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QAP OUT: WHY THE FEDERAL GOVERNMENT SHOULD REQUIRE MORE FROM HOW STATES ALLOCATE LOW-INCOME HOUSING TAX CREDITS

*Connor Blancato**

Prohibitively high land acquisition and construction costs block affordable housing developers from using the Low-Income Housing Tax Credit program in high opportunity areas. Policymakers must study the history of housing policy in the United States and realize that the LIHTC program works because it suitably balances previously problematic private-market competition, federalism concerns, and compliance issues. Federal lawmakers can look to Qualified Allocation Plans drafted by individual states as a way to encourage the construction of affordable housing without upsetting this equilibrium. To encourage such development, the federal government can require states, in determining tax credit allocations through QAPs, to give preference to difficult development areas, high opportunity areas, or areas with less than 10% affordable housing stock.

INTRODUCTION

After a half-century of federally administered housing programs resulting in varied levels of success, Congress enacted a workable program to subsidize the construction of affordable housing.[1] Since

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1986, the federal government has been incentivizing private developers to build affordable housing with its Low-Income Housing Tax Credit ("LIHTC") program.[2] The LIHTC program has been wildly successful: from 1997 to 2017, the program financed 47,511 projects and about 3.13 million units.[3] LIHTC is an important tool that mixes private interests with public money to create a socially desirable result.[4]

The LIHTC program is "notoriously complex," but it is essential to the construction and preservation of affordable housing in the United States.[5] The federal government provides tax credits, but the individual states distribute them to private developers.[6] Although the states are allowed broad discretion in determining where to allocate credits, their distribution priorities must be made clear in a Qualified Allocation Plan ("QAP").[7] A typical QAP uses a point system that gives each project a score based on the project's desirable characteristics.[8] Projects will receive more points depending on their specific characteristics, the characteristics of the applicant, the project readiness, development costs, and more.[9]

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[1] *See generally* MAGGIE MCCARTY ET AL., CONG. RESEARCH SERV., RL34591, OVERVIEW OF FEDERAL HOUSING ASSISTANCE PROGRAMS AND POLICY (2019) [hereinafter MCCARTY ET AL., OVERVIEW OF FEDERAL HOUSING] (summarizing the history of federal housing policy in the United States).

[2] Tax Reform Act of 1986, 99 Pub. L. No. 514, 100 Stat. 2085 (1986); MCCARTY ET AL., OVERVIEW OF FEDERAL HOUSING, *supra* note 1, at 16.

[3] *Dataset / Low-Income Housing Tax Credits*, U.S. DEP'T HOUSING & URBAN DEV. (May 24, 2019), https://www.huduser.gov/portal/datasets/lihtc.html.

[4] Ali Foyt, *Legal Obstacles to Affordable Housing Development*, 56. HOUS. L. REV. 505, 513–16 (2018).

[5] *Id.* at 516.

[6] MARK P. KEIGHTLEY, CONG. RESEARCH SERV., RS22389, AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT 2 (2019).

[7] JOE BIBER & CORP. FOR SUPPORTIVE HOUS., FINANCING SUPPORTIVE HOUSING WITH TAX-EXEMPT BONDS & 4% LOW-INCOME HOUSING TAX CREDITS 6 (2017), https://www.csh.org/wp-content/uploads/2012/01/Report_financing-withbondsand-litch_1012.pdf.

[8] *See* I.R.C. § 42(m)(1)(C) (2019).

[9] *Id.*; N.Y.C. DEP'T OF HOUS. PRES. & DEV., 2019 LOW INCOME TAX CREDIT QUALIFIED ALLOCATION PLAN 19 (2019), https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/2019-qualified-allocation-plan.pdf.

States are given wide deference in what characteristics are prioritized, with some general direction from Congress.[10] The Internal Revenue Code states that the QAPs must give preference to projects that serve the lowest-income tenants, for the longest period of time, and in low-income neighborhoods specified as Qualified Census Tracts.[11]

LIHTCs are valuable because they lower the total amount of federal income tax a developer owes.[12] The developer, who may possess more tax credits than what he owes in income tax, can either use these credits or sell them to corporate investors.[13] Thus, investors offset their federal income taxes while providing the developers with valuable liquid capital, all while creating additional low-income housing.[14]

LIHTC, despite all of its good qualities, also has its drawbacks.[15] High costs involved with land acquisition and development in highly regulated areas are a barrier to developers.[16] These costs come from overly restrictive zoning and building codes that limit development and artificially lower the supply of affordable housing.[17] This phenomenon has been long recognized as a national problem.[18] Both the Obama and Trump administrations have

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[10] Foyt, *supra* note 4, at 519.

[11] § 42(m)(1)(B)(ii).

[12] KEIGHTLEY, *supra* note 6, at 4.

[13] Neal Hefferen, *A Complete Guide to the Low-Income Housing Tax Credit Program*, PROP. METRICS (June 13, 2017), https://propertymetrics.com/blog/a-complete-guide-to-the-low-income-housing-tax-credit-program/#disqus_thread.

[14] *Id.*

[15] *See infra* Part III.

[16] *See id.*

[17] Benjamin Harney, *The Economics of Exclusionary Zoning and Affordable Housing*, 38 STETSON L. REV. 459, 462 (2009); WILLIAM A. FISCHEL, ZONING RULES! THE ECONOMICS OF LAND USE REGULATION 164–65 (2015).

[18]
> Zoning affects land values in a number of ways. *First,* by protecting development against the encroachment of undesirable uses, it can help maintain and enhance property values. Indeed, much of the interest and concern in the zoning system by homeowners is based on this desire to preserve their investment. *Second,* zoning may raise the price of land

identified these codes as a hindrance to the construction of affordable housing.[19] These highly regulated areas offer the most benefits to tenants.[20] High rents come along with these benefits, and a shortage of affordable housing for low-income individuals in these areas follows.[21]

If President Trump and Congress are serious about increasing the supply of affordable housing, they should consider giving states

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> designated for certain uses by restricting the supply of such land.

BUILDING THE AMERICAN CITY: REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS TO THE CONGRESS & TO THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 91-34, at 225 (1969).

[19]
> Over the past three decades, local barriers to housing development have intensified, particularly in the high-growth metropolitan areas increasingly fueling the national economy. The accumulation of such barriers—including zoning, other land use regulations, and lengthy development approval processes—has reduced the ability of many housing markets to respond to growing demand.

WHITE HOUSE, THE WHITE HOUSE HOUSING DEVELOPMENT TOOLKIT 2 (2016), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf; *see also* Exec. Order No. 13,878, 84 Fed. Reg. 30,853 (2019) (explaining how onerous zoning restrictions have become an obstacle for housing developers).

[20] FREDDIE MAC, SPOTLIGHT ON UNDERSERVED MARKETS: AFFORDABLE HOUSING IN HIGH OPPORTUNITY AREAS 4, 16 (2018), https://mf.freddiemac.com/docs/Affordable_Housing_in_High_Opportunity_Areas.pdf [hereinafter FREDDIE MAC, AFFORDABLE HOUSING].

[21] *Id.* at 13–14. The Department of Housing and Urban Development ("HUD") classifies tiers of affordability using its metric of Area Median Income ("AMI"), the number that HUD determines as the "midpoint of [an] area's income distribution." "Low-Income" refers to an individual or family that receives 80% of the AMI; a "Very Low-Income" family or individual receives 50% of the AMI; and an "Extremely Low-Income" family or individual receives 30% of the AMI. METRO. COUNCIL, LOCAL PLANNING HANDBOOK: AMI AND HOUSING AFFORDABILITY 1 (2018), https://metrocouncil.org/Handbook/Files/Resources/Fact-Sheet/HOUSING/Area-Median-Income-and-Housing-Affordability.aspx. For more information on the specific AMIs of certain areas, see *HOME Income Limits*, DEP'T HOUSING & URBAN DEV. EXCHANGE, https://www.hudexchange.info/programs/home/home-income-limits/ (last visited Jan. 31, 2020).

more guidance on how to allocate their LIHTCs.[22] Congress should amend the QAP requirements and mandate state housing finance authorities to encourage the development of affordable housing in areas that have the most to offer tenants, but also have the greatest barriers to its creation.[23]

This Note will continue in four parts. Part I will summarize the national housing crisis, its adverse effects, and how the current administration is dealing with it. Part II will address past subsidized housing programs and some recurring themes in housing reform. Part III will take a closer look at LIHTC, its QAP requirement, its successes, and its failings. Part IV will suggest how Congress can amend the QAP requirement to further the effectiveness of the LIHTC program by rewarding developers who overcome high land acquisition and development costs. While Congress should still mandate that QAPs give preference to projects that serve the lowest-income tenants for the longest time, QAPs should also give preference to areas with the highest construction costs and the most benefits to tenants. This new preference can materialize in three ways: for difficult development areas; for areas of high opportunity; or for areas that have less than 10% of affordable housing stock.

I. THE TRUMP ADMINISTRATION'S RESPONSE TO THE HOUSING CRISIS AND WHAT IT MEANS FOR THE FUTURE OF LIHTC

The United States is in the midst of a housing crisis.[24] The supply of affordable housing is decreasing as more Americans are looking to rent.[25] As a result, Americans are paying more for rent, despite

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[22] *Infra* Part IV.

[23] *Id*.

[24] Julian Castro, *Our National Affordable Housing Crisis*, CNN (Apr. 7, 2015, 7:51 AM), https://www.cnn.com/2015/04/07/opinions/castro-affordable-housing-crisis/index.html; Jared Bernstein et al., *The Conundrum Affordable Housing Poses for the Nation*, WASH. POST (Jan. 2, 2020), https://www.washingtonpost.com/realestate/the-conundrum-affordable-housing-poses-for-the-nation/2020/01/01/a5b360da-1b5f-11ea-8d58-5ac3600967a1_story.html ("The nation is in the grip of an affordable housing crisis.").

