EQUITY AND OWNERSHIP IN AFFORDABLE HOUSING

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The Low-Income Housing Tax Credit ("LIHTC") is the nation's largest affordable housing development program. From its inception, policymakers have seen the program's potential path to homeownership as one of its advantages. In fact, the Internal Revenue Code anticipates tenant and cooperative purchases of LIHTC-financed affordable housing. But the program has never achieved significant homeownership for low-income families. Meanwhile, residents in increasing numbers of LIHTC developments face instability related to investor acquisitions of rental housing and the expiration of restrictions that keep rents affordable—instability that resident ownership could prevent. This Article explores why LIHTC has not achieved greater homeownership opportunities and describes how one model could finally expand eventual tenant ownership in the program. This would not only improve housing security but enable low-income families to build wealth, representing a step toward equity in federal housing policy. At the same time, the limits of this model reflect limits to federal housing policy's approach to assisting low-income families, relative to the benefits available to higher income families.

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I. INTRODUCTION

The Low-Income Housing Tax Credit ("LIHTC")[1] is the nation's largest affordable housing development program. Introduced as part of the Tax Reform Act of 1986,[2] the LIHTC program has financed approximately 3.55 million units of affordable housing.[3] While LIHTC is generally used to finance affordable rental housing, Congress contemplated from early on that the program would facilitate tenant and cooperative purchases, providing a path to homeownership and continued affordability after the expiration of legal restrictions that keep rents affordable.[4] Indeed, this is part of the program's legal framework.[5] From

1. I.R.C. § 42.
2. Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189 (codified at I.R.C. § 42).
3. *Low-Income Housing Tax Credit (LIHTC): Property Level Data*, U.S. DEP'T OF HOUS. & URB. DEV., OFF. OF POL'Y DEV. & RSCH. (May 4, 2023), https://www.huduser.gov/portal/datasets/lihtc/property.html [https://perma.cc/SA4N-57B8] (through 2021) [hereinafter *LIHTC Data*]. By "affordable housing," this Article refers to housing with (1) occupancy restrictions, restricting who can live in a development to residents with incomes below certain levels, and (2) rent restrictions, restricting the rent that may be charged to residents.
4. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7108(q), 103 Stat. 2106, 2321 (codified at I.R.C. § 42(i)(7)).
5. *See* I.R.C. § 42(g)(6) (stating that de minimis payments to a lessor to be held toward the purchase of a property shall not mean the property is treated as failing to be rental housing); I.R.C. § 42(i)(7) (stating that tax benefits allowable regardless of right of first refusal held by tenants or a qualified nonprofit); I.R.C. § 42(m)(1)(C)(viii) (stating that selection criteria in state qualified allocation plans must include projects intended for eventual tenant ownership).

its beginning, policy-makers saw this potential path to ownership as an advantage compared with other housing programs.[6]

But, with a few exceptions, resident ownership—whether by families or cooperatives—has not grown with the LIHTC program. And the reasons for this have gone largely unexamined. Many scholars have explored low-income homeownership, with several noting the potential of shared equity arrangements, such as cooperatives, to balance affordability and wealth creation for low-income families.[7] But cooperatives and other shared equity models remain rare,[8] and there is little examination of ownership models in the context of the LIHTC program, even though LIHTC is the nation's primary vehicle for affordable housing development and includes a framework for eventual tenant ownership.

Meanwhile, the structure of the LIHTC program has led to growing instability.[9] Designed to attract private capital, the program has seen increased acquisition of projects by speculative investors in appreciating markets where affordable housing is most needed.[10] The LIHTC program also involves time-limited affordability restrictions, which are beginning to expire at larger numbers of LIHTC projects, leading to the prospect of steep rent increases for residents.[11] Homeownership could stabilize this housing.

U.S. law has long favored homeownership and it receives favorable tax treatment today.[12] Oft-cited rationales for this favorable treatment include homeownership's ability to provide economic security and the positive externalities flowing from homeownership, such as increased citizen involvement in local communities.[13] While there is evidence that the purported benefits of homeownership are overstated,[14] research confirms its association with wealth creation.[15] Moreover, this association generally holds for low-income homeowners,

6. *Low-Income Housing Tax Credit: Hearing Before the Subcomm. on Select Revenue Measures of the Comm. on Ways and Means*, 101st Cong. 7 (1989) [hereinafter *LIHTC Hearing*] (statement of Sec'y Jack Kemp, U.S. Dep't of Hous. & Urb. Dev.).

7. *See, e.g.*, Duncan Kennedy, *The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 HOW. L.J. 85, 90 (2002); Michael Diamond, *The Meaning and Nature of Property: Homeownership and Shared Equity in the Context of Poverty*, 29 ST. LOUIS U. PUB. L. REV. 85, 107 (2009); Julie D. Lawton, *Limited Equity Cooperatives: The Non-Economic Value of Homeownership*, 43 WASH. U. J.L. & POL'Y 187, 215–17 (2013).

8. Kennedy, *supra* note 7, at 85.

9. *See, e.g.*, Brandon M. Weiss, *Clarifying Nonprofit Purchase Rights in Affordable Housing*, 48 FORDHAM URB. L.J. 1159, 1168–72 (2021).

10. *See generally* David A. Davenport & Samuel T. Johnson, *Year-15 Disputes in the Low-Income Housing Tax Credit Program, Aggregators, and Their Playbooks*, 31 J. AFFORDABLE HOUS. & CMTY. DEV. L. 59 (2022).

11. *See, e.g.*, Brandon Duong, *What Can Be Done When LIHTC Affordability Restrictions Expire?*, SHELTERFORCE (Apr. 7, 2022), https://shelterforce.org/2022/04/07/what-can-be-done-when-lihtc-affordability-restrictions-expire/ [https://perma.cc/AR9N-25NT].

12. *See infra* notes 39–50 and accompanying text.

13. *See, e.g.*, Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 100 COLUM. L. REV. 101, 114–24 (2011).

14. *See, e.g.*, *id.*

15. CHRISTOPHER E. HERBERT, DANIEL T. MCCUE & ROCIO SANCHEZ-MOYANO, JOINT CTR. FOR HOUS. STUD., HARV. UNIV., IS HOMEOWNERSHIP STILL AN EFFECTIVE MEANS OF BUILDING WEALTH FOR LOW-INCOME AND MINORITY HOUSEHOLDS? (WAS IT EVER?) 9–13 (2013).

suggesting that expanding homeownership in the LIHTC program would not only provide housing security but also help low-income families build wealth.[16]

One model, pioneered by a nonprofit developer, suggests a way toward greater homeownership opportunities in the program. Cleveland's CHN Housing Partners operates a lease-purchase program in which LIHTC developments are designed for eventual tenant ownership from the start, with financing structures and other project characteristics tailored to this goal. While its feasibility may be limited to low-cost markets, this model has the potential to expand homeownership in the LIHTC program. This would represent a significant development in the context of historical efforts to boost homeownership among lower income families. But, policy changes beyond LIHTC would be needed to rebalance housing assistance toward low- and middle-income families and expand homeownership more dramatically.

This Article explores why the LIHTC program has not done more to advance homeownership and asset-building among residents when the program's history suggests that homeownership was a goal from the start. The Article then examines whether and how the LIHTC program could increase homeownership opportunities. Part II briefly reviews the history and rationale of homeownership policies in the U.S., including efforts to expand homeownership among low-income families. Part III describes how LIHTC works, as well as current instability in the program related to ownership structures and the expiration of affordability restrictions. Part IV delves deeper into the structure and organization of the LIHTC program to explore why resident ownership and equity-building is not more common. Part V then examines the Cleveland model, as well as its limitations, and describes reforms that could expand the use of the model and enable greater homeownership among lower income families.

II. HOUSING AND HOMEOWNERSHIP

Public policy in the U.S. has long favored homeownership, in part due to the benefits believed to result from people owning their homes. The purported benefits are numerous, ranging from economic security[17] to a range of physical[18] and mental[19] health benefits to positive externalities from direct citizen investment in communities.[20] While the evidence backing these arguments is varied, the evidence of the financial benefits is strongest and provides some rationale for federal policies favoring homeownership, as well as efforts to extend these benefits to lower income families.

16. *Id.* at 20–24.

17. *See, e.g.*, *id.* at 24–25.

18. *See, e.g.*, WILLIAM M. ROHE & MARK LINDBLAD, JOINT CTR. FOR HOUS. STUD., HARV. UNIV., REEXAMINING THE SOCIAL BENEFITS OF HOMEOWNERSHIP AFTER THE HOUSING CRISIS 24–25 (2013).

19. *See, e.g.*, Kim R. Manturuk, *Urban Homeownership and Mental Health: Mediating Effect of Perceived Sense of Control*, 11 CITY & CMTY. 409, 409 (2012).

20. *See, e.g.*, Andrew B. Hall & Jesse Yoder, *Does Homeownership Influence Political Behavior? Evidence from Administrative Data*, 84 J. POL. 351, 352–53 (2022).

A. The Benefits of Homeownership

Most fundamentally, owning one's home serves as a hedge against increased housing costs and inflation.[21] Renters have greater mobility but they are also more vulnerable to fluctuations in housing costs. Owning a home is also associated with increases in wealth, even after controlling for variables like income and starting wealth, as homeownership acts as a forced savings mechanism and may also allow for asset appreciation.[22] And, as discussed below, federal policy provides additional benefits, in the form of financing guarantees and tax advantages. Notably, studies find positive effects on wealth for lower-income families and people of color, though gains are smaller than for higher-income families and white families.[23]

Studies on the positive externalities of homeownership find more mixed results. For example, in *Reassessing the Citizen Virtues of Homeownership*, Stephanie Stern reviewed empirical research on four "subsets of citizen effects": social capital, local voting, property upkeep, and citizen traits of industry, autonomy, and satisfaction.[24] Her review found that homeownership effects on social capital were negligible and more closely tied to length of residence than homeownership.[25] Stern's review did find an association between homeownership and rates of voting, though the effect on active participation to solve local problems was smaller.[26] And her review found positive effects of homeownership on property upkeep, relative to landlord and tenant arrangements, though not as high as the association with voting.[27] Finally, Stern found little in the research to support the idea that homeowners display greater amounts of citizen attributes like industry and autonomy.[28]

Though evidence of the direct financial benefits of homeownership appears stronger than evidence of external benefits, the concept of homeownership as a vehicle for financial security is not immune to critique.[29] For one, it may lead families to hold much of their savings in one leveraged asset.[30] Following the

21. HERBERT ET AL., *supra* note 15, at 5.

22. *Id.* at 20–24 (reviewing literature of relevant studies using panel data).

