]. Continual or frequent nursing, medical, or psychiatric services are made available to residents of Building Z in addition to the same non-housing services that are made available to residents of Building X and Building Y. Thus, under the principles set forth above, Building Z would not be a residential rental property.

Development Fees

**Developer Fee Defined**

Generally, a developer fee represents payment for the developer’s services and is (at least in part) includable in eligible basis. There are three basic types of developer fees.
Turnkey Project Fee

The taxpayer (usually a partnership) enters into a development agreement with a developer to pay an amount that includes all hard construction costs and the developer’s fee. For example, the development agreement requires a payment of $2 million with the estimated hard costs of the project budgeted at $1,200,000. If the actual costs are consistent with the budgeted amounts, then the developer will have earned a fee of $800,000. If the actual costs exceed the budget, the development fee would decrease.

Fixed Amount Development Fee

A fixed amount developer fee occurs when the “hard costs” and the developer fee are separately stated line items in the contract. For example, $1 million of estimated hard costs with a developer fee added in a fixed amount of $150,000. Unlike a turnkey agreement, the developer fee does not decrease if the hard costs exceed the budgeted amount.

Completed Project Developer Fee

A completed project developer fee is passed on to the ultimate purchaser of the building as a component of the purchase price. The purchase price includes all the components (land, new construction, acquisition of and existing building, rehabilitation costs, and development fee), but the individual components may not be separately stated.

Related Parties

Typically, the developer will be the general partner (or managing general partner) of the partnership owning the project. The developer may also be related to the entity that actually constructed the project or the property management company operating the project. The inter-relationships need to be identified and understood, as these relationships will affect how transactions are conducted and documented.

While there are specific relationships noted throughout IRC §42, taxpayers are considered related for audit purposes if:

1. an adjustment made to one return requires corresponding adjustments to the other return to ensure consistent treatment (see also IRC §§ 1313(c) and 267), or
2. tax returns are for entities over which the taxpayer has control and which can be manipulated to divert funds or camouflage financial transactions.

Audit Issues & Techniques

There are four basic issues to consider when examining the developer fee.

1. Character of the services to be provided,
2. Services actually provided,
3. Reasonableness of the fee amount, and
To address these issues:

1. Review the development agreement or contract. Generally, the contract will outline all the anticipated responsibilities and remedies if the developer fails to perform according to the agreement. It should also disclose the payment terms. Typically, there will be payments at specific times during development and when development is completed. The developer may also have agreed to defer payment of a portion of the fee.

2. If the developer agreed to defer payment, review the developer fee note and/or other applicable documents evidencing the debt. The note and/or applicable document(s) will outline the terms (amount, interest, payment schedule, etc.) for payment of the deferred fee.

3. Review the taxpayer’s book and records to identify payment of the fee. If the developer agreed to defer a portion of the fee, determine whether payments been made and/or interest accrued according to the terms of the agreement.

The development services to be provided will be identified in the agreement entered into by the taxpayer and the developer. This contract, as well as any supporting documentation, should be reviewed to determine what services the developer expected to perform. Typically, the developer agrees to provide (or may have previously provided) services related to the acquisition, construction, and initial operating phases of development.

### Development Costs Includable in Eligible Basis

Examples of services typically includable in eligible basis include, but are not limited to:

1. Negotiating agreements for architectural, engineering, and consulting services, the construction of the low-income housing (including interiors) or improvements includable in eligible basis, and the furnishing of the associated supplies, materials, machinery or equipment.

2. Applying for and maintaining all government permits and approvals necessary for the construction of the project and securing the certificates of occupancy (or other equivalent documents) when completed.

3. Complying with the requirements imposed by insurance providers during construction.

4. Providing oversight, including inspections during the course of construction and approving eventual payment for the services rendered.

5. Implementing the taxpayer’s decisions made in connection with the design, development, and construction of the project.