[25] In the U.S., 11.2 million households are designated as extremely low-income. There are approximately 7.5 million rental units designated as affordable,

generating less income.[26] In 2015, nearly forty million Americans (an increase of 19% since 2001) were cost-burdened.[27] For the average American, rent has increased by almost a third while the real value of an individual's income has fallen or remained stagnant.[28] Minorities and the elderly have felt this change more than other groups.[29] The 11.2 million extremely low-income Americans have been hit the hardest, as they make up more than a quarter of all renters.[30] There is a housing shortage for extremely

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leaving a gap of 3.7 million. NAT'L LOW INCOME HOUS. COAL., GAP: A SHORTAGE OF AFFORDABLE HOMES 3 (2018), https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2018.pdf [hereinafter NAT'L LOW INCOME HOUS. COAL.]. While the number of housing units in New York City recently grew by about 8%, the adult population grew by 11%, and the number of adult-only households has taken up a larger percentage of all households. NYU FURMAN CTR., STATE OF NEW YORK CITY'S HOUSING & NEIGHBORHOODS: 2017 FOCUS: CHANGES IN NEW YORK CITY'S HOUSING STOCK 11 (2017), https://furmancenter.org/files/sotc/SOC_2017_FOCUS_Changes_in_NYC_Housing_Stock_1JUN2018.pdf.

[26] *See* THE PEW CHARITABLE TR., AMERICAN FAMILIES FACE A GROWING RENT BURDEN 76 (2018), https://www.pewtrusts.org/en/research-and-analysis/reports/2018/04/american-families-face-a-growing-rent-burden.

[27] *Nearly One-Third of American Households Are Cost-Burdened: Report*, THE REAL DEAL (June 19, 2019, 11:37 AM), https://therealdeal.com/2018/06/19/nearly-one-third-of-american-households-are-cost-burdened-report; THE PEW CHARITABLE TR., *supra* note 26, at 4. Families who pay more than 30% of their income to rent and utilities are considered "cost-burdened." *Affordable Housing*, U.S. DEP'T HOUSING & URBAN DEV., https://www.hud.gov/program_offices/comm_planning/affordablehousing/ (last visited Jan. 31, 2020). Families who pay more than 50% are "severely cost-burdened." Ahmad Abu-Khalaf, *JCHS' State of the Nation's Housing 2019 Report Shows That Renters Remained Widely Cost Burdened Even as Burden Rates Declined Slightly*, ENTERPRISE (June 25, 2019), https://www.enterprisecommunity.org/blog/jchs-state-nations-housing-2019-report-highlights-continued-affordability-challenges.

[28] THE PEW CHARITABLE TR., *supra* note 26, at 6.

[29] In 2001, 9% of American white individuals and 15% of American black individuals were severely cost-burdened. By 2015, 13% of white households were severely cost-burdened, and 23% of black households were severely cost-burdened. Although both groups increased in percentage, the gap between the two widened substantially. Elderly Americans (over age sixty-five) are also facing severely rent-burdened situations, rising from 15% rent-burdened in 2001 to 23% in 2015. *See id.* at 6, 12–13.

[30] NAT'L LOW INCOME HOUS. COAL., *supra* note 25, at 9.

low-income units in every American state and large metropolitan area.[31]

In 2018, these conditions forced severely cost-burdened families to spend 40% less on food and 75% less on healthcare compared to similarly situated poor but not cost-burdened households.[32] Not only are these cost-burdened families unable to save as much money and have less money for emergency costs or unexpected expenses, but high rents have a detrimental effect on a low-income family's ability to grow and pass down wealth.[33] High rents and housing instability also have less intuitive negative effects: these conditions are linked to unemployment,[34] poor mental and physical health,[35] and lackluster academic performance.[36]

The current administration's response to this crisis has been met with resistance from Congress.[37] In the past two years, President Trump proposed cutting the Department of Housing and Urban Development's ("HUD") budget by \$6.82 billion in 2018[38] and \$8.8

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[31] *Id.* at 8.

[32] *Id.* at 6.

[33] For a longer discussion on the negative effects of high rents on a family's ability to grow savings and the long-term financial impacts, *see* THE PEW CHARITABLE TR., *supra* note 26, at 14–17.

[34] *Housing Instability Increases Likelihood of Job Loss*, NAT'L LOW INCOME HOUSING COALITION (Feb. 20, 2018), https://nlihc.org/resource/housing-instability-increases-likelihood-job-loss.

[35] Candace Butera, *The Burden of a Late Rent Check Can Harm the Health of Both Parents and Kids*, PAC. STANDARD (Jan. 23, 2018), https://psmag.com/social-justice/late-rent-payments-family-health.

[36] Amelia Harper, *Study: Housing Instability Largest Predictor of Chronic Absenteeism*, EDUC. DIVE (Dec. 11, 2018), https://www.educationdive.com/news/study-housing-instability-largest-predictor-of-chronic-absenteeism/543974/.

[37] Sylvan Lane, *Waters Clashes with Trump Officials over 'Disastrous' Housing Plans*, THE HILL (Oct. 22, 2019, 1:24 PM), https://thehill.com/policy/finance/466928-trump-officials-democrats-spar-over-how-to-tackle-housing-crisis.

[38] *Trump-Carson Housing Budget Cut Estimator*, AFFORDABLE HOUSING ONLINE (May 23, 2017), https://affordablehousingonline.com/FY18-HUD-Budget-Cuts.

billion in 2019.[39] Currently, President Trump's 2020 proposed budget cuts HUD's funding another 16.4%,[40] a move answered by bipartisan pushback.[41] Public housing in particular is the target of massive cuts.[42]

The House of Representatives has thwarted Trump's attempts to limit HUD thus far.[43] Congress not only increased HUD's funding for 2018, but sustained the increases with an additional modest increase to certain programs in 2019.[44] Most importantly, Congress preserved the LIHTC program through the overhaul of the tax policy in 2017.[45] However, the 2017 Tax Cuts and Jobs Act has cast some doubts on the program's future.[46] A key component of the Tax Cuts

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[39] Brakkton Booker, *White House Budget Calls for Deep Cuts to HUD*, NPR (Feb. 13, 2018, 5:00 AM), https://www.npr.org/2018/02/13/585255697/white-house-budget-calls-for-deep-cuts-to-hud.

[40] Jeff Andrews, *Trump Administration Proposes Dramatic Cuts to Public Housing—Again*, CURBED (Mar. 11, 2019, 5:32 PM), https://www.curbed.com/2019/3/11/18260492/trump-2020-budget-proposal-cuts-hud-dot.

[41] Pam Fessler, *Bipartisan Disapproval over Trump Administration's Housing Program Cuts*, NPR (Apr. 3, 2019, 6:33 PM), https://www.npr.org/2019/04/03/709529287/bipartisan-disapproval-over-trump-administrations-housing-program-cuts.

[42] Andrews, *supra* note 40.

[43] Peter Lawrence, *2019 Omnibus Appropriations Provides Increases to HUD Funding, but Less Border Barrier Funding Than Administration's Request, Leading to Emergency Declaration*, NOVOGRADAC & CO. (Feb. 15, 2019, 12:00 AM), https://www.novoco.com/notes-from-novogradac/2019-omnibus-appropriations-provides-increases-hud-funding-less-border-barrier-funding.

[44] *Id.*

[45] *See Senate Committee Holds Hearing on LIHTC Improvement and Expansion*, NAT'L LOW INCOME HOUSING COALITION (Aug. 14, 2017), https://nlihc.org/resource/senate-committee-holds-hearing-lihtc-improvement-and-expansion. In deliberations for the 2017 tax bill, the Senate Finance Committee praised LIHTC's ability to "continue encouraging businesses to invest in affordable housing and provide individuals and families with expanded opportunities." U.S. SENATE COMM. ON FIN., 115TH CONG., TAX CUTS & JOBS ACT POLICY HIGHLIGHTS 2 (Comm. Print 2017), https://www.finance.senate.gov/imo/media/doc/11.9.17%20Policy%20Highlights.pdf.

[46] Thomas D. Morton, *The Impact of the Tax Cuts and Jobs Act on LIHTC Investments*, PILLSBURY L. (Jan. 1, 2018), https://www.pillsburylaw.com/en/news-and-insights/the-impact-of-the-tax-cuts-and-jobs-act-on-lihtc-investments.html.

and Jobs Act of 2017 is the corporate tax cut from 35% to 21%.[47] While this change does not directly affect the price of the LIHTCs, potential corporate investors now have a lower tax bill, making LIHTCs a less attractive offer for purchase from developers.[48] Early reports suggest that the demand for LIHTCs has decreased since the 2017 Act's implementation.[49]

Luckily, in 2018 Congress increased funding for LIHTC for the first time in twenty years.[50] Currently, a group of Senators supports a substantial increase to the program, which could jolt the production of affordable housing by as many as 1.9 million new units.[51] On June 25, 2019, President Trump issued Executive Order 13,878, forming a White House council to eliminate numerous regulatory barriers to affordable housing.[52] The Order charges the White House Council on Eliminating Regulatory Barriers to Affordable Housing with identifying "Federal, State, local, and tribal laws, regulations, and administrative practices that artificially raise the costs of housing development and contribute to shortages

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[47] *Id.*

[48] *Id.*

[49] KEIGHTLEY, *supra* note 6, at 5.

[50] Michael Novogradac, *Omnibus Spending Bill Contains Affordable Housing Credit Improvement Act Provisions*, NOVOGRADAC & CO. (Mar. 21, 2018, 12:00 AM), https://www.novoco.com/notes-from-novogradac/omnibus-spending-bill-contains-affordable-housing-credit-improvement-act-provisions.

[51] Patrick Sission, *New Affordable Housing Bill Aims to Add 1.9M Units Nationwide*, CURBED (June 5, 2019, 10:50 AM), https://www.curbed.com/2019/6/5/18653657/affordable-housing-development-congress-bill.

[52]
> It shall be the policy of my Administration to work with Federal, State, local, tribal, and private sector leaders to address, reduce, and remove the multitude of overly burdensome regulatory barriers that artificially raise the cost of housing development and help to cause the lack of housing supply. Increasing the supply of housing by removing overly burdensome regulatory barriers will reduce housing costs, boost economic growth, and provide more Americans with opportunities for economic mobility. In addition, it will strengthen American communities and the quality of services offered in them by allowing hardworking Americans to live in or near the communities they serve.