23. Laurie S. Goodman & Christopher Mayer, *Homeownership and the American Dream*, 32 J. ECON. PERSPS. 31, 43 (2018); HERBERT ET AL., *supra* note 15, at 24; *see also* Amir Kermani & Francis Wong, *Racial Disparities in Housing Returns* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29306, 2021), https://www.nber.org/papers/w29306 [https://perma.cc/6VSR-SGGE] (finding significant disparities in housing returns based on race, which are almost entirely explained by differences in distressed home sales).

24. Stern, *supra* note 13, at 114.

25. *Id.* at 115–16.

26. *Id.* at 117–19.

27. *Id.* at 119–20.

28. *Id.* at 120–23.

29. I thank Montré Carodine for questioning the premise that increased homeownership leads to increased financial security, relative to other savings and investment opportunities, particularly among low-income people and people of color.

30. *See, e.g.*, Stephen Day Cauley, Andrey D. Pavlov & Eduardo S. Schwartz, *Homeownership as a Constraint on Asset Allocation*, 34 J. REAL EST. FIN. & ECON. 283, 309 (2007).

foreclosure crisis of the late 2000s, it is easy to appreciate the risk this creates.[31] This also has implications for racial inequality since Black households hold more of their wealth in housing relative to white households, whose wealth is more diversified in stock and other assets, which may appreciate more quickly.[32] This is not because white households do not have higher homeownership rates—there remains a homeownership gap, which partially explains the nation's racial wealth gap—but because white households have additional wealth invested in other assets.[33] Since families need a place to live, however, the more appropriate comparison to homeownership may not be a stock portfolio but renting, and owning a home is generally more advantageous than renting, if a family can afford it.[34]

B. A Brief Overview of Homeownership Policies

Many of the benefits of homeownership in the U.S. are the result of public policy. Beginning in the nineteenth century, Congress passed several laws that allowed settlers to claim land or buy it at discounted prices.[35] For example, the original Homestead Act, enacted during the Civil War, in 1862, allowed individuals to claim up to 160 acres, provided that the individual had never taken up arms against the U.S.[36] After five years of living on the land and improving it through cultivation, the property was transferred for a small registration fee.[37] Similar legislation followed during Reconstruction and as the nation expanded west.[38] Policies encouraging homeownership have followed ever since.

31. Between 2006 and 2014, 9.3 million households lost their homes to foreclosure, a deed in lieu of foreclosure, or a short sale of a distressed home. Ken Fears, *Return Buyers: Many Already Here, Many More to Come*, NAT'L ASS'N OF REALTORS: ECONOMISTS' OUTLOOK (Apr. 17, 2015), https://www.nar.realtor/blogs/economists-outlook/return-buyers-many-already-here-many-more-to-come [https://perma.cc/3VGB-JUQW].

32. *See* Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schukarick, *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020* 20–22 (Fed. Rsrv. Bank of Minneapolis, Opportunity & Inclusive Growth Inst., Working Paper No. 59, 2022) (finding that more rapid capital gains in the stock market, relative to housing, since 1980 have contributed to the racial wealth gap). Black households also hold more housing debt relative to housing values, compared with white households, meaning this asset is more leveraged. *Id.* at 20. *But see* Goodman & Mayer, *supra* note 23, at 43 (finding that the returns to purchasing a home in a "normal" market typically outperform the stock market on an after-tax basis).

33. *See* Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: FEDS NOTES (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html [https://perma.cc/H3GG-879B] (analyzing data from the 2019 Survey of Consumer Finances and showing that homeownership rates for white households are significantly higher than for Black households and other households of color, while white households also hold more wealth in retirement accounts and other savings).

34. Goodman & Mayer, *supra* note 23, at 47; *see also* Kim-Eng Ky & Ryan Nunn, Fed. Rsrv. Bank of Minneapolis, *The Higher Cost of Rental Housing* 9–10 (Fed. Rsrv. Bank of Minneapolis, Working Paper, 2023) (finding that rental housing tends to be more expensive than physically similar owner-occupied housing).

35. *See, e.g.*, Preemption Act of 1841, ch. 16, 5 Stat. 453; Donation Land Act of 1850, ch. 76, 9 Stat. 496.

36. Homestead Act of 1862, Pub. L. No. 37–64, 12 Stat. 392 (repealed 1976).

37. *Id.*

38. Southern Homestead Act of 1866, ch. 126, 14 Stat. 66 (repealed 1976); Timber Culture Act of 1873, ch. 277, 17 Stat. 605 (repealed 1976); Forest Homestead Act of 1906, ch. 3074, 24 Stat. 233 (repealed 1976); Enlarged Homestead Act of 1909, ch. 160, 35 Stat. 639 (repealed 1976); Stock Raising Homestead Act of 1916,

Today, federal policy favors homeownership in many ways, through intervention in financial markets and through the tax code, including the home mortgage interest deduction, property tax deductions, the exclusion of capital gains tax on the sale of a home, and the exclusion of the imputed rental value of owner-occupied homes.[39] The home mortgage interest deduction allows homeowners to deduct the interest paid on the first $750,000 of a home mortgage.[40] Since the passage of the Tax Cuts and Jobs Act of 2017 ("TCJA") increased the standard deduction, usage of this deduction has fallen as fewer households itemize deductions. Current estimates of the annual cost of this deduction still hover around $25 billion.[41]

Homeowners may also deduct state and local property taxes from income taxes.[42] This deduction is currently capped at $10,000, but the cap will expire after 2025.[43] Currently, this deduction is estimated to cost approximately $25 billion annually.[44] Before the cap, which was implemented as part of the TCJA, the cost of this deduction was roughly $100 billion annually.[45]

Additionally, capital gains of up to $250,000 on the sale of principal residences, or $500,000 if filing jointly, are excluded from taxation.[46] This exclusion is currently estimated to cost around $40 billion annually.[47] There is no deduction for losses on the sale of principal residences.

Finally, the largest tax advantage to owning a home is the exclusion from taxable income of the imputed rental income from owner-occupied housing.[48] Landlords pay tax on rental income, which increases the rents they must charge. But homeowners do not pay tax on the rental income they effectively pay themselves, making owner-occupied less expensive than rental housing.[49] The U.S. Treasury Department estimates the value of this exclusion at approximately $135 billion annually.[50]

ch. 9, 39 Stat. 862 (repealed 1976). Nearly all of these programs involved racial restrictions. *See, e.g.*, Gabriel J. Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 BOS. U.L.R. 1271, 1296–99 (2020).

39. *See infra* notes 40–50 and accompanying text.

40. I.R.C. § 163(h)(3)(F)(i)(II). Before passage of the Tax Cuts and Jobs Act, home mortgage interest on the first $1,000,000 of indebtedness was deductible. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11043(a)(F)(i)(III), 131 Stat. 2054, 2086.

41. JOINT COMM. ON TAX'N, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2023-2027 tbl. 1 (2023) [hereinafter TAX EXPENDITURES]. The Tax Cuts and Jobs Act of 2017 increased the standard deduction to $12,000 for individuals and $24,000 for joint filers in 2018, indexed for inflation. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11021(a), 131 Stat. 2054, 2072. But the increase will expire after 2025. *Id.* In 2026, the estimated annual cost of the home mortgage interest deduction rises to $81.3 billion. TAX EXPENDITURES at tbl. 1.

42. I.R.C. § 164(a)(1).

43. *Id.* § 164(b)(6).

44. CONG. RSCH. SERV., THE SALT CAP: OVERVIEW AND ANALYSIS 2 (2020).

45. *Id.*

46. I.R.C. §§ 121 (b)(1)–(2)(A).

47. TAX EXPENDITURES, *supra* note 41.

48. U.S. DEP'T OF TREAS., OFF. TAX ANALYSIS, TAX EXPENDITURES tbl. 1 (2023).

49. Ky & Nunn, *supra* note 34, at 2 n.1.

50. U.S. DEP'T OF TREAS., *supra* note 48.

Tax benefits to homeownership skew toward higher income people. They are more likely to be eligible for benefits and their higher marginal tax rates mean that deductions and exclusions prevent larger amounts of taxes from being paid than equivalent deductions or exclusions if claimed by lower income people.[51] The extent to which these policies increase homeownership or simply benefit higher income people is unclear at best. Research suggests that tax benefits do not increase homeownership but instead increase housing prices as well as the size of houses purchased by homebuyers.[52] Regardless, expanding homeownership generally requires policies targeted more toward lower- and middle-income people because homeownership rates fall as income levels decrease.[53] Such policies also have the potential to make housing policy more balanced and equitable.

C. Low-Income Homeownership

The two primary benefits of homeownership are wealth accumulation, through forced savings and potential asset accumulation, and the housing stability that comes with ownership of one's home. While homeownership is not attainable for many, these two benefits are critical for low-income families. As a result, and because expanding homeownership requires focusing on relatively lower-income homebuyers, policy-makers have attempted to promote homeownership for low-income families for some time, with limited success.

1. Federal Policy

In some ways, the mortgage insurance provided to banks by the Federal Housing Administration ("FHA") during the New Deal era was the first low- and moderate-income homeownership program.[54] FHA guarantees allowed banks to make fixed-rate mortgages with longer repayment periods, and allowed for lower down payments.[55] This made financing more accessible, expanding homeownership widely while excluding Black Americans and other people of color, through redlining and other discriminatory practices now familiar to many.[56]

51. Timothy B. Lee, *This Chart Shows How Federal Housing Policy Benefits the Rich More Than the Poor*, VOX (Aug. 22, 2015), https://www.vox.com/2015/8/22/9182441/housing-tax-breaks-regressive [https://perma.cc/29UG-ZSEF].

52. *See, e.g.*, William G. Gale, Jonathan Gruber & Seth Stephens-Davidowitz, *Encouraging Homeownership Through the Tax Code*, 115 TAX NOTES 1171, 1179–81 (2007); Christian A. L. Hilber & Tracy M. Turner, *The Mortgage Interest Deduction and its Impact on Homeownership Decisions*, 96 REV. ECON. & STAT. 618 (2014); Jonathan Gruber, Amalie Jensen & Henrik Kleven, *Do People Respond to the Mortgage Interest Deduction? Quasi-Experimental Evidence from Denmark* (Nat'l Bureau of Econ. Rsch., Working Paper No. 23600, 2017).