See Appendix C for the treatment of specific costs not identified here.
Developmental Costs Not Includable in Eligible Basis

Development of a low-income project involves services that are not associated with the low-income buildings and, therefore, the costs are not includable in eligible basis. Typical services include (but are not limited to):

1. Acquiring the project site. Specific activities may include locating suitable sites, performing economic and feasibility studies, market studies, and negotiating the purchase price. The developer may be involved in the purchase (settlement and closing) for a selected site and be responsible for holding and maintaining the site until construction begins. Note: a portion of the purchase price may be included in eligible basis if the purchase included the acquisition of a building that is subsequently rehabilitated for use as low-income residential rental property.

2. Maintaining contracts, books and records sufficient to establish the value of the completed project.

Negotiating Financing

A developer may advise the taxpayer regarding available sources of financing, such as federal, state or local subsidy programs, as well as commercial financing. The developer may also negotiate the terms of the financing with lenders or secure financing. See “Cost of Securing Financing” on page 8-27.

Partnership Costs

Services associated with the partnership’s organization, syndicating partnership interests, or securing an allocation of IRC §42 credit, are not includable in eligible basis. These costs are discussed in detailed later in this chapter.

Initial Lease-Up Costs

Because of the developer’s expertise, the taxpayer may contract with the developer to complete the initial leasing of the rental units. Typical costs include (but are not limited to) hiring on-site managers and trained staff, advertising, and maintaining model units. These costs are not includable in eligible basis. Instead, the costs should be amortized over the life of the lease if long term. If the lease is for a short term, typically at least six months but no more than one year for low-income rental units, then the costs should be amortized over the period necessary for completing the initial leasing of all the rental units.

On-Going Management Costs

The developer may also contract to provide on-going management of the day-to-day operations of the project after the initial lease-up. Typical services include providing qualified on-site project managers, physically maintaining the project site, resolving tenant issues, renewing leasing and securing new tenants, including the completion of income certifications for low-income households. The manager will have authority to collect rents, make deposits, and pay expenses below specified dollar criteria without the taxpayer’s approval. The management services may also provide for the creation of books and records sufficient to accurately report rental income and
period expenses on the taxpayer’s federal income tax return. These costs should be expensed and matched against current rental income.

**Issue 2: Services Actually Provided**

The second issue to consider is whether the developer actually performed the services. While it is generally expected that one developer will initiate development and then provide services throughout the development process until the project is completed, there are instances where more than one developer is involved.

**Concurrent Developers**

Multiple developers may be involved at the same time. For example, a for-profit developer may work with a qualified nonprofit organization to develop a low-income project qualifying for a credit allocation under IRC §42(h)(5). When there are multiple developers, there are two basic questions:

1. How were developmental responsibilities divided among the developers? For example, responsibilities may be assigned based on the developers’ areas of expertise.

2. Did the developer have the skills and expertise needed to provide developmental services and complete the project?

**Consecutive Developers**

A developer may not be able to complete a project and the taxpayer will hire a new developer. Under these circumstances, it is important to understand why the developer could not complete the project, what services each developer performed, and how the developers were paid.

**Issue 3: Reasonable Fee**

While the absolute value of the fee can be large, the developer bears the equally large financial risk of failure. As a best practice, the state agencies have limited the developer fee amount that can be supported by the credit. While the methodologies differ, the state agencies generally limit the fee to a percentage of total costs. The IRS is not compelled to accept the developer fee amount allowed by the state agency and may raise issues involving the reasonableness of the fee amount if the facts and circumstances warrant doing so.

**Issue 4: Method of Payment**

Developer fee payments made during development, or at the time development is completed, and which are identified in the taxpayer’s books as payments of developer fees are (generally) not challenged. Deferred fees, however, require further consideration.

**Performance of Additional Services**

1. Because the developer may be (or is related to) the general partner, consider whether the payment is contingent upon providing services usually associated with the duties of a general partner.

2. Because the developer may be (or is related to) the entity operating the low-income project, consider whether payment of the developer fee is contingent on successfully operating the project, or maintaining the project in compliance with
IRC §42.

If the above fact patterns exist, separately or in combination, then the deferred portion of the developer fee is not includable in eligible basis because the developer is being paid for services unrelated to the development of the low-income building.