Exec. Order No. 13,878, 84 Fed. Reg. 30,853 (2019).

in housing supply."[53] The Order recognizes many problematic regulations and identified "overly restrictive zoning and growth management controls . . . unreasonable maximum-density allowances; historic preservation requirements; outdated manufactured-housing regulations and restrictions; [and] undue parking requirements" as regulatory barriers.[54] The Order also specifically mentions the LIHTC program as a means by which the federal government has stimulated the development of affordable housing.[55] Council members trying to effectively improve the LIHTC program must understand how their predecessors failed and how U.S. housing policy has evolved over time.

II. A SHORT HISTORY OF AMERICAN HOUSING POLICY

Firstly, it is important to explain the distinction between affordable housing and public housing, as the two are sometimes confusingly conflated and used interchangeably.[56] Public housing refers to projects that are owned or managed by the government.[57] Affordable housing is privately owned, where rent costs less than 30% of the household income, and is sometimes subsidized by the government for the benefit of low-income renters.[58] The successes and failures of these types of housing have been shaped by tension between private and public interests, state sovereignty, and issues with monitoring and compliance.[59]

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[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] Alex Beaver, *What Is the Difference Between Affordable Housing and Public Housing?* OLYMPIA MGMT. INC., https://olympiamanagement.net/2017/08/difference-affordable-housing-public-housing/ (last visited Jan. 31, 2020).

[57] *Id.*

[58] *Id.*

[59] *Infra* Part II.

A. Public Housing

Public housing began with the passage of the National Housing Act of 1937.[60] The Housing Act, which was a multipurpose New Deal program that provided homes for unemployed laborers during the Great Depression, presented states with statutory authority to initiate slum clearance and gave public works a boost.[61] Only families with an income less than five times the project's rent were eligible for the program.[62]

States had to form public housing authorities ("PHAs") to use federal funds.[63] PHAs issued bonds to finance the construction of projects, and the federal government would pay the interest and principal on these bonds.[64] The rent from the tenants would pay for the operation of the premises, allowing the PHAs to break even.[65] PHAs, unlike private landlords, have a social mission to serve their tenants.[66] Today there are over 3,000 PHAs.[67] New York City's

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[60] United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888.

[61]
> To provide financial assistance to the States and political subdivisions thereof for the elimination of unsafe and insanitary housing conditions, for the eradication of slums, for the provision of decent, safe, and sanitary dwellings for families of low income, and for the reduction of unemployment and the stimulation of business activity, to create a United States Housing Authority, and for other purposes.

Id. The Housing Act replaced a smaller program meant to finance the development of low-income housing. The short-lived housing division of the Public Works Administration financed more than 25,000 units. ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 110 (2006).

[62] The income limit was increased to six times the rent in cases of families with three or more children. United States Housing Act of 1937, Pub. L. No. 75-412, § 2(1), 50 Stat. 888. *See* MAGGIE MCCARTY, CONG. RESEARCH SERV., R41654, INTRODUCTION TO PUBLIC HOUSING 2 (2004), https://www.everycrsreport.com/files/20140213_R41654_ea33861d88be714fd141d7381f838624f1f5b859.pdf [hereinafter MCCARTY, INTRODUCTION TO PUBLIC HOUSING].

[63] MCCARTY ET AL., OVERVIEW OF FEDERAL HOUSING, *supra* note 1, at 2.

[64] SCHWARTZ, *supra* note 61, at 112.

[65] *Id.*

[66] MCCARTY, INTRODUCTION TO PUBLIC HOUSING, *supra* note 62, at 41.

[67] *Id.* at 10.

PHA, the New York City Housing Authority ("NYCHA"), is the largest, accounting for 17% of all public housing units in the country.[68] PHAs own and manage local public housing.[69] Localities are in the driver's seat when it comes to the location and position of housing projects.[70] If localities and municipalities do not wish to build public housing, they are under no obligation to do so.[71] By relying on local control, the federal government gave localities the option to not build public housing.[72]

Even though public housing was a federally funded program, the private sector influenced its design.[73] To protect the private housing market from competition with a publicly funded housing option, Congress required that public housing serve only tenants whose income was too low to secure housing on the open market.[74] While the National Housing Act of 1949 expanded the housing program, concerns from the private market prompted construction cost limits and a rent ceiling.[75] Additionally—partially because of protectionism and partially because of construction cost limits—public buildings were designed to look less desirable and aesthetically pleasing than their private-market counterparts.[76] Fears of competition from the private sector restrained the success and possibilities of public housing.[77]

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[68] The vast majority of PHAs are smaller, with 75% of them running under 250 units. *Id.*

[69] *Id.* at 9.

[70] SCHWARTZ, *supra* note 61, at 107–08; *see also* MCCARTY, INTRODUCTION TO PUBLIC HOUSING, *supra* note 62 (describing the discretion localities were given under the Housing Act of 1937).

[71] SCHWARTZ, *supra* note 61, at 107–08.

[72] *Id.*

[73] MCCARTY, INTRODUCTION TO PUBLIC HOUSING, *supra* note 62, at 3.

[74] SCHWARTZ, *supra* note 61, at 105.

[75] Public housing rents had to be at least 20% below the prevailing market rents. Housing Act of 1949. Pub. L. No. 81-171, §§ 301(b), 303, 63 Stat. 413, 422, 424; MCCARTY, INTRODUCTION TO PUBLIC HOUSING, *supra* note 62, at 3.

[76] *See* SCHWARTZ, *supra* note 61.

[77] MCCARTY, INTRODUCTION TO PUBLIC HOUSING, *supra* note 62, at 3.

After two decades of operation, it was clear that public housing was not cost-effective.[78] When tenants' incomes plummeted, revenue from rent also fell, and with maintenance fees increasing, PHAs were no longer breaking even.[79] To cut costs, PHAs deferred doing maintenance and unessential repairs, which only led to higher costs later.[80]

With the Housing and Urban Development Act of 1969, the federal government began subsidizing PHAs' operating costs and capital expenses.[81] The Brooke Amendment in the 1969 Act capped the rents paid by low-income families to just 25% of their incomes.[82] Congress changed the limit to 30% in 1981, and this 30% yardstick measurement is still commonly used to gauge whether a rental is affordable or not.[83] Capping the rent and tying it to income ensured that tenants were not cost-burdened.[84] "The Brooke Amendment is considered to be responsible for codifying an income-based rent structure in federal housing programs."[85] The income-based rent structure exists to this day.[86]

The end of the 1960s into the 1970s marked a shift in federal policy.[87] The federal government chose to incentivize the private

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[78] MCCARTY ET AL., OVERVIEW OF FEDERAL HOUSING, *supra* note 1, at 6.

[79] SCHWARTZ, *supra* note 61, at 111–13.

[80] *See id.* at 113–14.

[81] MCCARTY, INTRODUCTION TO PUBLIC HOUSING, *supra* note 62, at 5. In 1969, the federal government gave $14.9 million in operating assistance; this number increased to $727 million in 1979. SCHWARTZ, *supra* note 61, at 113.

[82] MCCARTY, INTRODUCTION TO PUBLIC HOUSING, *supra* note 62, at 5.

[83] *See What Is Affordable Housing?*, AFFORDABLE HOUSING ONLINE, https://affordablehousingonline.com/what-is-affordable-housing (last visited Jan. 31, 2020). This metric is not without its critics. *See* Chris Matthews, *Why Should You Only Spend 30% of Your Income on Housing?*, FORTUNE (Aug. 4, 2015), https://fortune.com/2015/08/04/housing-30-percent-rule/; *see also* Catherine New, *How Much Should I Spend on Rent? Ignore the '30% Rule'*, EARNEST (Sept. 17, 2015), https://www.earnest.com/blog/rent-and-the-30-percent-rule/ (arguing the 30% metric should not be treated as a hard and fast rule, especially for higher-income individuals and families).

[84] MCCARTY, INTRODUCTION TO PUBLIC HOUSING, *supra* note 62, at 5.

[85] MCCARTY ET AL., OVERVIEW OF FEDERAL HOUSING, *supra* note 1, at 5.

[86] METRO. COUNCIL, *supra* note 21; *HOME Income Limits*, *supra* note 21.

[87] MCCARTY ET AL., OVERVIEW OF FEDERAL HOUSING, *supra* note 1, at 6.

creation and ownership of housing rather than a publicly owned housing option.[88] Subsequently, Congress began preferring subsidization of affordable housing by utilizing the private market rather than expanding the creation of public housing.[89] Congress has not allocated funding for more construction of public housing since 1994.[90] Presently, PHAs face a backlog of capital costs, increasing operational fees, and a decline in the overall number of units.[91]

B. *Affordable Housing*

One of the federal government's first attempts to encourage private market involvement in subsidized housing was to issue mortgages at below-market interest rates ("BMIR"), an effort known as the Section 221(d)(3) program.[92] Started in 1961, the program allowed developers to obtain BMIRs on mortgages (usually around 3%) on buildings which charged lower rents to median-income families that were pushed out of the rental market.[93] The

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[88] *Id.*

[89] "Affordable housing delivery in the United States has evolved toward greater privatization, now constructed and maintained through an assortment of public and private financing tools, most of which public housing is unable to access or leverage." Kristin Niver, *Changing the Face of Urban America: Assessing the Low-Income Housing Tax Credit*, 102 VA. L. REV. 48, 51 (2016); MCCARTY ET AL., OVERVIEW OF FEDERAL HOUSING, *supra* note 1, at 6.

[90] MCCARTY, INTRODUCTION TO PUBLIC HOUSING, *supra* note 62, at 8.

[91] *Id.* at 8–9.

[92] Before Section 221(d)(3), Congress had initiated another supply-side incentive called Section 202 to benefit the construction of housing for the elderly. Section 221(d)(3) expanded Section 202's list of eligible borrowers from just private nonprofits to private for-profit developers and government entities. MCCARTY ET AL., OVERVIEW OF FEDERAL HOUSING, *supra* note 1, at 3–4.