53. Gay Cororaton, *Distribution of Housing Wealth Across Income Groups from 2010–2020*, NAT'L ASS'N OF REALTORS: ECONOMISTS' OUTLOOK (Mar. 11, 2022), https://www.nar.realtor/blogs/economists-outlook/distribution-of-housing-wealth-across-income-groups-from-2010-2020 [https://perma.cc/3SNM-FH78].

54. Anne B. Shlay, *Low-Income Homeownership: American Dream or Delusion*, 43 URB. STUD. 511, 514 (2006).

55. *See id.*

56. For a readable description of the FHA's discriminatory practices, see RICHARD ROTHSTEIN, THE COLOR OF LAW 59–76 (2017); *see also* Todd M. Michney, *How the City Survey's Redlining Maps Were Made:*

Several decades later, in the aftermath of the Great Society programs, policy-makers targeted homeownership toward a narrower group of low-income families. Congress added Section 235 to the National Housing Act in 1968.[57] This program subsidized mortgaged loans, backed by the FHA, for low-income homebuyers and required no down payment.[58] Defaults were common, leading to a moratorium on Section 235 loans in 1973, though the program continued with limited funding for several years.[59] It was terminated in 1988.[60] Around the same time, the Department of Housing and Urban Development ("HUD") used its administrative authority to create a homeownership program in public housing.[61] The so-called Turnkey III program allowed annual contributions paid to public housing authorities by HUD to build equity for participating tenants after the bonds financing a project were paid off.[62] The complicated nature of the program prevented it from gaining traction.[63] Finally, in 1990, Congress authorized Homeownership and Opportunity for People Everywhere programs.[64] These "HOPE" programs would have allowed for assistance to purchase units in public housing and other forms of HUD-assisted housing, but Congress never funded the programs.[65]

Currently, the Housing Choice Voucher ("HCV") program, administered by HUD, includes a homeownership option[66] and the Family Self Sufficiency asset-building program.[67] The HCV homeownership program allows participants to use their housing subsidy toward mortgage payments but is little used.[68] Researchers at HUD have found housing prices to be the primary barrier to the use of vouchers for homeownership, even in relatively lower-cost housing markets.[69]

A Closer Look at HOLC's Mortgagee Rehabilitation Division, 21 J. PLAN. HIST. 316 (2022) (examining the origins and history of the redlined maps used by the Home Owners' Loan Corporation).

57. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 101, 82 Stat. 476, 477–85.

58. Nathaniel S. Cushman & Charles Edson, *Affordable Housing: An Intimate History*, *in* THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 21–22 (Tim Iglesias, Rochelle E. Lento & Rigel C. Oliveri eds., 3d ed. 2022); *Federal Housing Administration Mortgage Insurance Programs (Inactive)* N.Y.U. FURMAN CTR. FOR REAL EST. & URB. POL'Y, https://furmancenter.org/coredata/directory/entry/federal-housing-administration-mortgage-insurance-programs-unavailable (last visited Mar. 2, 2024) [https://perma.cc/S8VJ-7X98].

59. Cushman & Edson, *supra* note 58, at 21–22.

60. Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 401(d), 101 Stat. 1815, 1899.

61. 24 C.F.R. Pt. 904 ("Low Rent Housing Homeownership Opportunities"); *see also* Cushman & Edson, *supra* note 58, at 22.

62. Cushman & Edson, *supra* note 58, at 22.

63. *Id*.

64. *See* Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, Title IV, 104 Stat. 4079, 4148 (1990).

65. Cushman & Edson, *supra* note 58, at 22.

66. 42 U.S.C. § 1437f(y).

67. *Id*. § 1437u.

68. *HCV Homeownership Program*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/homeownership (last visited Mar. 2, 2024) [https://perma.cc/T6BK-EDQG]. According to HUD's enrollment report, there are only 9,749 participants currently in the program. *Id.*

69. GRETCHEN LOCKE ET AL., U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF POL'Y DEV. & RSCH., VOUCHER HOMEOWNERSHIP STUDY 31–32, 95–96 (2006).

Participant credit problems and housing authority staffing shortages have also presented barriers to greater utilization.[70]

Family Self Sufficiency is an asset-building program involving both services and a savings program intended to help families achieve economic independence and self-sufficiency.[71] A core feature of the program is a savings mechanism. If a participant experiences an income increase, which would typically increase monthly rent in the HCV program—rents under the program are set at 30% of income—the additional rent goes into an interest-accruing escrow savings account.[72] Savings accrued in this account are disbursed when participants graduate from the program, creating an incentive to increase earnings and save.[73] In addition, the program requires participation in case management, involving education and training, as well as financial counseling, including homeownership preparation.[74] Homeownership is the most frequently cited goal among participants.[75] Based on a current evaluation, the effects of the program on employment and earnings appear negligible, but a subset of participants increase savings as a result of the program.[76]

The U.S. Department of Agriculture ("USDA") Section 502 programs[77] have experienced more success than HUD programs.[78] Administered by the USDA's Rural Housing Service, Section 502 programs enable low- and moderate-income people to purchase homes in eligible rural areas.[79] The Section 502 direct loan program provides payment assistance for low-income people to reduce interest rates to as low as 1% and requires no down payment.[80] Approximately $55 million in appropriations supported up to $1 billion in Section 502 direct loans authorized in fiscal year 2021.[81] In addition, the Section 502

70. *Id.* at 32.

71. 42 U.S.C. § 1437u(a); U.S. DEP'T HOUS. & URB. DEV., FAMILY SELF-SUFFICIENCY PROGRAM FACT SHEET 1 (2016).

72. *Id.* § 1437u(e)(2).

73. NANDITA VERMA, STEPHEN FREEDMAN, BETSY TESSLER, BARBARA FINK & DAVID NAVARRO, U.S. DEP'T OF HOUS. & URB. DEV. OFF. POL'Y DEV. & RSCH., WORK, ENGAGEMENT, AND WELL-BEING AT THE MIDPOINT 58 (2021).

74. *Id.* at 4–9.

75. *Id.* at 47–48.

76. *Id.* at 130–31.

77. 42 U.S.C. §§ 1471–1490t (Section 502 refers to the relevant section of the Housing Act of 1949, which first introduced the programs); 7 C.F.R. Pt. 3550 (direct loan program); 7 C.F.R. Pt. 3555 (guaranteed loan program).

78. *See* Cushman & Edson, *supra* note 58, at 22.

79. *See Single Family Housing Direct Home Loans*, USDA, https://www.rd.usda.gov/programs-services/single-family-housing-programs/single-family-housing-direct-home-loans (last visited Mar. 2, 2024) [https://perma.cc/HUD4-7P56].

80. *Id.*

81. KATIE JONES & MAGGIE MCCARTY, CONG. RSCH. SERV., USDA RURAL HOUSING PROGRAMS: AN OVERVIEW 22 (2022). The $55 million figure represents the credit subsidy required to make $1 billion in loans. *Id.*

guaranteed loan program assists lenders in providing loans to low- and moderate-income people by providing loan guarantees.[82]

Considered as a whole, these programs suggest that a lack of funding and, in some cases, complicated program structures have presented obstacles to participation and ultimate success. Several of the programs also targeted very low-income people, exacerbating the challenge provided by insufficient funding.[83] The straightforward nature of the Section 502 programs suggests that simplicity may help these programs succeed, though that program is relatively small and used mostly in low-cost areas.

2. Non-Governmental Models

Beyond government, nonprofit and cooperative organizations have attempted to develop homeownership and equity-building programs for low-income people for some time, though none at a scale comparable to federal housing programs. Many of these may also work in tandem with governmental programs. Among the most common are shared equity models, which may not fit into a neat binary of rental or ownership. Shared equity housing includes several different models of collective ownership, such as limited equity cooperatives, community land trusts, and deed-restricted housing programs.[84]

Cooperative ownership has a long history in the U.S. Some of the first cooperatives were organized by farmers as early as the 19th century to coordinate agricultural production.[85] There are many types of cooperatives—worker cooperatives, purchasing cooperatives, and housing cooperatives, to name a few—but the common thread is that cooperatives are owned and controlled by their members, who use the products or services of the cooperative.[86] In the housing context, cooperatives are owned by a cooperative entity, whose members reside in the housing owned by the cooperative.

In the late 1960s, civil rights activists in southern Georgia initiated one of the first modern efforts to cooperatively own land for people who could not otherwise afford it.[87] New Communities, Inc. was founded as a farm collective in 1969 by several individuals who had been active in the Civil Rights Movement,

82. *Single Family Housing Guaranteed Loan Program*, USDA, https://www.rd.usda.gov/programs-services/single-family-housing-programs/single-family-housing-guaranteed-loan-program (last visited Mar. 2, 2024) [https://perma.cc/4QNR-662R].

83. Cushman & Edson, *supra* note 58, at 21–23.

84. JOHN EMMEUS DAVIS, NAT'L HOUS. INST., SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED, OWNER-OCCUPIED HOUSING 5 (2006).

85. LYNN PITTMAN, CTR. FOR COOP., UNIV. OF WIS., HISTORY OF COOPERATIVES IN THE UNITED STATES: AN OVERVIEW 2–3 (2018).

86. *What is a Cooperative*, UNIV. OF NEB.: NEB COOP. DEV. CTR., https://ncdc.unl.edu/what-cooperative (last visited Mar. 2, 2024) [https:perma.cc/QXS7-76X5]. Most cooperatives follow some version of the following seven principles: open and voluntary membership, democratic control, member economic participation, autonomy and independence, education and training for members, cooperation and solidarity with other cooperatives, and concern for community. *Id.*; *Cooperative Identity, Values & Principles*, INT'L COOP. ALL., https://www.ica.coop/en/cooperatives/cooperative-identity (last visited Mar. 2, 2024) [https://perma.cc/N9EY-WBQD].

87. DAVIS, *supra* note 84, at 21; *Our History*, NEW CMTYS. INC., https://www.newcommunitiesinc.com/new-communities.html (last visited Feb. 27, 2024) [https://perma.cc/Z7HQ-A4CU].

including Charles and Shirley Sherrod, members of the Student Nonviolent Coordinating Committee ("SNCC").[88] The organizers sought to support Black farmers who were driven from their land for participating in the Movement and provide a "safe haven" that could become self-sufficient.[89]

In seeking economic justice and land security, New Communities formed one of the first versions of what has come to be known as a community land trust, where land is collectively owned and leased to members of the collective, in this case for farming and homes.[90] Community land trusts may also be owned by a nonprofit that attempts to represent the interests of a community.[91] Community land trusts often lease land to owners of homes on that land through long-term ground leases that restrict the resale of the homes to affordable prices.[92] This can prevent land speculation and maintain affordability.[93] In high-cost markets, where land typically accounts for an outsized portion of housing costs, community land trusts can be a powerful way to maintain greater affordability.[94] While individuals' ability to build wealth may be moderated due to resale restrictions, affordability lasts.