**Intent to Pay Deferred Developer Fee**

In some cases, the terms and conditions of the deferred developer fee note and/or other documents may suggest that the taxpayer does not intend to pay the deferred fee. This issue is particularly important to address if the parties to the transaction are related. Consider whether:

1. the note and/or other documentation bears no interest rate or no payment is required for extended periods of time, suggesting that the agreement is not an arm’s length transaction,

2. payment is contingent on events unlikely to occur,

3. payment is subordinate to payment of other debt, and it is unclear that payment would ever be financially possible,

4. the developer holds a right of first refusal to purchase the property for a price equal to the outstanding debt, or

5. the general partner, who is (or is related to) the developer, is required to make a capital contribution sufficient to pay the deferred fee if the fee is not paid before a specified date.

If the above fact patterns exist, separately or in combination, the deferred developer fee note may not be bona fide debt.

**Analysis of Debt**

An extended discussion of bona fide debt is included here. See also Chapter 10.

**Recourse or Nonrecourse Debt**

Generally, debt, whether recourse or nonrecourse, is includable in the basis of property. *Commissioner v. Tufts*, 461 U.S. 300 (1983); *Crane v. Commissioner*, 331 U.S. 1, 11 (1947). However, the obligation must represent genuine, noncontingent debt. Nonrecourse debt is not includable if the property securing the debt does not reasonably approximate the principal amount of the debt, or if the value of the underlying collateral is so uncertain or elusive that the purported indebtedness must be considered too contingent to be includable in basis.

Recourse liabilities are generally includible in basis because they represent a fixed, unconditional obligation to pay, with interest, a specified sum of money. However, the mere fact that a note is recourse on its face is not determinative. For example, an obligation, whether recourse or nonrecourse will not be treated as a true debt where payment, according to its terms, is too contingent or repayment is otherwise unlikely. A liability is contingent if it is dependent upon the happening of a subsequent event, such as the earning of profits.
Genuine Indebtedness

When considering whether transactions characterized as “loans” constitute genuine indebtedness for federal tax purposes, the courts have isolated a number of criteria from which to judge the true nature of an arrangement which in form appears to be debt. In *Fin Hay Realty Co. v. United States*, 398 F.2d 694, 696 (3rd Cir. 1968), the court enumerated the following sixteen nonexclusive factors that bear on whether an instrument should be treated as debt for tax purposes:

1. The intent of the parties;
2. the identity between creditors and shareholders;
3. the extent of participation in management by the holder of the instrument;
4. the ability of the debtor to obtain funds from outside sources;
5. thinness of capital structure in relation to debt;
6. the risk involved;
7. the formal indicia of the arrangement;
8. the relative position of the obligees as to other creditors regarding the payment of interest and principal;
9. the voting power of the holder of the instrument;
10. the provision of a fixed rate of interest;
11. a contingency on the obligation to repay:
12. the source of the interest payments;
13. the presence or absence of a fixed maturity date;
14. a provision for redemption by the corporation;
15. a provision for redemption at the option of the holder; and
16. the timing of the advance with reference to when the taxpayer was organized.

As the *Fin Hay* court noted, “Neither any single criterion nor any particular series of criteria can provide an exclusive answer in the kaleidoscopic circumstances which individual cases present.” The Sixth Circuit cited *Fin Hay* with approval in *Indmar Products Co., Inc. v. Commissioner*, 444 F.3d 771, (6th Cir. 2006), confirming that “[t]he various factors…are only aids in answering the ultimate question whether the investment, analyzed in terms of its economic reality, constitutes risk capital entirely subject to the fortunes of the corporate venture or represents a strict debtor-creditor relationship.” The Tax Court has also held that the case-enumerated factors are merely aids to determining whether a given transaction represents genuine debt. *Nestle Holdings, Inc., v. Commissioner*, T.C. Memo, 1995-441.
Notice 94-47, 1994-1 C.B. 357, provides that the characterization of an instrument for federal income tax purposes depends on the terms of the instrument and all the surrounding facts and circumstances. Among the factors that may be considered when making such a determination are:

1. whether there is an unconditional promise on the part of the taxpayer to pay a fixed sum on demand or at a fixed maturity date that is in the reasonable foreseeable future,

2. whether the lender has the right to enforce the payment of principal and interest,

3. whether the lender’s rights are subordinate to rights of general creditors,

4. whether the instruments give the lender the right to participate in the management of the issuer (in this case, the IRC §42 project),

5. whether the taxpayer is thinly capitalized,

6. whether the lender (stockholders or partners) is related to the taxpayer,

7. the label placed upon the instrument by the parties, and

8. whether the instrument is intended to be treated as debt or equity for non-tax purposes, including regulatory, rating agency, or financial accounting purposes.

The weight given to any factor depends upon all the facts and circumstances. No particular factor is conclusive in making the determination of whether an instrument constitutes debt or equity. There is no fixed or precise standard. As noted in Goldstein v. Commissioner, T.C. Memo 1980-273, 40 TCM 752 (1980), among the common factors considered when making this determination are whether:

1. a note or other evidence of indebtedness exists,

2. interest is charged,

3. there is a fixed schedule for repayments,

4. any security or collateral is requested,

5. there is any written loan agreement,

6. a demand for repayment has been made,

7. the parties' records, if any, reflect the transaction as a loan any repayments have been made, and

8. the borrower was solvent at the time of the loan.

The key inquiry is not whether certain indicators of a bona fide loan exist or do not exist, but whether the parties actually intended and regarded the transaction to be a loan.
An essential element of bona fide debt is whether there exists a good-faith intent on the part of the recipient of the funds to make repayment and a good-faith intent on the part of the person advancing the funds to enforce repayment. See Fisher v. Commissioner, 54 TC 905 (1970).

In Story v. Commissioner, 38 TC 936 (1962) the Court held that the mere fact that the original payee indicated he might or might not attempt to collect on the notes, or that he might forgive all or portions of them in the future, makes the notes no less binding obligations until the events occurred which would relieve the obligation. However, the Commissioner, in C.B. 1965-1, 4, limited his acquiescence in this case to the factual nature of that particular case. See Rev. Proc. 65-4, C.B. 1965-1, 720.

The Court relied upon Story v. Commissioner, supra, in Haygood v. Commissioner, 42 TC 936 (1964), in concluding that notes created enforceable indebtedness even though petitioner had no intention of collecting the debts but did intend to forgive each payment as it became due. In an Action on Decision, the Commissioner stated that it will “continue to challenge transfers of property where the vendor had no intention of enforcing the notes given in exchange for the interest transferred but instead intended to forgive them as they became due. The [Commissioner] believes the intent to forgive the notes is the determinative factor…where the facts indicate that the vendor as part of a prearranged scheme or plan intended to forgive the notes he received for the transfer of his land, so valuable consideration will be deemed received…” Action on Decision, 1976 A.O.D. LEXIS 364.

**Related Party Transactions**

In the typical fact pattern for IRC §42 projects, both the general partner of the taxpayer (the purported debtor) and the developer (the purported creditor) are controlled by the same entity (or may be the same entity). Where borrowing transactions occur between related entities rather than as arm’s length, they are “subject to particular scrutiny because the control element suggests the opportunity to contrive a fictional debt.” Gefman v. Commissioner, 154 F.3d 61, 68 (3d Cir. 1998). Stated another way, where “the same persons occupy both sides of the bargaining table,” the form of a transaction “does not necessarily correspond to the intrinsic economic nature of the transaction, for the parties may mold it at their will” in order “to create whatever appearance might be of…benefit to them despite the economic reality of the transaction.” Gefman, 54 F.3d 61 at 75, citing Fin Hay Reality v. United States, 398 F.2d 694, 697 (3d Cir. 1968). Accord, Anchor Natl. Life Ins. Co. v. Commissioner, 93 T.C. 382, 407 (1989).