[93] National Housing Act of 1961, Pub. L. No. 87-70, § 101, 75 Stat. 149 (1961); *see* NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT: ASSESSMENT OF PROGRAM PERFORMANCE & COMPARISON TO OTHER FEDERAL AFFORDABLE RENTAL HOUSING SUBSIDIES 15 (2011), https://www.novoco.com/sites/default/files/atoms/files/novogradac_hag_study_2011_graphics.pdf [hereinafter NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT]. The maximum qualifying income for the families in this program was often near an area's median income. The program would later receive criticism for its middle-class emphasis. SCHWARTZ, *supra* note 61, at 130.

private lenders who issued the mortgages promptly sold them to government-sponsored mortgage guarantor Fannie Mae, who promised to fulfill a mortgage if the developer ever defaulted.[94] In sum, the federal government was issuing low-interest mortgages to developers by using banks as middlemen.[95] Section 221(d)(3) facilitated the construction of about 184,000 units, far fewer compared to other programs.[96] Administrative delays and inexperienced buyers were only some of the problems faced by this program.[97] The incentive was font-based, so once a developer completed a project and secured a mortgage, no incentive motivated the developer's compliance with federal standards of affordability.[98] Instead, developers were incentivized to build as much as possible and were more interested in the completion of a project than the project's eventual operation.[99] Additionally, the lenient loan prepayment restrictions meant that property owners would often prepay the loan, subsequently fulfill their obligations to the government by refinancing, and then gain windfalls by converting the properties to market-rate housing.[100] By 1975, one quarter of Section 221(d)(3) owners had defaulted on their properties, and since the federal government had guaranteed the mortgages, it incurred large costs paying for the management of defaulted properties.[101] Congress discontinued the program in the mid-1960s, and only 11,000 Section 221(d)(3) units remain today.[102]

The Housing and Urban Development Act of 1968 attempted to correct the issues of prior programs with the Section 236 program,

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[94] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93.

[95] SCHWARTZ, *supra* note 61, at 130.

[96] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93.

[97] SCHWARTZ, *supra* note 61, at 130.

[98] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 16.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 15–16.

[102] Andrew Kochera, *A Summary of Federal Rental Housing Programs*, AARP (May 2001), https://www.aarp.org/home-garden/housing/info-2001/aresearch-import-778-FS85.html.

which provided an interest rate payment ("IRP").[103] A private developer would secure a mortgage from a private lender with a fair market interest rate.[104] The federal government paid the difference between the price of the mortgage with a market interest rate and the price the mortgage would have with a 1% interest rate.[105] The government was essentially ensuring that developers would receive the equivalent of a 1% mortgage from private lenders.[106] This program cost more than a BMIR, so the government required the owners to rent units to lower-income tenants—those who earned 80% of the Area Median Income ("AMI").[107] The IRP program, much like its predecessor, fell victim to the rising inflation of the 1970s, and as operating costs rose, so did the rents.[108] Many tenants found rents prohibitively expensive.[109] Nonetheless, the program was more popular than the Section 221(d)(3) BMIR, and the Section 236 IRP created 544,000 units.[110]

In response to the inflation of the 1970s, Congress took additional action.[111] High costs and long construction periods caused officials to turn away from pure construction subsidies.[112] Subsequently, the Section 8 voucher program was introduced, a

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[103] Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 236, 82 Stat. 476, 498–503; NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 17.

[104] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 17.

[105] SCHWARTZ, *supra* note 61, at 159.

[106] *Id.*

[107] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 17.

[108] SCHWARTZ, *supra* note 61, at 130.

[109] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 18.

[110] "Section 236's quick start reflected changes in the federal tax code that greatly increased the incentive to invest in rental housing. Among other benefits, the tax code was revised to allow for accelerated depreciation, which attracted private investors to shelter income from other sources." SCHWARTZ, *supra* note 61, at 131.

[111] *Id.* at 133.

[112] MCCARTY, INTRODUCTION TO PUBLIC HOUSING, *supra* note 62, at 5.

program that serves almost 3.5 million households today.[113] Section 8 as a whole refers to two programs: the now-defunct project-based vouchers that were a supply-side subsidy, and the still-popular tenant-based Section 8 vouchers that are a demand-side subsidy.[114] Both were initiated by the Housing and Community Development Act of 1974.[115] When a unit or a family qualified for either voucher, the tenant would be charged fair market rent.[116] Under the tenant voucher, the federal government would pay the difference between 25% (later 30%) of the family's income and the fair market rent.[117] Under the project voucher, the federal government paid for the construction of the project upfront, and in return, the developer charged below-market rent for a term established in a Housing Assistance Payment ("HAP") contract.[118] Unlike the early days of public housing, a family's rent would drop proportionally if its income declined suddenly.[119]

The Section 8 New Construction/Substantial Rehabilitation ("NC/SR") program, the supply-side subsidy, proved to be highly expensive.[120] Since the program was project-based, HUD would contract with developers, who agreed to build new construction projects and charge below-market rent to low and extremely low-income tenants in exchange for each tenant's voucher money.[121] Developers entered into HAP contracts for ten to forty years.[122] The financing was secured far in the future, which was an improvement over the BMIR program, but Section 8 still suffered from monitoring issues.[123] Developers, who knew that the federal

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[113] KEIGHTLEY, *supra* note 6, at 4.

[114] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 19.

[115] Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 8, 88 Stat. 633, 662–666.

[116] SCHWARTZ, *supra* note 61, at 133.

[117] MCCARTY, INTRODUCTION TO PUBLIC HOUSING, *supra* note 62, at 6.

[118] SCHWARTZ, *supra* note 61, at 133.

[119] *Id.*

[120] *Id.*

[121] MCCARTY ET AL., OVERVIEW OF FEDERAL HOUSING, *supra* note 1, at 11.

[122] *Id.*

[123] SCHWARTZ, *supra* note 61, at 133.

government guaranteed rent, had little incentive to invest in or improve their buildings, or to keep their operating costs low.[124] Research soon found that the tenant-based home choice voucher (which today lets low-income families choose from already existing house stock) cost less money than the project-based subsidy.[125] Section 8 NC/SR was terminated in 1983,[126] and the tenant-based home choice voucher program became permanent in 1988.[127]

The 1980s also marked the introduction of another program.[128] Building off the lessons from Section 221(d)(3) and the Section 236 programs, Congress again turned its attention to a private market supply-side incentive and created a program that relied on private market forces to enforce a new monitoring scheme: LIHTC.[129]

III. DESCRIPTION OF THE LIHTC PROGRAM

The LIHTC program began with the Tax Reform Act of 1986[130] and became a permanent feature of the nation's housing policy in 1993.[131] LIHTC is a market-based solution that increases affordable housing options with a supply-side incentive to motivate developers

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[124] *Id.*

[125] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 20.

[126] *Id.* Although the program was terminated, HUD is still involved in HAP contracts with some of the older units. Of those, 1.3 million units of housing are funded under contracts that have not yet expired or contracts that have expired and were renewed. CONG. RESEARCH SERV., RL32284, AN OVERVIEW OF THE SECTION 8 HOUSING PROGRAMS: HOUSING CHOICE VOUCHERS AND PROJECT-BASED RENTAL ASSISTANCE 6 (2014), https://www.everycrsreport.com/files/20140207_RL32284_c06c87f7a9b055ade32ee0ca1e2bd69c17c89ecb.pdf.

[127] Housing and Community Development Act of 1987, Pub. L. No. 100-242, §§ 141–150, 101 Stat. 1815, 1849–56 (1988) (codified at 42 U.S.C. 1437f); MCCARTY, INTRODUCTION TO PUBLIC HOUSING, *supra* note 62, at 7.

[128] Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189–220 (1986).

[129] *Infra* Part III.

[130] KEIGHTLEY, *supra* note 6, at 1; Tax Reform Act of 1986, 100 Stat. at 2085–2963.

[131] Omnibus Budget Reconciliation Act of 1993, 103 Pub. L. No. 66, § 13142, 107 Stat. 312, 438 (1993).

to either create new construction or initiate rehabilitation of existing housing.[132] LIHTCs are federally provided tax credits that offset the federal income tax of affordable housing developers who in return promise to charge below-market rents on a portion of their units.[133] The program not only relies on the invisible hand of the free market but also on individual states' discretion in how to allocate their credits.[134] Furthermore, the program's monitoring and compliance scheme ensures the affordability of the units under its purview.[135] This Part is divided in four sections: (A) an overview of the LIHTC program; (B) an in-depth look at the LIHTC's QAP requirement; (C) a summary of the program's successes; and (D) a discussion of how it may perpetuate housing segregation.

A. Overview of LIHTC

A LIHTC provides a developer (or ultimate purchaser) with either a 4% credit rate or a 9% credit rate.[136] Developers with projects that qualify under the requirements of the Internal Revenue Code receive a tax credit equal to either 4% or 9% of the proposed building's qualified cost of construction each year, for ten years.[137] For example, let's say a project costs $100,000 and qualifies under the Internal Revenue Code for a LIHTC with a 9% credit rate.[138] Each year, for ten years, the developer will receive 9% of $100,000 (or $9,000) in tax credits.[139] Accounting for interest rates, the 9% tax credit was worth $70,000 to the developer in 2019, creating a 70% subsidy level.[140] The changing interest rate also means that LIHTCs do not maintain credit rate values of 4% and 9%.[141] The

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[132] Foyt, *supra* note 4, at 514.

[133] KEIGHTLEY, *supra* note 6, at 1.

[134] MCCARTY ET AL., OVERVIEW OF FEDERAL HOUSING, *supra* note 1, at 7.

[135] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 7–8.

[136] KEIGHTLEY, *supra* note 6, at 1.

[137] I.R.C. § 42(f)(1) (2019); KEIGHTLEY, *supra* note 6, at 1.

[138] KEIGHTLEY, *supra* note 6, at 1.

[139] *Id.*

[140] *Id.*

[141] *Id.*

LIHTC program is committed to keeping the subsidy level (30% and 70% respective to the 4% LIHTC and 9% LIHTC) constant rather than the credit rates.[142] In reality, adjusting for the fluctuating interest rates, the 4% credit rate has vacillated between 3.15% and 3.97% since 1986.[143] The 9% rate ranged between 7.35% and 9.27%.[144] In October 2019, the 9% LIHTC credit rate was 7.39%, and the 4% LIHTC credit rate was 3.17%.[145]

Developers who receive the tax credits generally sell them to investors.[146] "Taxpayers claiming the tax credits are usually investors, not developers."[147] There are a number of different third-party LIHTC investors, including private investors, banks, and tax-credit syndicators that pool LIHTCs from many properties into a single investment fund.[148] Normally, a developer and an investor are part owners of an entity like a limited liability partnership.[149] The investor gains control of the tax credits, while the developer maintains management rights over the property.[150] The investor, in turn, uses the tax credits to offset the investor's income tax.[151] LIHTC projects are important investments for banks in particular because LIHTCs are seen as favorable towards banks' obligations under the Community Reinvestment Act ("CRA").[152]

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[142] § 42(b); KEIGHTLEY, *supra* note 6, at 1.