Other shared equity models, like cooperatives, may be coupled with community land trusts. Housing cooperatives include both market rate cooperatives, where shares in a cooperative are sold for unrestricted prices, or limited equity cooperatives, where sales prices are restricted to maintain affordability.[95] Limited equity cooperatives are generally owned by a cooperative organization, and members have a right to live in their units based on some form of occupancy agreement with the cooperative.[96] Restrictions typically employ a formula that allows residents to build some amount of equity while ensuring that the housing will be accessible to new residents.[97] This balances the competing goals of enabling residents to gain some amount of wealth while preserving the housing as affordable.[98] In fact, research suggests that shared equity models can assist low-income families in building modest amounts of wealth.[99] But they remain rare; a

88. *Our History*, *supra* note 87.

89. *Id.*

90. *Id.*; Julie Farrell Curtin & Lance Bocarsly, *CLTs: A Growing Trend in Affordable Home Ownership*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 367, 370 (2008).

91. *See* Curtin & Bocarsly, *supra* note 90, at 370.

92. *See, e.g.*, *id.*

93. *Id.* at 370–72.

94. *Id.* at 373.

95. *Id.* at 369.

96. *Id.*

97. ANNA CARLSSON, JOINT CTR. FOR HOUS. STUD., HARV. UNIV., SHARED EQUITY HOUSING: A REVIEW OF EXISTING LITERATURE 9–10 (2019).

98. *See* Michael Diamond, *Affordable Housing and the Conflict of Competing Goods: A Policy Dilemma*, *in* AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS 1, 1–9 (Nestor M. Davidson & Robin Paul Malloy eds., 2009).

99. Arthur Acolin, Alex Ramiller, Rebecca J. Walter, Samantha Thompson & Ruoniu Wang, *Transitioning to Homeownership: Asset Building for Low- and Moderate-Income Households*, 31 HOUS. POL'Y DEBATE 1032, 1032 (2021) (panel study finding median shared equity homeowners accumulated about $1,700 more savings annually than similarly situated renters in the panel).

2016 census of limited equity cooperatives by the Urban Homesteading Assistance Board identified just 166,608 total units in the country.[100]

III. THE LOW-INCOME HOUSING TAX CREDIT

The LIHTC program was introduced as part of the Tax Reform Act of 1986.[101] By any measure, it is the federal government's largest program subsidizing the development of affordable housing.[102] Through 2021, over 52,000 LIHTC projects, containing approximately 3.55 million units of housing, have been financed through the program, roughly 100,000 units annually.[103] LIHTC is estimated to cost the federal government around $13.5 billion annually.[104] Current legislation would expand the program.[105]

A. How LIHTC Works

LIHTC works by pulling private capital into affordable housing development in exchange for federal income tax credits, which are allocated to the states. State housing credit agencies, in turn, award the credits to specific projects pursuant to qualified allocation plans ("QAPs") created by each state, which establish rules and preferences for LIHTC projects within the state.[106] Credits are only allowed to finance the "applicable fraction" (the portion of a project used for low-income housing) of a project's "eligible basis" (essentially, the depreciable portion of a project).[107] Projects receive the credits over a 10-year "credit period."[108]

There are two types of credits: a competitive "9%" credit and a "4%" credit that is available when 50% or more of a project is financed with tax-exempt bonds.[109] The 9% credit is designed to finance 70% of the low-income portion

100. URB. HOMESTEADING ASSISTANCE BD., COUNTING LIMITED-EQUITY CO-OPS, RESEARCH UPDATE (2016). This estimate is down from a figure of 425,000 limited equity cooperatives, "long cited" by the National Association of Housing Cooperatives. *Id.*

101. Act of Oct. 22, 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189 (codified at I.R.C. § 42). The credit was temporary when introduced. After being extended for several years, LIHTC was made permanent in 1993. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13142(a), 107 Stat. 312, 437–38.

102. *See* MARK P. KEIGHTLEY, CONG. RSCH. SERV., AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT 1 (2023). Note that while LIHTC is the nation's largest affordable housing *development* program, LIHTC is not the nation's largest affordable housing program. Funding for tenant-based rental subsidies, namely the HCV program, has hovered above $20 billion annually for the last several years. *See, e.g.*, U.S. DEP'T OF HOUS. & URB. DEV, FY 2022 CONGRESSIONAL JUSTIFICATIONS 5-4 TO 5-8.

103. *LIHTC Data*, *supra* note 3.

104. KEIGHTLEY, *supra* note 102, at 1; TAX EXPENDITURES, *supra* note 41.

105. Affordable Housing Credit Improvement Act of 2023, H.R. 3238, 118th Cong. § 101 (introduced May 11, 2023) (increasing state allocations of credits).

106. *See* I.R.C. § 42(m).

107. *Id.* §§ 42(c)–(d). Note that this does include land acquisition costs, which may not be financed with LIHTCs, creating some incentive for developers to build in areas where land is least expensive.

108. *Id.* § 42(a), (f).

109. *Id.* §§ 42(b), (h)(4). The Tax Reform Act of 1986 explicitly included 9% and 4% for projects placed in service in 1987, the first year of the program. Act of Oct. 22, 1986, Pub. L. No. 99-514, § 252(a), 100 Stat. 2085, 2189–90. For projects placed in service after 1987, the statute required the credit rates that would yield,

of a project, with 70% representing the present value of the 10-year stream of 9% credits.[110] Developers must apply to state housing credit agencies for these competitive credits, and there is a finite amount allocated to states annually using a formula based on state populations.[111] The 4% credit is designed to finance 30% of the low-income portion of a project, with 30% representing the present value of the 10-year stream of 4% credits in this case.[112] If 50% or more of a project is financed with tax-exempt bonds, the project is effectively entitled to the credits; there is no limit to the amount of these credits, beyond a state's volume cap for tax-exempt bonds.[113]

Housing subsidized by the credits must be occupied by low-income households[114] and the rent restricted to certain levels[115] for a minimum of 30 years.[116] Occupancy is typically restricted to households earning 60% or less of the area median income and rent restricted to 30% of this income limit.[117] Through their QAPs, states may—and many do—require longer periods of affordability.[118] During the first fifteen years of this period, the "compliance period,"[119] credits are subject to recapture if the units financed with credits at a project do not comply with program requirements, such as occupancy and rent limits.[120] During the next fifteen years of affordability, the "extended use period,"[121] enforcement mechanisms are less clear, though state housing credit agencies are authorized to develop enforcement mechanisms.[122]

As a practical matter, since most developers do not have enough tax liability to take advantage of tax credits—and many affordable housing developers are

over a 10-year period, a present value of 70% and 30%, respectively. *Id.* Historically, the credit rates, as determined by the Treasury Department, have been lower than 9% and 4%. KEIGHTLEY, *supra* note 102, at 2. The Housing and Economic Recovery Act of 2008 temporarily implemented a 9% floor to that credit rate. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 3002, 122 Stat. 2654, 2879. In 2015, the 9% floor to that credit rate was made permanent. Protecting Americans from Tax Hikes Act, Pub. L. No. 114-113, § 131, 129 Stat. 2242, 3055 (2015) (codified at I.R.C. § 42(b)(2)(B)). In 2020, a 4% floor to that credit rate was implemented. Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, § 201, 134 Stat. 3038, 3056 (codified at I.R.C. § 42(b)(3)). Note that while the credit rates required to achieve 70% and 30% subsidies are lower than the 9% and 4% floors, the LIHTC program effectively provides a subsidy greater than 70% and 30%, respectively, of the low-income portion of projects.

110. I.R.C. § 42(b); *see also* KEIGHTLEY, *supra* note 102, at 1–2. The method of discounting is prescribed by statute. *Id.* § 42(b)(1)(C).

111. I.R.C. § 42(h)(3).

112. *Id.* § 42(b); *see also* KEIGHTLEY, *supra* note 102, at 1–2.

113. *Id.* § 42(h)(4).

114. *Id.* § 42(g)(1).

115. *Id.* § 42(g)(2).

116. *Id.* § 42 (h)(6).

117. *Id.* § 42(g).

118. For example, California requires a 55-year affordability period. CAL. CODE REGS. tit. 4, § 10325(c)(6) (2023).

119. I.R.C. § 42(i)(1).

120. *Id.* § 42(j).

121. *Id.* § 42(h)(6)(D).

122. *Id.* § 42(h)(8). For example, California's QAP authorizes its housing credit agency, the California Tax Credit Allocation Committee, to issue fines for noncompliance. *See* CAL. CODE REGS. tit. 4, § 10337(f) (2023); *Approved Compliance Fine Schedule*, CAL. TAX CREDIT ALLOCATION COMM., https://www.treasurer.ca.gov/ctcac/compliance/compliance-violations-fines.pdf (last visited Mar. 2, 2024) [https://perma.cc/L8YY-R4WU].

nonprofits that are exempt from taxation under section 501(c)(3) of the Internal Revenue Code ("IRC") —developers generally create legal partnerships with investors to utilize the credits.[123] Investors contribute upfront capital to these partnerships in return for the rights to the credits.[124] This capital, in turn, decreases the amount of debt ultimately needed to finance a project, enabling below-market rents. In addition to the credits, investors receive other tax benefits, such as the ability to claim depreciation and losses from projects.[125] Investors may also receive benefits under the Community Reinvestment Act, which rewards investment in low-income neighborhoods.[126] In all, these benefits generally result in a reasonable return on investors' capital.[127] Developers, for their part, generally receive a significant development fee for their efforts, as well as a share of any cash flow.[128]

Investors in LIHTC projects may be individual financial institutions but are often investment funds with multiple investors, created through a process of syndication. Syndication allows multiple investors to invest in a project, often through funds with multiple investors, that in turn invest in multiple projects.[129] The use of funds also allows investors to spread risk across projects.[130] This allows syndicators, which set up funds and connect investors to actual projects, to offer a more consistent rate of return to ultimate investors.[131]

The LIHTC program has been subject to a range of critiques, among them its mixed record in achieving fair housing goals,[132] inefficiencies in the design and operation of the program,[133] and the rent burdens faced by tenants relative

123. The specific form of these partnerships may vary depending on the state and other factors, but limited partnership, limited liability companies, and limited liability limited partnerships are common legal forms.