As the Gefman Court explained, “[t]he rule in Fin Hay accords with the general principle that tax consequences must be determined not from the “form of the transaction,” but from its “true substance.” Gefman, 154 F.3d at 75. Thus, “a transaction must be measured against an objective test of economic reality and characterized as a bona fide loan only if its intrinsic economic nature is that of a genuine indebtedness.” Where the transaction is not the project of an arm’s length relationship, much less weight is accorded to the factors relating to the form of the transaction than to those factors that go to the substance of the arrangement. See Laidlaw v. Commissioner, T.C. Memo. 1998-232; 75 TCM (CCH) 2598, 2617.
**Intrinsic Economic Nature**

In form, the deferred developer fee will be structured as a promissory note or other debt instrument. However, given the relationship between the parties, a court may accord little weight to the form of the transaction. Instead, the essential question is whether the instrument’s “intrinsic economic nature is that of a genuine indebtedness.”

1. **Independent Creditor Test**

   Consider the substantive terms of the alleged debt. For example, the note does not provide for installment payments; rather, the note is due and payable only after an extended period of time. It is only payable after all the taxpayer’s operating expenses and all other sums due are paid. The debt is nonrecourse and unsecured. In the event of default, the note holder’s sole remedy is a judgment against the taxpayer, to be collected against whatever assets (if any) the taxpayer has at the time of default. Despite these unusually generous terms, the debt is interest-free.

   The acid test of the economic reality of a purported debt is whether an unrelated outside party would have advanced funds to the borrower under like circumstances. *Fischer v. U.S.*, 441 F.Supp. 32, 28 (1977). It is highly unlikely that an outside lender would have advanced funds to a taxpayer under the terms described above. Generally, creditors avoid subjecting funds to the risk of the borrower’s business as much as possible and seek a reliable return. See *Laidlaw*, T.C. Memo 1998-232. Commercial lenders thus impose borrowing terms that ameliorate risks and charge interest rates that are reasonably calculated to compensate for those risks and provide a reasonable return on the lender’s investment. As described above, none of the note terms suggest any effort to limit risks. The note is due and payable far in the future. There are no installment payments due in the interim. The note is subordinated to other debt and is only payable after all the taxpayer’s operating expenses have been paid. The note is unsecured and nonrecourse. An economically motivated lender would charge significant interest to account for these risks, but the deferred developer fee note considered here is interest-free. Altogether, these features indicate that the debt instrument’s “intrinsic economic nature” is not that of genuine debt.

2. **Debt-Equity Ratios**

   Another factor that can indicate an absence of substance to purported debt is thinness of the taxpayer’s capital structure relative to accumulated debt. *Fin Hay*, 398 F.2d 694, 696; *Laidlaw*, 75 TCM (CCH) at 2620. Courts generally consider a borrower’s debt to equity ratio and other financial data in deciding if it is thinly capitalized. *Tyler v Tomlinson*, 414 F.2d 844, 850 (5th Cir. 1969). A taxpayer’s thin capitalization adds to the evidence that a deferred developer fee is not genuine debt. However, even if the taxpayer’s capital structure were more robust, that alone, especially in light of the highly favorable terms of the debt, would not necessarily tip the balance in favor of treating a deferred developer fee as described above as genuine debt.
3. Potential Sources of Repayments

A related factor when considering the substance of the transaction is the taxpayer’s ability to repay the advance and the reasonable expectation of the repayment. *Laidlaw*, 75 TCM (CCH) at 2624. Normally, there are four such possible sources: (1) liquidation of business assets, (2) profits, (3) cash flow, and (4) refinancing with another lender. “The burden is on the taxpayer to establish this, of course, and such a conclusion must be based on concrete facts and sound assumptions about the [taxpayer’s] future.” *Fischer v. United States*, 441 F.Supp 32, 39 (1977).