[143] KEIGHTLEY, *supra* note 6, at 1.

[144] *Id.*

[145] *See Affordable Housing Resource Center: Tax Credit Percentages 2019*, NOVOGRADAC & CO., https://www.novoco.com/resource-centers/affordable-housing-tax-credits/data-tools/tax-credit-percentages-2019 (last visited Jan. 31, 2020).

[146] KEIGHTLEY, *supra* note 6, at 3.

[147] *Id.* at 1.

[148] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 7–8.

[149] Foyt, *supra* note 4, at 520.

[150] *Id.*

[151] The market price of the credit fluctuates typically between $0.80 and $0.90 per tax credit. KEIGHTLEY, *supra* note 6, at 4.

[152] OFFICE OF THE COMPTROLLER OF THE CURRENCY, LOW-INCOME HOUSING TAX CREDITS: AFFORDABLE HOUSING INVESTMENT OPPORTUNITIES FOR BANKS 1 (2014), https://www.occ.gov/publications-and-resources

In exchange for receiving these generous tax credits from the government, developers promise to charge lower rents for a restrictive period of fifteen years but can also agree to an extended use agreement that lasts thirty years.[153] The developer may not raise rent above 30% of the AMI.[154] There are three income restriction tests today; a proposed project need only satisfy one. Traditionally, the Internal Revenue Code required that properties meet one of two tests to show eligibility for LIHTC allocation, both of which are still viable today: the "20–50 test" or the "40–60 test."[155] To satisfy the 20–50 test, "at least 20% of the units must be occupied by individuals with an income of 50% or less of the area's median gross income, adjusted for family size."[156] To satisfy the 40–60 test, "at least 40% of the units must be occupied by individuals with income 60% or less of the area's median gross income, adjusted for family size."[157] Congress added a third "average income test" option in 2018.[158] This test requires developers to keep 40% of the units occupied with tenants who make an average of 60% of the AMI.[159]

/publications/community-affairs/community-developments-insights/pub-insights-mar-2014.pdf. The Community Reinvestment Act is intended to encourage banks and other lending institutions to give back to their communities by incentivizing investment through tax credits. Community Reinvestment Act (CRA) of 1977, 12 U.S.C. § 2901; *Community Reinvestment Act (CRA),* OFF. COMPTROLLER CURRENCY, https://www.occ.treas.gov/topics/consumers-and-communities/cra/indexcra.html (last visited Jan. 31, 2020).

[153] I.R.C. §§ 42(h)(6), 42(h)(6)(D) (2019); David Cohen, *Improving the Supply of Affordable Housing: The Rule of the Low-Income Housing Tax Credit*, 6 J.L. & POL'Y 537, 545 (1998); Sagit Leviner, *Affordable Housing and the Role of the Low Income Housing Tax Credit: A Contemporary Assessment*, 57 TAX L. 869, 873 (2004).

[154] § 42(g)(2); KEIGHTLEY, *supra* note 6, at 3.

[155] KEIGHTLEY, *supra* note 6, at 3.

[156] *Id.*; *see also* § 42(g)(1)(A) (codifying the 20–50 test).

[157] *Id.*; *see also* § 42(g)(1)(B) (codifying the 40–60 test).

[158] § 42(g)(1)(C).

[159] This may sound very similar to the 40–60 test, but it is different. The 40–60 test prohibits any tenant with an income higher than 60% of the AMI to count towards the statutory requirements. The average income test allows the landlord to rent to higher-income individuals, with, say, an income of 75% of the AMI, as long as they are offset by lower-rent apartments somewhere else. However, no

The developer must monitor the tenants' incomes to make sure the building stays in compliance; falling out of compliance permits the IRS to recapture the credits.[160]

Importantly, developers do not immediately receive tax credits following a successful bid.[161] Tax credits are only awarded after a building is completed, is in compliance, and qualifies for the credits.[162] In turn, the federal government is not liable if the developer defaults, in contrast to the Section 221(d)(3) BMIR program.[163] Rather, liability is spread between the developer and investor.[164]

Similar to how each state receives federal money for public housing through their PHAs, the federal government distributes an annual LIHTC allocation to each state via a state agency that administers the program, typically (but not always) the Housing Finance Agency ("HFA").[165] Each state's allocation limit has traditionally been determined by the state's total population multiplied by $1.75, or a minimum of $2,000,000.[166] However, in 2018, the program received a temporary bump, and each state received $2.75625 per person, or a minimum of $3,166,875.[167] Generally speaking, any credits that are not used by the state are compiled in a national pool, and other states compete for the surplus.[168]

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tenant can earn more than 80% of the AMI and count towards the average income. KEIGHTLEY, *supra* note 6, at 3.

[160] Tenants may earn up to 140% of their income limitation before falling out of compliance. *See e.g.*, §§ 42(g)(2)(D), 42(j), 42(l)(2); *see also* Mark Lipshultz, *Merging the Public and Private: The LIHTC Program and a Formula for More Affordable Housing*, 36 REV. BANKING & FIN. L. 379, 396 (2016) (discussing the compliance and investigative requirements of the program).

[161] KEIGHTLEY, *supra* note 6, at 3.

[162] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 9.

[163] *Id.* at 9, 15.

[164] *Id.* at 9.

[165] KEIGHTLEY, *supra* note 6.

[166] I.R.C. § 42(h)(3)(C)(ii) (2019); Lipshultz, *supra* note 160.

[167] This 12.5% increase in funding is secured until 2021. § 42(h)(3)(C)(i); KEIGHTLEY, *supra* note 6.

[168] § 42(h)(3)(D)(i); KEIGHTLEY, *supra* note 6.

Because 9% LIHTCs are limited in supply over their 4% counterparts, developers must compete for them.[169] Developers submit proposals that include estimates for construction cost, material cost, contractors' fees, the amount of tax credits requested, and a statement of how many units will be reserved for low-income tenants.[170] Developers who want to receive 9% LIHTCs face stiff competition.[171] In total, hopeful developers apply for three times the number of 9% LIHTCs than are available.[172] The competition for the 9% LIHTC causes developers to look for other sources of financing, such as the 4% LIHTCs.[173]

Four percent LIHTCs are not subject to the same competitive process.[174] Only 9% LIHTCs count towards the state volume cap.[175] Instead, the 4% LIHTCs are tied to another source of financing: tax-exempt private activity bonds.[176] However, to be eligible for any 4% LIHTCs, a project must pass the "50% test." The 50% test requires that tax-exempt private activity bonds fund at least 50% of the project's total cost.[177] If bonds fund 49.9999% of the project, the developer will get no tax credits, but when the project hits the 50% threshold, the project is entitled to 4% LIHTC funding.[178] These 4% LIHTCs exist "as of right" (as opposed to the competitive 9% LIHTC), meaning that if the project meets the 50% test and other

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[169] Lipshultz, *supra* note 160, at 391–92.

[170] *Id.* at 391.

[171] Joseph Guggenheim, *Tax Exempt Financing: New Opportunities in Affordable Housing*, J. HOUSING & COMMUNITY DEV. 25, 27 (Nov./Dec. 1999).

[172] *Id.* at 26.

[173] *See id.*

[174] NOVOGRADAC & CO., TAX-EXEMPT HOUSING BASICS 1 (2009), http://www.ipedconference.com/powerpoints/Tax-Exempt_Housing_Bond_Basics.pdf.

[175] *See* KEIGHTLEY, *supra* note 6.

[176] JUSTIN COOPER, MULTIFAMILY RENTAL HOUSING: FINANCING WITH TAX-EXEMPT BONDS 29 (2d ed. 2010), https://media.orrick.com/Media%20Library/public/files/2/2709-pdf.pdf.

[177] I.R.C. § 42(h)(4)(B) (2019); COOPER, *supra* note 176, at 30.

[178] COOPER, *supra* note 176, at 30.

requirements,[179] the credits are guaranteed. This makes the 4% LIHTC a more reliable source of income, especially for large-scale projects.[180] Bonds are subject to a similar volume cap as 9% LIHTCs,[181] limiting the availability of the 4% LIHTC and driving down their demand.[182]

"Enhanced LIHTCs" can give developers a boost if they choose to invest in statutorily defined areas especially in need of development.[183] Projects in two specific areas are granted a subsidy up to 130% of their qualified construction costs in tax credits.[184] This additional bonus is reserved for Qualified Census Tracks ("QCTs") and Difficult Development Areas ("DDAs").[185] QCTs must be designated by the Secretary of HUD and require either that "50[%] or more of the households have an income which is less than 60[%]" of the AMI or have a poverty rate of at least 25%.[186] DDAs have "high construction, land, and utility costs relative to area

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179 These requirements include a 95% "Good Cost" limitation which restricts how much money can be spent on land acquisition and the cost associated with issuing the bonds. § 141(c)(1)(A); COOPER, *supra* note 176, at 23.

180 BIBER, *supra* note 7.

181 COOPER, *supra* note 176, at 25. The volume cap on private activity bonds is calculated slightly differently than LIHTC. Multi-family residential rental projects are just one use of the private activity bonds, but all of the uses are subject to one volume cap. In 2019, the volume cap for each state was the greater of $105 per capita or $311.38 million. Rev. Proc. 2019-44, 2019-47 I.R.B. 21; I.R.C. § 146(d)(1) (2019). *See* STEVEN MAGUIRE & JOSEPH HUGHES, CONG. RESEARCH SERV., RL31457, PRIVATE ACTIVITY BONDS: AN INTRODUCTION (2018), https://fas.org/sgp/crs/misc/RL31457.pdf (discussing the volume cap for Private Activity Bonds).

182 COOPER, *supra* note 176, at 25.

183 Cohen, *supra* note 153, at 544–45.

184 For example, let's return to our earlier project that cost $100,000 to build. Instead of taking 70% of the $100,000 like in a normal LIHTC deal, an enhanced LIHTC allows the developer to use 70% of $130,000. That way, the project will be eligible for $91,000 in LIHTCs. I.R.C. § 42(d)(5)(B)(i)(I) (2019); Cohen, *supra* note 153, at 544–45.