124. KEIGHTLEY, *supra* note 102, at 5–6; MARK P. KEIGHTLEY, DONALD J. MARPLES & MOLLY F. SHERLOCK, CONG. RSCH. SERV., TAX EQUITY FINANCING: AN INTRODUCTION AND POLICY CONSIDERATIONS 1 (2019).

125. Note that operating losses are common due to the below-market rents at LIHTC developments. Investors do not necessarily anticipate operating income but invest in LIHTC developments primarily for the tax benefits.

126. *See* 12 U.S.C. § 2903(a).

127. Estimates of recent yields range from approximately 5% to 8% annually. Teresa Garcia, *Affordable Housing Experts Expect LIHTC Equity Pricing Increase into 2022*, 12 NOVOGRADAC J. TAX CREDITS ISSUE VI 1, 2 (2021).

128. *See, e.g.*, CAL. CODE REGS. tit. 4, § 10327(c)(2) (2023).

129. U.S. GOV'T ACCOUNTABILITY OFF., LOW-INCOME HOUS. TAX CREDIT: THE ROLE OF SYNDICATORS 5 (2017).

130. *Id.*

131. *See, e.g.*, *id.* at 3, 8.

132. *See, e.g.*, Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIA. L. REV. 1011, 1020–21 (1998); Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1779 (2005); Michelle Layser, *How Federal Tax Law Rewards Housing Segregation*, 93 IND. L.J. 915, 948–52 (2018). *But see* Ingrid G. Ellen, Keren M. Horn & Katherine M. O'Regan, *Poverty Concentration and the Low Income Housing Tax Credit: Effects of Siting and Tenant Composition*, 34 J. HOUS. ECON. 49, 58 (2016) (finding little evidence that LIHTC increases the concentration of poverty even if it could do more to deconcentrate poverty).

133. *See, e.g.*, Michael D. Eriksen & Stuart S. Rosenthal, *Crowd Out Effects of Place-Based Subsidized Rental Housing: New Evidence from the LIHTC Program*, 94 J. PUB. ECON. 953, 956 (2010) (finding that the LIHTC program has a significant "crowd out" effect on private investment in housing); Brandon M. Weiss, *Locating Affordable Housing: The Legal System's Misallocation of Subsidized Housing Incentives*, 70 HASTINGS

to other affordable housing programs.[134] There is also a sizeable literature critiquing the use of tax expenditures to make public policy, in general,[135] including some examination of the LIHTC program, specifically.[136] The most relevant issues in the LIHTC program for this Article's purposes relate to, one, uncertainty about owner motivations after the compliance period and, two, the expiration of affordability restrictions after the extended use period.

B. Year 15

The design of section 42 of the IRC and ownership structures create a "year 15" transition for most LIHTC projects.[137] Historically, because investors receive the credits in the ten years after a project is placed in service, and because the credits are no longer subject to recapture after the initial 15-year compliance period, investors have seen little need to oversee compliance after year fifteen.[138] Therefore, investors have generally sought to exit the ownership of LIHTC projects at that point.[139]

If a project involves a nonprofit developer, it is customary for the governing documents of the ownership entity to include a right of first refusal for the nonprofit to purchase the project after year fifteen.[140] The IRC includes language making clear that a right of first refusal, whether granted to a nonprofit or tenants, in cooperative form or otherwise, does not jeopardize the tax credits allocated to

L.J. 215 (2019) (examining allocation rules that facilitate "misallocation," where LIHTC disproportionately finances housing in neighborhoods that already have high numbers of housing units at similar rents); Evan Soltas, *Tax Incentives and the Supply of Low-Income Housing* (Jan. 11, 2024) (unpublished manuscript), *available at* https://economics.mit.edu/people/phd-students/evan-soltas [https://perma.cc/EBW6-95B2] (finding that the LIHTC program adds few new units of housing and instead reallocates units to lower-income households).

134. *See, e.g.*, Anne R. Williamson, *Can They Afford the Rent? Resident Cost Burden in Low Income Housing Tax Credit Developments*, 47 URB. AFFS. REV. 775, 781 (2011) (finding that a majority of LIHTC residents are rent burdened); N.Y.U. FURMAN CTR. FOR REAL EST. & URB. POL'Y & MOELIS INST. FOR AFFORDABLE HOUS. POL'Y, WHAT CAN WE LEARN ABOUT THE LOW-INCOME HOUSING TAX CREDIT PROGRAM BY LOOKING AT THE TENANTS? 5–6 (2012) (finding that LIHTC tenants experience lower rent burdens than other low-income households but higher rent burdens than tenants in HUD-assisted housing). Unlike other affordable housing programs, which limit rents to a percentage of a tenant's income, often 30%, LIHTC rents are limited to 30% of the applicable income limit. I.R.C. § 42(g)(2). In 2018, Congress added an average income option to LIHTC's occupancy restrictions, which allows for lower income limits—and thus lower rents—while also expanding eligibility to higher income residents (earning up to 80% of area median income). Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, § 103(a), 132 Stat. 348, 1157 (codified at I.R.C. § 42(g)).

135. *See, e.g.*, Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 82 HARV. L. REV. 705, 737–38 (1970) (arguing generally against the use of tax expenditures instead of direct subsidies).

136. *See, e.g.*, David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 WASH. U. L. REV. 1823, 1859 (2006) (arguing that the LIHTC should be replaced with increased tenant-based vouchers to reduce redundancy and inefficiency).

137. JILL KHADDURI, CARISSA CLIMACO & KIMBERLY BURNETT, U.S. DEP'T OF HOUS. & URB. DEV., OFF. OF POL'Y DEV. & RSCH., WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 & BEYOND? 29 (2012).

138. *Id.*

139. *Id.*

140. *Id.* at 30–31.

the project.[141] Though not required, this right of first refusal is common and often coupled with a purchase option, which may include rights to purchase the investor interest in the ownership entity or the project itself. Similarly, projects that do not involve nonprofit partners may still involve purchase or refusal rights for a for-profit developer in anticipation of an investor exit.

As a result, ownership of the vast majority of LIHTC developments has historically transferred to developer partners after year fifteen.[142] Developer partners generally have either a mission or business model that involves holding on to these properties and operating them, generating income from management fees, operating income, or refinancing.[143] Some may eventually recapitalize a project, receiving a new allocation of credits and receiving a development fee through the process, while also extending affordability restrictions.[144]

More recently, however, a growing number of investors, sometimes known as "aggregators," have disrupted historic patterns of disposition at year fifteen. These investors have acquired ownership interests in LIHTC projects in an attempt to extract value from projects beyond the tax benefits the program is designed to provide.[145] They do this by challenging the purchase rights held by nonprofits and other developers, in some instances to hold onto valuable property or perhaps to leverage a higher option price.[146] Aggregators may also seek to take advantage of a "qualified contract" provision in the IRC, which allows for early termination of the extended use period if an owner notifies the state housing credit agency of an intent to sell and the credit agency is not able to find a qualified buyer within one year.[147] And because properties are worth more in high-cost markets, so-called aggregators tend to acquire ownership interests in properties located in areas where housing costs are especially high and affordable housing especially needed.[148] This interruption of customary practice has increased uncertainty about the future of affordability at many LIHTC developments. It also highlights why developers, perhaps now more than ever, seek to carefully prescribe respective rights and obligations after year fifteen in the legal documents that govern ownership of LIHTC projects.

141. I.R.C. § 42(i)(7)(A). The statute also prescribes a minimum purchase price of (i) the project's outstanding debt and (ii) any taxes attributable to the sale. *Id.* § 42(i)(7)(B).

142. KHADDURI ET AL., *supra* note 137, at 29–30.

143. *Id.* at 32.

144. *Id.* at 35.

145. For a general discussion of the trend, see Davenport & Johnson, *supra* note 10; David A. Davenport & Samuel T. Johnson, *Year-15 Disputes in the Low-Income Housing Tax Credit Program*, 31 J. AFFORDABLE HOUS. & CMTY. DEV. L. 323, 330 (2023) (case law update) [hereinafter Davenport & Johnson Update]; Weiss, *supra* note 9, 1168–72.

146. WASH. STATE HOUS. FIN. COMM'N, NONPROFIT TRANSFER DISPUTES IN THE LOW INCOME HOUSING TAX CREDIT PROGRAM: AN EMERGING THREAT TO AFFORDABLE HOUSING 5–6 (2019); Davenport & Johnson, *supra* note 10, at 71–75; Davenport & Johnson Update, *supra* note 145, at 331 ("[T]he Aggregator problem is real and continues to disrupt the delicately balanced relationships central to the LIHTC's program's success.").

147. I.R.C. §§ 42(h)(6)(E)–(F).

148. WASH. STATE HOUS. FIN. COMM'N, *supra* note 146, at 5; *see also* Beth Healy & Christine Willmsen, *Investors Mine for Profits in Affordable Housing, Leaving Thousands of Tenants at Risk*, WBUR (Apr. 29, 2021), https://www.wbur.org/news/2021/04/29/investors-low-income-housing-boston-south-end [https://perma.cc/YUU2-RRSQ].

C. Expiring Affordability

As described, LIHTC offers a form of subsidy to private actors in return for a minimum of thirty years of affordability restrictions. But the legal restrictions that keep rents affordable eventually expire. This can jeopardize families' ability to remain in their homes and afford the rent after these restrictions expire.[149] As some have noted, it also represents a forfeit of public investment, allowing private actors to seize more value than necessary to encourage participation in the program.[150]

This is not a new problem, nor unique to LIHTC. In fact, it repeats a dynamic inherent in the first generation of privately operated, publicly subsidized housing. In the 1960s and 1970s, federal housing policy moved away from public housing, owned and operated by local public housing authorities and subsidized through HUD, and moved toward programs that encouraged private development by providing mortgage insurance and loan subsidies.[151] In exchange for this financing, owners entered into regulatory agreements that restricted income eligibility and rent levels.[152] These restrictions, however, were typically tied to the life of the mortgage, meaning that affordability expired when a mortgage matured—or earlier if market conditions led an owner to prepay the mortgage, which was typically allowed after twenty years.[153]

This led to a wave of housing developments where affordability was threatened during the 1980s. Congress acted in 1987 and 1990 to implement standards for prepayment and create incentives for owners to remain in the programs, including by allowing prescribed rent increases and providing additional federal assistance.[154] Since most projects financed through this first generation of public subsidies for privately owned housing were developed in the 1960s and 1970s, and most subsidized mortgages had 40-year terms, the issue grew relevant again in the 2000s and 2010s.[155] This has contributed to a churn in the affordable

149. *See, e.g.*, Duong, *supra* note 11.