Consider the taxpayer described in TAM 200044004, which was a partnership formed to construct, develop, and operate a low-income housing tax credit property. The taxpayer’s managing partner was related to other parties, including the developer. The other general partner was a nonprofit corporation. At completion of the construction, the taxpayer did not have sufficient funds to pay the entire development fee so it issued a note for the balance owing. The note was payable at maturity, 13 years from completion of the project. The note was unsecured and source-of-payment restrictions were in effect during the term of the note. Payment was subordinate to other debts. The note bore interest which was compounded annually and added to the unpaid principal during the term of the note. The taxpayer was obligated to pay off the note in full at maturity and the general partners were obligated to make additional capital contributions necessary to pay off the note at maturity. Financial statements also indicated that payments had been made on the note.

The TAM concluded that the amount of the developer fee note was includable in the building’s eligible basis. The note was an obligation on the part of the taxpayer to pay a fixed amount, with interest, at maturity. Although payments were contingent on cash flow or receipts from capital transactions prior to maturity, all remaining principal and accrued interest were payable at maturity. Also, although sources of payment were contingent, and the developer could not foreclose on any security interest in any specific asset, the general partners were obligated, at maturity, to contribute an amount sufficient to pay off the note in full. Repayment of the note was also backed by the equity the taxpayer had in the assets beyond the general partners’ guarantee. In other words, it appeared the taxpayer has sufficient equity and assets to repay the note.

Critical to the determination in the TAM was the fact that the note bore interest to compensate the lender for the various financial risks posed by the note. The TAM cites an excerpt from *Gibson Products v. United States*, 637 F.2d 1041 (5th Cir 1981), in which the court stated that, “the single most important factor dictating that the transaction . . . was not a true loan is the fact that the total combined assets . . . were not sufficient to pay the note on or before the maturity date . . . absent production from any of the leases.” 637 F.2d at 1047.
In *Carp & Zuckerman v. Commissioner*, the Tax Court concluded that the taxpayers failed to prove that they performed the development services specified in the agreement. The Court explained that the taxpayer bears the burden of proving that the developer fee constituted a qualified expenditure and that it was inappropriate to apply the rule found in *Cohan v. Commissioner*. See Appendix I.

**Summary**

Ultimately, the burden is on the taxpayer to demonstrate that the developer fee was earned and is includable in eligible basis. If the taxpayer has deferred payment, the taxpayer will also need to demonstrate the deferred fee is bona fide debt. For related party transactions, when a court may accord little weight to the form of the transaction, the intrinsic economic nature of the transaction must be considered; i.e., would an unrelated outside lender advanced funds to the taxpayer under like circumstances? Particularly when the absence of interest provisions (or very low interest rates), unsecured, nonrecourse, subordinated, balloon payment would normally dictate a significant interest rate in a commercial setting to compensate the lender for the associated risks.

**Partnership Costs**

Partnership costs are not includable in eligible basis. Because the taxpayer may have included partnership costs in the development costs, the taxpayer’s books and records should be reviewed.

**Organizing Costs**

Generally, IRC §42 projects are owned by partnerships. The cost of organizing a partnership is amortized over a period of time not less than 60 months under IRC §709(b) and is not includable in eligible basis. Organizational costs include associated legal and accounting fees for preparing legal documents and contracts, making required regulatory filings, etc.

**Syndication Costs**

Syndication costs are incurred for the marketing and selling of partnership interests. Expenses include the preparation of offering memorandums and promotional materials, broker fees and commissions, legal fees, and due diligence costs. None of these costs are includable in eligible basis. Under IRC §709, these costs are capital costs that are not currently expensed or amortized, nor includable in the basis of the property for purposes of depreciation.

**IRC §42 Credit Allocation Costs**

Credit allocation costs are incurred to secure an allocation of IRC §42 credit. These costs are not capitalized to the low-income buildings’ adjusted basis and, therefore, are not includable in eligible basis. Activities related to credit allocation costs include (but are not limited to):

1. Reviewing the state agency’s qualified allocation plan, which identifies the state’s housing priorities (IRC §42(m)(1)(B) and (C)) and locating qualifying sites.

2. Conducting a comprehensive market study of the housing needs of low-income individuals in the area to be served by the project. IRC §42(m)(1)(A)(iii) specifies that the market study is to be conducted before the credit allocation is made and at the developer’s expense by a disinterested party approved by the