185 I.R.C. § 42(d)(5)(B) (2019).

186 § 42(d)(5)(B)(ii)(I).

median gross income."[187] These enhanced LIHTCs are meant to incentivize construction in areas where there is a need for affordable housing, but where developers face significant obstacles to project initiation and completion.[188]

B. *Qualified Allocation Plans*

In order to receive any federal tax credits for distribution, a state HFA must create a QAP.[189] "The plan must set forth selection criteria, establish procedures to monitor noncompliance, and give preference in credit allocation to projects serving the lowest income tenants for the longest periods."[190] These plans are federally required, but state created.[191] When LIHTC was originally enacted, states had total discretion over funds, but Congress amended the Internal Revenue Code in 1989 to implement more oversight.[192] Every state has a QAP, and New York City and Chicago have their own separate QAPs beyond those of their respective states.[193]

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[187] § 42(d)(5)(B)(iii)(I). Since 2016, HUD has been using Small Difficult Development Areas ("SDDA"). Instead of marking entire metropolitan areas as a DDA, SDDAs are designated at the zip code level. Kurt Usowski, *HUD Advances Opportunity and Fair Housing for Low-Income Renters with Small Difficult Development Areas*, PD&R EDGE, https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-012516.html (last visited Jan. 31, 2020); WILL FISCHER, CENTER ON BUDGET POLICY PRIORITIES, LOW-INCOME HOUSING TAX CREDIT COULD DO MORE TO EXPAND OPPORTUNITY FOR POOR FAMILIES 7 (2018), https://www.cbpp.org/sites/default/files/atoms/files/8-28-18hous.pdf.

[188] KEIGHTLEY, *supra* note 6, at 3.

[189] A 4% LIHTC must also adhere to the QAP, but it is not subject to the competitive process. § 42(m); KEIGHTLEY, *supra* note 6.

[190] Cohen, *supra* note 153, at 547.

[191] KEIGHTLEY, *supra* note 6.

[192] Leviner, *supra* note 153, at 874.

[193] SARAH OPPENHEIMER & POVERTY & RACE RESEARCH ACTION COUNCIL, BUILDING OPPORTUNITY II: CIVIL RIGHTS BEST PRACTICES IN LOW INCOME HOUSING TAX CREDIT PROGRAM (2015 UPDATE) 1 (2015), https://www.prrac.org/pdf/BuildingOpportunityII.pdf.

QAPs are typically flexible plans that give higher scores to projects that are in line with the state's priorities.[194] In New York City for example, there are "rounds" of funding, and each round has a "minimum score."[195] Any project below this score will not be funded by credits.[196] There is much crossover between agencies, but differing local economic climates cause disparities.[197] For example, the QAP for New York City's HFA, the Department of Housing Perseveration and Development ("HPD"), gives three points to a project with capacity for families with many children, six points for serving tenants with very low income, and one point for being in a historic or landmarked neighborhood.[198] QAPs can also take points away if a developer has a problematic history with the HFA.[199] Similarly, some states, such as Alabama, have provisions that deduct points for proposed projects near environmental hazards or other dangerous land uses.[200]

Requiring states to formulate QAPs is a way for Congress to maintain some control over a state's desired allocation while still giving states broad discretion.[201] The Internal Revenue Code's Section 42(m)(1)(B)(ii) requires that a HFA draft a QAP that

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[194] *See* Foyt, *supra* note 4, at 519–20 (discussing applications that tailor their proposals to states' QAPs); *see also* NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 13 (discussing how states only choose projects that are in line with their respective QAPs).

[195] The minimum score is calculated by taking the average score of all the proposals in the round and reducing it by 20%. *See* N.Y.C. DEP'T OF HOUS. PRES. & DEV., *supra* note 9, at 17.

[196] *Id.*

[197] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 13.

[198] N.Y.C. DEP'T OF HOUS. PRES. & DEV., *supra* note 9, at 17, 19.

[199] *Id.* at 20.

[200] These land uses include junk yards, waste treatment plants, and prisons. ALA. HOUS. FIN. AUTH., 2019 HOUSING CREDIT ALLOCATION PLAN 8–9 (2019); *see also* OPPENHEIMER & POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 193, at 1 (listing other states that penalize projects for their proximity to undesired land uses).

[201] Leviner, *supra* note 153, at 874; *see also* Javon Henry, *Low Income Housing Tax Credits and the Dangers of Privatization*, 16 PITT. TAX REV. 247, 263 (2019) (discussing how states are in charge of the place, location, variation, and ownership distribution through the QAP).

prioritizes: "(I) projects serving the lowest income tenants, (II) projects obligated to serve qualified tenants for the longest periods, and (III) projects which are located in qualified census tracts . . . and the development of which contributes to a concerted community revitalization plan."[202] New York City, for example, gives one point to projects that are in QCTs.[203] Although states are mandated to require a "Concerted Community Revitalization Plan" ("CCRP"), only fifteen QAPs had a definition of the phrase in 2015 nationwide, allowing states to circumvent congressional direction by taking advantage of ambiguous phrasing.[204]

After reading the published QAP, developers craft their proposals to align with the respective state's priorities; states then give LIHTCs to projects serving the most tenants with the lowest incomes.[205] A new QAP is required of the states annually, so credit-issuing agencies, such as HFAs, are always changing their plans to respond to changes in the market.[206] Research has shown that developers are responsive to changes in governments' QAP plans, making the QAP essential to understanding how affordable housing is built in the United States.[207]

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[202] I.R.C. § 42(m)(1)(B)(ii) (2019); Henry, *supra* note 201.

[203] N.Y.C. DEP'T OF HOUS. PRES. & DEV., *supra* note 9.

[204] SARAH OPPENHEIMER & POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 193, at 7. The New York City QAP defines CCRPs as "areas a) that have a plan for revitalization, and b) where a tax credit project is expected to contribute to that broader revitalization effort." N.Y.C. DEP'T OF HOUS. PRES. & DEV., *supra* note 9. *See generally* MATHEW AMPLEMAN ET AL., POVERTY & RACE RESEARCH ACTION COUNCIL, ASSESSMENT CRITERIA FOR "CONCERTED COMMUNITY REVITALIZATION PLANS": A RECOMMENDED FRAMEWORK (2017) (providing a recommendation for how states can define their CCRPs to add clarity).

[205] *See* Hefferen, *supra* note 13 (discussing how a state's QAP may be stricter than federal guidelines); *see also* Cohen, *supra* note 153, at 547 (discussing how state Housing Finance Agencies ("HFAs") create their own selection criteria while following federal mandates).

[206] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 13.

[207] FISCHER, *supra* note 187, at 5.

C. The Success of the LIHTC

The LIHTC program has become a vital source of financing in the creation of affordable housing.[208] "LIHTC has financed more units than any other construction and preservation program that operates today."[209] From 1997 to 2017, the program funded 47,511 projects, creating 3.13 million units.[210] LIHTC financed almost one third of all newly constructed multi-family housing units during its first two decades of operation.[211] The program accrues few overhead expenses, and investors are confident in its reputation for creating successful projects.[212] LIHTC projects stay in operation, and the foreclosure rate for LIHTC apartments is an astounding 0.08%, compared to a rate of 0.27% for non-LIHTC apartments.[213] The program costs the federal government around $8 billion a year, which may seem hefty, but that figure is much lower than that representing what the government spends on vouchers[214] or the $195 billion worth of income forgone due to mortgage tax exemptions.[215]

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[208] Foyt, *supra* note 4, at 516.

[209] CORIANNE PAYTON SCALLY ET AL., THE LOW-INCOME HOUSING TAX CREDIT: PAST ACHIEVEMENTS, FUTURE CHALLENGES, URBAN INSTITUTE 8 (2018), https://www.urban.org/sites/default/files/publication/98761/lihtc_past_achievements_future_challenges_finalized_0.pdf.

[210] *Low-Income Housing Tax Credits*, U.S. DEP'T HOUSING & URBAN DEV. (last revised May 24, 2019), https://www.huduser.gov/portal/datasets/lihtc.html.

[211] U.S. DEP'T OF HOUS. & URBAN DEV., WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND? 3 (2012), https://www.huduser.gov/publications/pdf/what_happens_lihtc_v2.pdf.

[212] SCALLY ET AL., *supra* note 209.

[213] NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 4.

[214] Initially, it appears that LIHTC only costs a fifth of the voucher programs, but since tenants living in LIHTC-financed buildings can also use Section 8 vouchers, the programs are hard to disentangle. Anywhere between 18% and 70% of LIHTC residents receive other rental assistance. *See* SCALLY ET AL., *supra* note 209, at 6 (comparing the costs of government housing programs and why they may be misleading on the surface).

[215] It is estimated that the federal government forgoes $195 billion in income tax revenue due to the mortgage tax deduction, a program that entitles homeowners an income tax deduction in the amount of the interest accrued on

The program's success can be attributed in part to three lessons learned from previous housing programs: decentralized management, utilization of the private market, and an effective compliance method.

The LIHTC program encourages large investments from the private sector, often from sophisticated third-party investors.[216] Most of these projects are financially viable and have a positive tax flow.[217] The private market's approval of the program has helped it maintain longevity.[218] "It is the longest running national affordable rental housing program producing new units."[219] The private market's active role in the program makes its participants allies rather than adversaries.[220] Private market forces were mobilized and came to the defense of the program when the 2017 tax bill was up for debate.[221] Additionally, the private market's involvement helped the LIHTC program secure bipartisan support.[222]

State control and decentralization are important to LIHTC's continued success.[223] Firstly, decentralized housing agencies are necessary for compliance and maintenance purposes.[224] Local authorities can serve their neighborhoods more efficiently than the

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their home mortgages. *See* Robert Collionson et al., *Low-Income Housing Policy* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 21071, 2017), https://www.nber.org/papers/w21071.pdf.

216 Michael Novogradac, *The Big 7: Seven Key Reasons for the LIHTC Program's Success*, NOVOGRADAC & CO. (July 13, 2013, 12:00 AM), https://www.novoco.com/notes-from-novogradac/big-7-seven-key-reasons-lihtc-programs-success. In 2013, the program raised $13 billion in capital. Will Parker, *The Lobbyist Hit List*, THE REAL DEAL (May 1, 2017, 11:00 AM), https://therealdeal.com/issues_articles/the-lobbyist-hit-list/.