150. Brandon M. Weiss, *Residual Value Capture in Subsidized Housing*, 10 HARV. L. & POL'Y REV. 521, 525–26 (2016).

151. The first of these programs, created by Section 202 of the Housing Act of 1959, offered direct loans to nonprofits that provided affordable housing to the elderly and disabled. Housing Act of 1959, Pub. L. No. 86-372, § 202, 73 Stat. 654, 667 (codified at 12 U.S.C. § 1701q). In 1961, Congress added the Section 221(d)(3) below-market interest rate (BMIR) program, which provided subsidized loans to private developers of affordable housing. Act of June 30, 1961 Pub. L. No. 87-70, § 101, 75 Stat. 149 (codified at 12 U.S.C. § 1715l(d)(3)). Congress replaced the Section 221(d)(3) BMIR program with the Section 236 program in 1968. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 201, 82 Stat. 476, 498 (codified at 12 U.S.C. § 1715z-1). Under Section 236, HUD paid lenders an interest reduction payment that effectively reduced the interest rate paid by private developers to 1%. NAT'L HOUS. L. PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS § 1.3.3 (5th ed. 2018).

152. NAT'L HOUS. L. PROJECT, *supra* note 151, § 12.3.2.2.

153. *Id.*

154. *See* Emergency Low-Income Housing Preservation Act of 1987, Pub. L. No. 100-242, § 201-235, 101 Stat. 1877, 1877–86 (1988); Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub. L. No. 101-625, tit. VI., § 601, 104 Stat. 4079, 4275.

155. *See, e.g.*, Letter from Margaret Salazar, Associate Deputy Assistant Secretary, U.S. Dep't of Hous. & Urb. Dev., to Section 236 Multifamily Property Owners (Jan. 6, 2014).

housing supply: as new units are constructed, others are lost to deterioration, abandonment, or conversion to more expensive housing.[156]

The LIHTC program now faces the potential for a similar problem. The first LIHTC projects were developed in the late 1980s and early 1990s and affordability restrictions last for a minimum of thirty years, unless a state QAP requires longer affordability.[157] In fact, HUD estimates that a critical mass of projects began to reach the expiration of use restrictions in 2022.[158] Many LIHTC developments involve additional public funding sources, which may require projects to provide affordable housing for longer than thirty years.[159] But, absent additional requirements, after a LIHTC project's affordability restrictions expire, there is little to prevent conversion to market rate housing.[160] An additional wrinkle is that by year thirty, many developments have significant unmet capital needs.[161] How those capital needs will be met, and whether public sources requiring new affordability restrictions will be involved, is unclear and depends on the circumstances of individual projects.

As Brandon Weiss has observed, the expiration of affordability restrictions also presents the opportunity for private-sector participants in the program to gain significant value in the form of unencumbered property.[162] One might believe that this is necessary to encourage participation in the LIHTC program. But, the primary benefit to developers in the program comes in the form of developer fees, which are limited by state housing credit agencies but typically reach into the millions of dollars and are paid during the development of a project.[163] And, as described above, investors receive the tax benefits from their participation in the program during the compliance period and, historically, have sought to exit the program soon afterward.[164] Thus, the potential value of a project at the end of affordability restrictions, at least thirty years down the road, is generally an

156. *See, e.g.*, ANDREW AURAND, DAN EMMANUEL, KEELY STATER, KELLY MCELWAIN & ANNA WARD, PUB. & AFFORDABLE HOUS. & RSCH. CORP. & NAT'L LOW-INCOME HOUS. COAL., PICTURE OF PRESERVATION 9–15, 19–22 (2021).

157. During the first few years of the program, before LIHTC was made permanent, only a 15-year use restriction was required. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2190. In 1989, the 15-year extended use period was added to the initial 15-year compliance period, creating the current 30-year minimum affordability period. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7108, 103 Stat. 2106, 2309 (codified at I.R.C. § 42(h)(6)).

158. KHADDURI ET AL., *supra* note 137, at 67.

159. At least in higher-cost markets, affordable housing developments typically require several sources of public funding to meet development costs. *See, e.g.*, ELIZABETH KNEEBONE & CAROLINA K. REID, TERNER CTR. FOR HOUS. INNOVATION, U.C. BERKELEY, THE COMPLEXITY OF FINANCING LOW-INCOME HOUSING TAX CREDIT HOUSING IN THE UNITED STATES 2 (2021).

160. One of the critiques of LIHTC related to inefficiency is that LIHTC developments "crowd out" private development in certain markets, essentially providing market-rate housing. *See* Eriksen & Rosenthal, *supra* note 133, at 953. This is possible because LIHTC rents are set relative to area median income, meaning that in certain sub-markets, if median incomes are less than the median income for the area as whole, market rents and LIHTC rents may not be that different. A corollary to this critique is that, in these areas, there is less threat of rising rents following the expiration of use restrictions. *See, e.g.*, KHADDURI ET AL., *supra* note 137, at 42.

161. *See* KHADDURI ET AL., *supra* note 137, at 68.

162. *See* Weiss, *supra* note 150, at 547–48.

163. *See, e.g.*, CAL. CODE REGS. tit. 4, § 10327(c)(2) (2023).

164. *See supra* Section III.B.

afterthought. To the extent that a LIHTC project is a public investment, the expiration of affordability restrictions represents a forfeit of that investment.[165]

For projects owned and operated by nonprofit organizations, the exempt purposes of the organization should prevent a project from ceasing to operate as affordable housing.[166] Other owners, while not nonprofit, may still seek to keep a project affordable, whether due to a mission, business model, or both. Because the business models of many LIHTC developers involve affordable housing, researchers have estimated the risk of conversion to market-rate housing to be more modest than may be implied by the high number of LIHTC developments with expiring affordability restrictions.[167] But there is little guaranteed at this point in the life cycle of a LIHTC project. One of the only safeguards to affordability after use restrictions expire is the orientation of the owner. For these and other reasons, scholars and policy-makers have advocated for expanding the role of nonprofit developers in the program.[168] A complementary response would be to expand eventual tenant ownership, giving tenants increased stability and autonomy, as well as the opportunity to build wealth.

IV. Homeownership in the LIHTC Program

After LIHTC's introduction in 1986, amendments to the IRC added in 1988 and 1989 made clear that purchases by tenants after the end of the compliance period would not jeopardize tax credits.[169] Around this time, Congressional hearings indicated that one of the perceived advantages of LIHTC was that it could facilitate a path to ownership for tenants.[170] Jack Kemp, then-Secretary of HUD and a proponent of low-income homeownership programs, called LIHTC one of his highest priorities, due in part to its ability to provide homeownership.[171] This early understanding of the LIHTC program as a potential path to homeownership is reflected in the development of the statute, as well as IRS guidance and state

165. *See* Weiss, *supra* note 150, at 548.

166. *See* Memorandum from Robert S. Choi, I.R.S., to Manager of Exempt Organizations Determinations (July 30, 2007).

167. *See* Khadduri et al., *supra* note 137, at 61–66.

168. *See, e.g.*, Weiss, *supra* note 150, at 550–53.

169. *See* Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3381–82 (adding language codified at I.R.C. § 42(g)(6) clarifying that de minimis equity contributions by tenants to lessor, to be held for eventual purchase, are consistent with LIHTC program); Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7108(q), 103 Stat. 2106, 2321 (adding language codified at I.R.C. § 42(i)(7) clarifying that the tax benefits under the LIHTC statute are allowable notwithstanding a right of first refusal held by tenants and setting a minimum purchase price for the exercise of such right of first refusal).

170. *See, e.g.*, *LIHTC Hearing*, *supra* note 6, at 7 (statement of Sec'y Jack Kemp, U.S. Dep't of Hous. & Urb. Dev.) ("The design of the credit makes it compatible with homeownership."); *id.* at 22 (statement of Rep. Brian Donnelly, D-MA) ("We have to make more initiatives to turning some of these rental units into home ownership.").

171. *Id.* at 7 (statement of Sec'y Jack Kemp, U.S. Dep't of Hous. & Urb. Dev.) ("Home ownership and the low-income housing tax credit are important tools and have been one of my highest priorities that I have set for HUD in helping low-income families make a transition from being assisted renters toward homeowners in their own right.").

QAPs.[172] But, it has not been able to achieve much success in assisting low-income families with achieving homeownership.

A. Frameworks for Eventual Tenant Ownership

1. IRC Section 42 and IRS Guidance

Section 42 of the IRC states that "[n]o Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified low-income building merely by reason of a right of 1st refusal held by the tenants (in cooperative form or otherwise) . . . to purchase the property after the close of the compliance period."[173] The IRC also requires that state QAPs include "projects intended for eventual tenant ownership" in their selection criteria.[174] In addition, the statute clarifies that de minimis equity contributions by tenants to be held toward a purchase—presumably, in a lease-to-purchase model—will not jeopardize a project's treatment as rental housing for the purpose of the LIHTC program.[175]

Guidance from the Internal Revenue Service ("IRS") has further developed the framework for eventual tenant ownership. An early issue, unresolved in the IRC, was whether a tenant purchase at the end of the compliance period would satisfy occupancy and rent requirements during the extended use period, if the commitment was terminated upon the purchase.[176] The IRC requires an extended low-income housing commitment with such restrictions during the extended use period for a project to be eligible for the credits.[177] Critically, in Revenue Ruling 95-49, the IRS held that this requirement is satisfied even though provisions may be suspended or terminated after the compliance period when a tenant exercises the right of first refusal to purchase their home.[178] The IRS cited the language of section 42(i)(7) and reasoned that the exercise of a tenant's right of first refusal "continues the availability of low-income housing beyond the compliance period by permitting low-income tenants to be homeowners instead of renters."[179] Further, "[t]he objectives of section 42(h)(6) [the extended low-income housing commitment provision] and (i)(7) are similar in that both sections attempt to promote housing for low-income individuals beyond the compliance period, by

172. *See supra* Section IV.A.