217 SCHWARTZ, *supra* note 61, at 94.

218 SCALLY ET AL., *supra* note 209, at 9.

219 *Id.* at 8.

220 *Id.* at 8–9.

221 Parker, *supra* note 216.

222 SCALLY ET AL., *supra* note 209, at 9.

223 *See* NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 8 (explaining how both state allocation agencies and individual investors review and assess potential properties).

224 Leviner, *supra* note 153, at 874.

centralized HUD can.[225] PHAs monitor at a state level, but this mechanism proves less efficient and more problematic than decentralizing operational and maintenance responsibility to individual owners like the LIHTC program does.[226] Second, the program's flexibility at the state level maximizes its ability to help the most tenants.[227] Since states have their hand on the LIHTC faucet, and there is a high demand for these credits, states can be selective and only pick projects that best serve each state's needs.[228] Local officials know the problems and needs of their local constituencies and can respond to their concerns better than national policymakers.[229]

The threat of losing tax credits ensures long term compliance.[230] Unlike the Section 221(d)(3) BMIR, the LIHTC program has corporate investors buy in and accept some risk, thus securing an interest in keeping the project in compliance.[231] This interest is bolstered by the fact that the tax credits are distributed to a project over time, rather than being distributed upfront.[232] Since private investors in these deals are often sophisticated, they provide more oversight than some of the other supply-side investments in the United States' public housing history.[233] The massive amount of capital these investors have in the project further heightens their interest, and most investors will take it upon themselves to audit and

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[225] MCCARTY ET AL., OVERVIEW OF FEDERAL HOUSING, *supra* note 1, at 7; *see also* Niver, *supra* note 89, at 56, 59–60 (discussing HUD's exclusive public nature in contrast to LIHTC's coalition of public, private, and non-profit actors).

[226] SCHWARTZ, *supra* note 61, at 112–13.

[227] *Id.* at 98.

[228] Michael Williams, *Land Costs as Non-Eligible Basis: Arbitrary Restrictions on State Policymaking Authority in Low-Income Housing Tax Credit Program*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 335, 354 (2015).

[229] *See* MCCARTY ET AL., OVERVIEW OF FEDERAL HOUSING, *supra* note 1, at 7.

[230] *See* NOVOGRADAC & CO., LOW-INCOME HOUSING TAX CREDIT, *supra* note 93, at 8 (explaining how additional due diligence from third-party investors is in part due to the risk of losing credits).

[231] *Id.* at 7–9.

[232] *Id.* at 11.

[233] *Id.*

investigate projects to ensure compliance.[234] LIHTC produces higher quality housing and possibly higher property values due to the virtually privatized and efficient monitoring method that HUD is neither equipped nor motivated to achieve.[235]

D. Fallbacks of LIHTC

The LIHTC program is by no means perfect.[236] Some critics argue that the LIHTC program may be subsidizing the construction of housing that would have been built regardless of the federal hand-out.[237] The Government Accountability Office recommends that LIHTC could prevent fraud with additional monitoring on the federal level.[238] Finally, LIHTC properties are not perpetually affordable; 15,000 LIHTC units will end their affordability period by 2024.[239] Though acknowledging those valid criticisms, this Section will focus on one critique of the LIHTC program in particular—that LIHTCs perpetuate segregation and racially discriminatory housing practices.[240] There are two main reasons for

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[234] *Id.*

[235] Niver, *supra* note 89, at 59.

[236] *See* Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 HASTING L.J. 211, 235 (2003) (arguing that the LIHTC competitive process is geared towards private market investors rather than nonprofit housing groups). *See generally* Cohen, *supra* note 153, at 552–61 (arguing that LIHTC does not meet the housing need, its methodology is flawed, and the credit is inefficient); Williams, *supra* note 228 (arguing that current tax-based housing subsidies reward racial segregation).

[237] Cohen, *supra* note 153, at 548–50.

[238] *See* GOV'T ACCOUNTABILITY OFFICE, LOW-INCOME HOUSING TAX CREDIT; IMPROVED DATA & OVERSIGHT WOULD STRENGTHEN COST ASSESSMENT & FRAUD RISK MANAGEMENT (2018), https://www.gao.gov/assets/700/694541.pdf.

[239] SCALLY ET AL., *supra* note 209, at 15–16.

[240] *See generally* Henry, *supra* note 201, at 247 (arguing that LIHTC has made segregation more likely and less visible); Shilesh Muralidhara, *Deficiencies of the Low-Income Housing Tax Credit in Targeting the Lowest-Income Households and in Promoting Concentrated Poverty and Segregation*, 24 L. & INEQ. 353, 363–70 (arguing that LIHTC promotes concentrated segregation and

the concentration of LIHTC projects in minority and low-income neighborhoods: market incentives and statutory mandates.[241]

LIHTCs cannot be used to offset the cost of buying land.[242] The tax code requires that the eligible basis for tax credits shall be calculated "without regard to the adjusted basis of any property which is not residential property."[243] This distinction between land costs and construction costs has become a barrier to project development in areas where land value is high.[244] Developers are incentivized to keep acquisition costs low and buy where the land is cheap.[245] As a result, developers unintentionally cluster LIHTC projects where the profit will be the largest.[246] A recent study by HUD concluded that, "[d]espite the incentives offered through the DDA provision, high land assembly costs can significantly reduce incentives to invest in [LIHTC] property development particularly since land costs cannot be included in a developer's calculation of eligible basis."[247] Only 7% of total LIHTC projects and 6% of LIHTC units are in DDAs, where land cost is the highest.[248]

Federal policies on the QAP exacerbate the problem.[249] A hands-off approach has resulted in only a handful of states requiring project plans that affirmatively achieve fair housing practices, and none of them specify what targets to reach or how to achieve these goals.[250]

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poverty); *see* Williams, *supra* note 228 (arguing that current tax-based housing subsidies reward racial segregation).

241 William Callison, *Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit*, 19 S. CAL. REV. L. & SOC. JUST. 213, 241–50 (2010).

242 Foyt, *supra* note 4, at 533.

243 I.R.C. § 42(d)(4)(A) (2019).

244 Williams, *supra* note 228, at 369.

245 Foyt, *supra* note 4, at 533.

246 CASEY J. DAWKINS, OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., EXPLORING THE SPATIAL DISTRIBUTION OF LOW INCOME HOUSING TAX PROPERTIES 35 (2011), https://www.huduser.gov/publications/pdf/dawkins_exploringliht_assistedhousingrcr04.pdf.

247 *Id.* at 36.

248 FREDDIE MAC, AFFORDABLE HOUSING, *supra* note 20, at 7.

249 Callison, *supra* note 241, at 247.

250 SARAH OPPENHEIMER & POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 193, at 8.

QAPs often avoid explicitly mentioning race.[251] Additionally, because QCTs are likely to be in neighborhoods that are racially and poverty-concentrated,[252] and because there is a federally mandated preference for construction in QCTs, a disproportionate number of LIHTC units exist in poor, minority neighborhoods.[253] Nationally, 34% of LIHTC units are in high-poverty neighborhoods, while only 18% of rental units are in high-poverty neighborhoods.[254] Meanwhile, 56% of all LIHTC units are in minority neighborhoods, compared to the 40% of rental units that are in minority neighborhoods.[255]

Although research is ongoing, low-income families in low-income areas are denied access to many benefits that low-income families have when surrounded by high-income neighbors.[256] These benefits include positive adult role models, positive peer influence,

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[251] Exceptions to this rule are Massachusetts, North Carolina, and Pennsylvania. *Id.* at 10.

[252] Of the 4,164 census tracts that are racially and poverty-concentrated, only 479 of them are not QCTs. Racially concentrated areas of poverty have (1) a poverty rate that is (i) at least three times higher than the core-based statistical area in which the tract is located, or (ii) greater than 40%; and (2) a nonwhite population of 50% or greater. FREDDIE MAC, SPOTLIGHT ON UNDERSERVED MARKETS: MIXED-INCOME HOUSING IN AREAS OF CONCENTRATED POVERTY, 2 (2018), https://mf.freddiemac.com/docs/Affordable_Housing_in_Areas_of_Concentrated_Poverty.pdf; *see Racially or Ethnically Concentrated Areas of Poverty (R/EAPS)*, U.S. DEP'T HOUSING & URBAN DEV. (Feb. 8, 2018), https://hudgis-hud.opendata.arcgis.com/datasets/56de4edea8264fe5a344da9811ef5d6e_0.

[253] *See* Henry, *supra* note 201, at 272, 274; *see also* Callison, *supra* note 241, at 247 (discussing how the congressionally mandated preference for projects in QCTs has favored concentration of LIHTCs in low-income neighborhoods).

[254] A high-poverty area is one where at least 30% of its residents are poor. FISCHER, *supra* note 187, at 3.

[255] *Id.*

[256] ROY ET AL., P'SHIP OF AMERICA'S ECON. SUCCESS, THE HIDDEN COSTS OF THE HOUSING CRISIS 19–22 (2008), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/partnership_for_americas_economic_success/paeshousingreportfinal1pdf.

and professional networks.[257] A peer group's influence cannot be understated; its beneficial or negative impact lasts well after a child has moved away from home.[258] Furthermore, housing in low-income areas (particularly those with high crime rates) can have negative effects on tenants.[259] Living in a high-crime neighborhood will affect how parents interact with, restrict, and give attention to their children.[260] Low-income neighborhoods have trouble attracting amenities that are sometimes taken for granted, such as grocery stores.[261] Additionally, children from low-income neighborhoods are less likely to attain higher levels of education, in part because of negative peer influence.[262]

The Supreme Court recently ruled that a QAP can violate the statutory protections found in the Fair Housing Act ("FHA").[263] In the case *Texas Department of Housing and Community Affairs v. The Inclusive Housing Communities Project*, the plaintiff, a not-for-profit corporation, bought a disparate impact claim under the FHA, arguing that "the Department and its officers had caused segregated housing patterns by allocating too many tax credits to housing in predominately black inner-city areas and too few in predominately white suburban neighborhoods."[264] The plaintiff pointed to the fact that from 1999 to 2008, 99.29% of all LIHTC-financed units were in census tracts with less than 50% Caucasian residents.[265] Without commenting on the underlying claim, the Court ruled that the statutory construction of Section 805(a) of the FHA includes

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[257] JILL KHADDURI ET AL., LIHTC AND MIXED INCOME HOUSING: ENABLING FAMILIES WITH CHILDREN TO LIVE IN LOW POVERTY NEIGHBORHOODS? 1 (2004), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.512.9534&rep=rep1 &type=pdf.

[258] Studies have shown that high school peer influence can affect undergraduate GPA. ROY ET AL., *supra* note 256.

[259] *Id.* at 20.

[260] *Id.*

[261] *Id.* at 19.

[262] *Id.* at 20–21.

[263] Foyt, *supra* note 4, at 532.

[264] Tex. Dep't Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2510 (2015).

[265] *Id.* at 2514.

disparate impact liability, meaning that this disparity in LIHTC allocation could be prima facie evidence for a discrimination claim under the FHA.[266] The Supreme Court recognized that HFAs are liable for QAPs that cause a disparate impact on minorities.[267]

IV. ADDITIONAL QAP REQUIREMENT

To avoid racial and income concentration of affordable housing, Congress should amend Section 42 of the Internal Revenue Code to include additional requirements for states when drafting their QAPs. By failing to impose higher standards in QAPs, Congress is partially at fault for this concentration.[268] To offset high construction and land acquisition costs, the federal government should require states to give preference to projects in high opportunity areas.[269] Tenants in high opportunity areas enjoy several socially valuable benefits, such as improved mental and physical health, high rates of employment,[270] lower crime rates, access to quality education systems, and greater social mobility.[271] A new QAP mandate incentivizing projects in high opportunity areas can make these benefits accessible to more low-income tenants. Policymakers

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266 Foyt, *supra* note 4, at 516–17.

267 *Tex. Dep't Hous. & Cmty. Affairs*, 135 S. Ct. at 2523. However, the Supreme Court also included some language that suggested the QAP's inclusion of private entrepreneurs and state deference is preferable:

> It would be paradoxical to construe the HFA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable. Entrepreneurs must be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community's quality of life and are legitimate concerns for housing authorities.

Id.

268 *See supra* Section III.D.

269 FREDDIE MAC, AFFORDABLE HOUSING, *supra* note 20, at 14.

270 FISCHER, *supra* note 187, at 2.

271 FREDDIE MAC, AFFORDABLE HOUSING, *supra* note 20, at 11.

should preserve the LIHTC program's decentralized monitoring scheme that utilizes private market interests, and should reduce state discretion, which is partially to blame for the concentration of race and poverty through discretionary LIHTC distribution and optional PHA creation.[272] The new QAP mandate can give preference to three types of areas: DDAs, high opportunity areas, or areas with less than 10% affordable housing.

QAPs can encourage investment in DDAs. DDAs are often located in high opportunity areas, thus sharing many of the same benefits.[273] This mandate can mirror the QCT mandate.[274] However, the definition of a DDA under the Internal Revenue Code is broad: "any area designated by the Secretary of Housing and Urban Development as an area which has high construction, land, and utility costs relative to area median gross income."[275] Hence, an incentive calling for DDA development directly prefers areas with high costs, not areas with high benefits, and the two are not mutually exclusive.[276] Moreover, HUD controls the methodology of determining areas that qualify as DDAs and announces the designation of new DDAs annually.[277] States would not have the power to designate DDAs, a factor which may upset the balance between federal and state power that the LIHTC program has achieved. HUD is also a centralized agency, and it may not be able to respond to local communities like states' HFAs can.[278] However, HUD similarly designates QCTs, and this central decision making

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[272] *See supra* Part II and Section III.D.

[273] FREDDIE MAC, AFFORDABLE HOUSING, *supra* note 20, at 2.

[274] I.R.C. § 42(m)(1)(B)(ii)(III) (2019). A sample draft of the amendment to Section 42(m)(1)(B)(ii) could require that a HFA draft a QAP that prioritizes "projects which are located in difficult development areas (as defined in subsection (d)(5)(B)(iii)) and the development of which contributes to a concerted community revitalization plan."

[275] § 42(d)(5)(B)(iii).

[276] *See* FREDDIE MAC, AFFORDABLE HOUSING, *supra* note 20, at 2–7.

[277] Statutorily Mandated Designation of Difficult Development Areas and Qualified Census Tracts for 2020, 84 Fed. Reg. 50, 465–67 (2019).

[278] *Supra* Section III.C.

has not disrupted the program.[279] Furthermore, state discretion has led to concentrated poverty and segregation, which may indicate a need for *more* federal guidance.[280] This method of additional congressional influence over QAPs gives federal authorities significant power.

Some states have voluntarily implemented a preference in their QAPs for "high opportunity areas."[281] Currently, states differ with respect to what qualifies as a high opportunity area, but the top five indicators are access to education, economic growth/jobs, income levels, health care, and access to transportation.[282] To remedy racial segregation, the district court in *Texas Department of Housing & Community Affairs v. Inclusive Communities Projects, Inc.* ordered the department to include a new QAP requirement calling for considerations and point distributions for factors precisely like those indicative of high opportunity areas.[283] This option gives states wide discretion in how they could implement new QAP requirements. A motivated state would tailor the QAP to its particular needs, possibly preferring projects in areas with educational resources and employment opportunities, and might forgo, say, transportation access if that characteristic is not prioritized. However, an unmotivated state might leave the term "high opportunity" undefined (similar to how "Concentrated Community Revitalization

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[279] Richard Goldstein, *Housing Tax Credit and Basis Boost*, NIXON PEABODY LLP (Nov. 3, 2015), http://web20.nixonpeabody.com/ahrc/Lists/Posts/Post.aspx?ID=755.

[280] *See supra* Section III.D (arguing that state discretion has led to *de facto* segregation in the past).

[281] QAPs of nineteen states have a requirement that includes at least one of these factors. FREDDIE MAC, AFFORDABLE HOUSING, *supra* note 20, at 2.

[282] *Id.* at 2–3.

[283] "The District Court's remedial order required the addition of new selection criteria for the tax credits. For instance, it awarded points for units built in neighborhoods with good schools and disqualified sites that are located adjacent to or near hazardous conditions, such as high crime or landfills." Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2514 (2015) (citation omitted).

Plan" is left undefined in many states),[284] making the mandate useless.[285]

A third alternative would mirror Chapter 40B of Massachusetts's legal code.[286] In Massachusetts, affordable housing developers can apply to local zoning boards for a special permit to waive certain zoning restrictions.[287] These decisions can be appealed to a state-level board, but if more than 10% of the local board's housing stock is affordable to low-income tenants, then the state board cannot overturn its decisions.[288] This scheme is meant to streamline development and increase the supply of affordable housing, and it has been relatively successful.[289] Massachusetts curates a list articulating every "community" and what percentage of that community's housing stock is affordable, which it calls the "Subsidized Housing Inventory" ("SHI").[290] Congress can borrow the 10% benchmark from Chapter 40B and through an amendment to Section 42 of the Internal Revenue Code mandating that states give preference to projects in areas with less than 10% of affordable housing stock.[291] This option avoids clustering, which is a problem affecting both QCTs and DDAs.[292] Its mechanical application also

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[284] *Supra* Section III.C.

[285] FISCHER, *supra* note 187, at 6.

[286] MASS. GEN. LAWS ch. 40B, §§ 20–22 (2020).

[287] *Id.* § 21.

[288] *Id.* § 20.

[289] *See* John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 837–40 (2019). The Act has been credited with creating 70,000 housing units. *MassHousing Planning and Programs Department*, MASS. HOUSING, https://www.masshousing.com/portal/server.pt/community/planning_programs/207/masshousing%27s_planning_programs_department (last visited Jan. 31, 2020).

[290] *Subsidized Housing Inventory (SHI)*, MASS.GOV (2020), https://www.mass.gov/service-details/subsidized-housing-inventory-shi.

[291] The Massachusetts QAP already uses the SHI as an alternative to high opportunity areas. Massachusetts's benchmark is 12%. Under this recommendation of 10%, states can create more stringent requirements if the individual state sees fit. MASS. DEP'T HOUS. & CMTY. DEV., LOW INCOME HOUSING TAX CREDIT PROGRAM: 2018–2019 QUALIFIED ALLOCATION PLAN 8 (2017), https://www.mass.gov/doc/2018-2019-qap/download.

[292] DAWKINS, *supra* note 246.

eliminates state discretion, which, as previously mentioned, has been problematic in the past.[293]

These suggested additions to the Section 42 QAP requirements are meant to encourage the construction of affordable housing in areas that have high costs, but also have the most advantages. The proposed QAP rules are moderate; they preserve the LIHTC monitoring scheme and do not disturb the careful balance between private and public markets. Though absolute state discretion may be sacrificed, federalism concerns should be mitigated by the fact that this preference does not have to be coercive to developers. States write the QAPs and decide how many points developments in high opportunity areas should receive. States have the choice to deprioritize these preferences by setting them at a lower point value and might prioritize housing with other characteristics.

CONCLUSION

Although there are considerable benefits to building LIHTC housing in low-income and diverse neighborhoods, not all LIHTC housing should be built there, as development in higher opportunity areas can provide significant quality of life advantages to low-income tenants who might not otherwise have access to similar benefits.[294] LIHTC is the most successful housing program in the history of the United States.[295] It balances federalism concerns and harnesses the private market in a monitoring scheme that is both efficient and low-cost in a way no other program has been able to achieve.[296] With minor adjustments to the program's QAP requirements, LIHTC subsidiaries might be able to penetrate the areas that would benefit low-income tenants the most.[297] By remembering what makes the program work, the White House

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[293] *See supra* Sections II.A and III.D.

[294] FISCHER, *supra* note 187, at 2.

[295] "The Low-Income Housing Tax Credit has become the most prolific source of funding for new affordable rental units and a key resource for preserving public housing and other federally assisted housing units." SCALLY ET AL., *supra* note 209, at v.

[296] *Supra* Section III.C.

Council can advise appropriately, and Congress can amend the LIHTC program to produce not only a large quantity of affordable housing, but also quality affordable housing.