173. I.R.C. § 42(i)(7). Congress added the explicit reference to cooperatives in 1990, soon after LIHTC's introduction. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11407(b)(1), 104 Stat. 1388, 1388–474.

174. I.R.C. § 42(m)(1)(C)(viii).

175. *Id.* § 42(g)(6).

176. Rev. Rul. 95-49, 1995-2 C.B. 7. The specific issue involved reconciling the requirement in section 42(h)(6) of the IRC that an extended low-income housing commitment be in effect to claim the credits, with subsection (i)(7)'s contemplation of a resident purchase, which in this case involved the termination of such commitment.

177. I.R.C. § 42(h)(6).

178. Rev. Rul. 95-49, 1995-2 C.B. 7. There is some ambiguity as to the effect of a subsequent sale *by* a tenant after the compliance period but before the end of the extended use period. The credits are not subject to recapture after the compliance period but such a sale would appear to violate the spirit if not the language of section 42 of the IRC.

179. *Id.*

rental in the case of section 42(h)(6) or by outright ownership in the case of section 42(i)(7)."[180]

IRS guidance also makes clear that different models of homeownership are possible through the LIHTC program. Residential rental property eligible for credits under LIHTC includes apartment buildings, single-family homes, townhouses, duplexes, and condominiums.[181] While multifamily housing is a common model for affordable housing, LIHTC is used to finance affordable single-family homes, most commonly in lower-cost markets, rural areas, and Indian country.[182] In fact, section 42 states that projects may take the form of scattered-site projects, which consist of multiple sites consolidated into one project.[183] This may assist with the development of single-family homes for eventual tenant ownership, allowing individual parcels to be subdivided and sold to individual tenants after the compliance period ends.

The IRS has also confirmed that converting a LIHTC project to a condominium structure at the end of the compliance period, in connection with a plan that would allow tenants a right of first refusal to purchase their units at the end of the compliance period, satisfies LIHTC's statutory requirements.[184] In the project described in a relevant IRS private letter ruling, purchase prices were based on the rents allowed under LIHTC and met the minimum purchase price permitted by the statute, and a new extended low-income housing commitment was entered into after the compliance period to reflect the ownership plan.[185] But, the utilization of condominium conversions for eventual tenant ownership appears limited and IRS guidance involving condominium regimes in LIHTC projects tends to describe arrangements where entire buildings or sections of building are owned as one unit, for funding or other purposes, as opposed to projects where each unit of housing is owned separately.[186]

2. *State Qualified Allocation Plans*

As described, each state QAP must include "projects intended for eventual tenant ownership" in its selection criteria for competitive credits.[187] A 50-state survey of QAPs (also including the District of Columbia, five U.S. territories, and three cities)[188] shows that thirty-six QAPs provide at least a nominal amount

180. *Id.*

181. I.R.S. Notice 88-91, 1988-2 C.B. 414.

182. Telephone Interview with Russell Kaney, 21st Century Communities (Oct. 28, 2022).

183. I.R.C. § 42(g)(7).

184. I.R.S. P.L.R. 200703024 (Jan. 19, 2007). The private letter ruling approving of the plan involved an ownership plan that allowed for tenant purchases as well as sales to qualified buyers who met LIHTC income limits in the case of vacancies.

185. *See id.*

186. *See, e.g.*, I.R.S. P.L.R. 200335030 (Aug. 29, 2003).

187. I.R.C. § 42(m)(1)(C)(viii). Following the statutory language, this Article uses "eventual tenant ownership" to refer to purchases and ownership by LIHTC residents, notwithstanding that once these tenants become owners, they are no longer tenants.

188. A list of the fifty state QAPs reviewed, as well as QAPs from the District of Columbia, U.S. territories, and cities, is included in Appendix 1 to this Article with pinpoint citations to the relevant language, where

of points to these projects in the scoring systems used to award competitive credits.[189] Relative to other points available, the points tied to projects intended for eventual tenant ownership in the majority of the QAPs are quite modest.[190] Eight QAPs include tiebreakers instead of points for these projects.[191] Four QAPs, while not formally providing points or tiebreakers, include general language indicating that projects intended for eventual tenant ownership will be considered under the selection criteria.[192] In addition, most state QAPs maintain specific requirements for homeownership projects, such as requiring certain types of housing—typically single-family homes—and the submission of homeownership plans, financial feasibility plans, and other documentation.[193] Notably, ten state QAPs appear to fall short of IRC requirements because they do not explicitly include projects intended for eventual tenant ownership in their selection criteria.[194]

Two states, Ohio and Utah, have included small set-asides—pools of credits reserved for specific types of projects—for projects related to homeownership. For several years, Ohio's QAP included a set-aside of one credit award each year to a project in a "central city" pool involving single-family homes or townhomes, which included those intended for eventual tenant ownership.[195] While this set-aside was not necessarily limited to projects intended for eventual tenant ownership, in practice, it typically supported these projects.[196] The most recent

applicable [hereinafter QAP Survey]. Some state QAPs include sub-allocations for certain cities or regions. Chicago, Minneapolis/St. Paul, and New York City have their own QAPs as a result. A summary of relevant QAP provisions is included in Appendix 2.

189. *Id*. These include the QAPs for Alaska, American Samoa, Arizona, Arkansas, California, Colorado, Delaware, the District of Columbia, Georgia, Guam, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minneapolis/St. Paul, Missouri, Nebraska, New Jersey, New Mexico, New York City, North Dakota, Northern Mariana Islands, Oklahoma, Oregon, Puerto Rico, South Dakota, Tennessee, Texas, U.S. Virgin Islands, Vermont, Virginia, West Virginia, and Wisconsin.

190. *Id*.

191. *Id*. These include the QAPs for Alabama, Illinois, Iowa, Maine, Minnesota, New Hampshire, North Carolina, and South Carolina.

192. *Id*. These include the QAPs for the City of Chicago, Florida, Maryland, and Washington state. The Chicago QAP requires that its allocating agency "shall consider" these projects as a selection criterion. Chi. Dep't Hous., 2023 Qualified Allocation Plan 15 (2023). The Florida QAP includes these projects among the selection criteria that "will be considered." Fla. Hous. Fin. Corp., 2023 Qualified Allocation Plan 1 (2023). The Maryland QAP states that "[t]he allocation criteria include" these projects. Md. Dep't Hous. & Cmty. Dev., Maryland Qualified Allocation Plan 15 (2023). The Washington state QAP requires its housing credit agency to "give weight" to these projects but does not award points. Wash. State Hous. Fin. Comm'n, Low-Income Housing Tax Credit Program Qualified Allocation Plan 1 (2012).

193. *See* QAP Survey, *supra* note 188.

194. These include the QAPs for Connecticut, Massachusetts, Mississippi, Montana, Nevada, New York, Ohio, Pennsylvania, Rhode Island, and Wyoming. *See* QAP Survey, *supra* note 188. The Massachusetts QAP references the IRC requirement but does not actually include projects intended for eventual tenant ownership as a selection criterion. *See* Mass. Dep't Hous. & Cmty. Dev., Low Income Housing Tax Credit Program 2023-2024 Qualified Allocation Plan 6–7 (2023). New York's QAP goes slightly farther, including "community impact/revitalization" in its scoring and ranking criteria and states that plans and/or efforts in this area will be evaluated based on a number of criteria, one of which is evidence of a "plan that addresses the homeownership . . . needs of the neighborhood." N.Y. COMP. CODES R. & REGS. tit. 9, § 2040.3(f)(1)(i)(c) (2021).

195. Ohio Hous. Fin. Agency, 2022–2023 Qualified Allocation Plan § III.A.3 (2022) [hereinafter 2022-2023 Ohio QAP].

196. Telephone Interview with Kevin Nowak, Exec. Director, CHN Hous. Partners (Aug. 23, 2022).

Ohio QAP, however, does include this set-aside.[197] Utah's QAP sets aside five percent of its credit allocation for homeownership projects.[198] If this set-aside is not used in a given year, the credits get moved to the general pool in the following year.[199]

Finally, four states, Iowa, Nebraska, North Dakota, and Pennsylvania, include programs that attempt to facilitate homeownership through savings mechanisms or other assistance as part of their QAPs. Iowa, while not offering financial assistance, does offer several resources as part of its Renter to Ownership Single-Family Education ("ROSE") Program.[200] Owners participating in the ROSE Program must offer homeownership education and financial counseling at no cost to households during their first year in the program.[201] Owners must also offer maintenance workshops to participating households.[202]

Nebraska requires owners claiming points for projects intended for eventual tenant homeownership to set aside $50 of tenants' monthly rent in a savings account to assist tenants in purchasing their home.[203] The account is forfeited if the tenant does not complete the homeownership program.[204] Separately, Nebraska's QAP includes a Tenant Down Payment Savings Plan and Tenant Savings Plan as part of the supportive services that are eligible for points.[205] The Tenant Down Payment Savings Plan requires owners providing supportive services to set aside $25 per month per unit to be used by residents toward the purchase of a home or to pay off debt.[206] The QAP awards two points if an owner offers this plan.[207] Similarly, the Tenant Savings Plan requires owners providing supportive services to set aside $10 per month per unit in a separate account to be used by residents for eligible expenses.[208] The QAP awards one point for this plan.[209]

The North Dakota QAP offers two points to projects that offer a rent rebate for homeownership, separate from projects intended for eventual tenant

197. *See* Ohio Hous. Fin. Agency, 9% LIHTC Qualified Allocation Plan (Program Years 2024-2025) (2023).

198. Utah Hous. Corp., 2024 Federal and State Housing Credit Program Allocation Plan 19 (2023) [hereinafter Utah QAP].

199. *Id.*

200. Iowa Fin. Auth., 2024 – 9% Qualified Allocation Plan app. M (2023) [hereinafter Iowa QAP].

201. *Id.*

202. *Id.*

203. Neb. Inv. Fin. Auth., 2024–2025 Qualified Allocation Plan, Description and Requirements of CROWN Program (2023) [hereinafter Nebraska QAP] (Attachment D to Property Management Agreement, Exhibit C to CROWN Land Use Restriction Agreement, Tab 14 to Qualified Allocation Plan). The Iowa QAP formerly included a similar requirement that owners set aside $50 per month per tenant for eventual purchases. Iowa Fin. Auth., 2023–9% Qualified Allocation Plan app. M (2022). This requirement is not included in the current Iowa QAP. *See* Iowa QAP, *supra* note 200.

204. Nebraska QAP, *supra* note 203.

205. *Id*.

206. *Id*. at Exhibit 211 (Supportive Services).

207. *Id*. at 2024/2025 9% NIFA/NDED Application 37.

208. *Id*. at Exhibit 211 (Supportive Services).

209. *Id*. at 2024/2025 9% NIFA/NDED Application 37.

ownership.[210] The rent rebate requires the owner to set aside 5% of a resident's rent paid, to be offered as a rebate of rent if the resident moves directly into homeownership when vacating the project.[211] The rent rebate requires a binding contract and must involve a rebate of rent for the entire tenancy.[212]

Pennsylvania, one of the states that does not explicitly include projects intended for eventual tenant ownership in its selection criteria, does require projects that offer homeownership opportunities to set aside a minimum of $2,500 to assist residents with the purchase.[213] This amount may not be included in the project budget.[214] Proposals for homeownership conversions must also include homeownership counseling and other planning.[215]

QAPs rarely mention cooperative ownership.[216] References to single-family homes are much more common.[217] Most states are more oriented toward single-family homes as the model for eventual tenant ownership.[218] Indeed, many states require these projects to consist of single-family homes, with some also including townhomes and duplexes.[219]

B. Challenges to Eventual Tenant Ownership

Despite the provisions described in both the IRC and in state QAPs, eventual tenant ownership, whether through cooperative models or otherwise, remains rare.[220] Given the legal framework of the LIHTC statute, its history, and current issues in the program, as well as a general preference for homeownership in federal housing policy, an underexplored question is why. This section explores why LIHTC has not fostered more opportunities for eventual tenant ownership—or any kind of equity for residents.

1. Legal

As described, eventual tenant ownership after the compliance period is contemplated by the IRC.[221] And the legislative history of section 42 indicates that

210. N.D. Hous. Fin. Agency, 2024 Low-Income Housing Tax Credit Program Allocation Plan 11 (2023).

211. *Id.*

212. *Id.*

213. Pa. Hous. Fin. Agency, Allocation Plan for Program Year 2024 Low Income Housing Tax Credit Program 23 (2023).

214. *Id.*

215. *Id.*

216. QAP Survey, *supra* note 188.

217. *Id.* Note that cooperative ownership and single-family homes are not mutually exclusive; in theory, a cooperative could own single-family homes in which its members lived. In practice, however, such an arrangement appears rare.

218. An exception is Kentucky, which prohibits detached single-family homes from its tenant ownership scoring. Ky. Hous. Corp., Qualified Allocation Plan 2023–2024, Exhibit B, FY 2023 QAP Scoring (New Supply).

219. QAP Survey, *supra* note 188.

220. KHADDURI ET AL., *supra* note 137, at 29–35 (describing that general partner, or original developer, purchases are by far the most common outcome after year fifteen and that when new owners do purchase projects, they are typically for-profit organizations seeking to benefit from cash flow and scale).

221. *See supra* Subsection IV.A.1.

eventual tenant ownership is not only allowable; some policy-makers saw it as a goal.[222] But ambiguity surrounding the language describing the right of first refusal for tenants and nonprofits has led to increasing numbers of investors challenging nonprofit purchase rights. While this does not necessarily impact tenants without purchase rights to begin with, the ambiguity presents a potential obstacle in projects that currently involve a right of first refusal for tenants or nonprofits that may seek to foster eventual tenant ownership.

To the degree that there are further legal issues with eventual tenant ownership, they relate to the complexity of the program and the structure of LIHTC transactions. Given this complexity, each party to a LIHTC transaction typically engages counsel that specializes in relevant areas of law, if not the LIHTC program specifically.[223] Low-income families eligible to reside in LIHTC projects may face difficulty affording counsel or consultants, which are all but mandatory to navigate this complex program. Nascent cooperatives may face similar barriers and require legal assistance even earlier as they organize themselves and create a legal cooperative structure.

Additionally, the documents memorializing a LIHTC transaction, namely the owner's partnership agreement or operating agreement, which memorializes the agreement between the initial developer and investor, often include purchase rights and other obligations.[224] This may affect tenants' ability to purchase their home at the end of the compliance period. As explained below, unless tenants are involved from the beginning, whether independently or through a nonprofit with an ownership model, tenants are unlikely to have any rights to purchase their homes in the legal documents that govern a project and its ownership.[225]

2. *Financial*

Unsurprisingly, one of the fundamental challenges to eventual tenant ownership is accessing financing. Residents of LIHTC developments are necessarily low-income people and yet need to afford both a down payment and a monthly mortgage to purchase their homes.[226] Since low-income people are less likely to have savings, smaller down payments may be helpful, but can also increase the amount of mortgage financing needed.[227] Financial products that can both assist with a down payment and keep monthly mortgage payments affordable are critical. But accessing this financing may be a challenge. Higher-cost markets may exacerbate the challenge; even if more valuable property is able to provide security, larger loans require higher monthly payments. It may be difficult for tenants to afford payment on these loans or access the credit required.

222. *See supra* notes 170–71 and accompanying text.

223. While legal costs may be paid out of the proceeds of a LIHTC transaction, this will not be the case in a tenant purchase after the compliance period, unless a project is recapitalized with a new allocation of tax credits.

224. Thomas D. Morton, *Investor Considerations for Year 15 Exits*, 11 NOVOGRADAC J. TAX CREDITS Issue II, 1, 2–3 (2020).

225. *See infra* Part V.

226. *See, e.g.*, Shlay, *supra* note 54, at 516–17.

227. *Id.*

3. *Practical*

The practicalities of LIHTC transactions present the most fundamental challenges to eventual tenant ownership. Much of the groundwork for what happens at the end of the compliance period is laid at the very beginning of a project. Indeed, developers and financing parties try to dictate what will happen over the life of a project in the numerous legal documents that govern an affordable housing deal. This includes purchase rights, debt structures, and operations during the compliance period, which may impact the eventual purchase price. Since much of this is decided early, tenants are unlikely to have input unless they are at the table from the beginning of a project. But tenant involvement in the early stages of LIHTC development is not how the program works. And for new construction projects, there are no tenants before a project is built.

The lifecycle of a LIHTC project typically begins with a developer, whether for-profit or nonprofit, applying for tax credits and other financing.[228] The criteria by which credits are awarded favor experience with prior projects.[229] This is not unreasonable; housing agencies want to finance developers with a track record. But, tenants are likely to be an afterthought at this stage.

Once financing is awarded, a developer finds an investor that can utilize the tax credits and negotiates the terms of a partnership, whereby the investor will receive the rights to the credits in return for installments of capital.[230] Developers and investors tend to form relationships over time, which can aid negotiations and carry over to subsequent projects. The form of legal documents that memorialize the terms of a deal may become familiar to the parties and their attorneys, expediting the closing process—and minimizing legal and other costs—for subsequent deals.[231] As a result, webs of relationships form among repeat players in the affordable housing industry.

But tenant-purchasers are not repeat players; they are interested in one transaction only. This makes interrupting the normal business planning and operations of players in the industry a challenge from the start. While approaching ownership after the compliance period remains an option, it is less likely to succeed. There may already be parties with purchase rights. Even if not, the financing structure of the project may present challenges. For example, a project with significant debt will be more difficult to purchase. Further, there may be more practical challenges with dividing the project itself to sell individual units. Each of these make eventual tenant ownership less likely.

In some ways, a tenant-owned cooperative presents a simpler structure for tenant purchases than single-family homes or condominiums, which require

228. As described above, 9% credits are awarded through a competitive application process, while projects financed at least 50% through tax-exempt bonds are eligible for 4% credits. I.R.C. § 42(h)(4).

229. *See, e.g.*, CAL. CODE REGS. tit. 4, § 10325(c)(1)(A) (2023); CONN. HOUS. FIN. AUTH., LOW INCOME HOUSING TAX CREDIT 2024 AND 2025 QUALIFIED ALLOCATION PLAN 26 (2023).

230. *See, e.g.*, Steven M. Virgil, *Cooperative Ownership of LIHTC Affordable Housing Post Year 15*, 31 J. AFFORDABLE HOUS. & CMTY. DEV. L. 115, 116–17 (2022).

231. The author relies on personal experience as a transactional attorney specializing in affordable housing and community development projects, including many projects financed through the LIHTC program.

subdividing property and multiple sales, each with their own real estate and financing documents. In contrast, a purchase by a tenant cooperative involves a single property transfer.[232] Moreover, as others have pointed out, a limited equity cooperative may be well-suited to purchasing a LIHTC property because affordability requirements already exist, so the cooperative may operate in a way that is both consistent with the LIHTC program and the goals of the cooperative.[233] The more complex aspect is setting up the cooperative and creating governance structures, and tenants organizing themselves to do so. This may explain why cooperatives remain rare in the LIHTC context; though specific estimates are difficult to find, a 2006 tally found the total number of units of LIHTC-financed cooperative housing to be just in the thousands.[234]

Like many community development financing programs, the LIHTC program is complex and benefits from scale. Moreover, its structure is designed to attract private capital from investors and has nurtured an affordable housing industry that, while successful by some measures, is largely inaccessible to residents.[235] This means that residents are not involved at the outset of project development and financing, when decisions impacting the life cycle of a project are made. As a result, there is a catch-22 where tenant purchases at the end of the compliance period rely on tenant involvement at the early stages of a project, when it is nearly impossible for tenants to be involved. The dynamic makes it difficult for residents to achieve ownership and build equity in LIHTC developments, whether through cooperatives or otherwise, limiting residents' ability to build wealth and exert long-term control over their homes.

V. Expanding Ownership in Affordable Housing

While the LIHTC program, in general, has proven unable to expand low-income homeownership opportunities at a meaningful scale, one model has achieved success in its region. This model may not be feasible in all markets. But it offers a template for using LIHTC to develop affordable housing for eventual tenant ownership that could be adapted in many areas of the country.

A. The Cleveland Model

Ohio is one of the only states with a critical mass of LIHTC-financed housing that has been sold to residents.[236] All of these involve single-family homes,

232. *See, e.g.*, Virgil, *supra* note 230, at 116–17.

233. *Id.* at 133.

234. A 2005 estimate put the number of housing units in limited or zero equity cooperative cooperatives at 425,000, including 7,000 units financed by LIHTC or Community Development Block Grants (CDBG). Davis, *supra* note 84, at 27. More recent research has revised the 425,000 figure down to 166,608 units. Urb. Homesteading Assistance Bd., Counting Limited-Equity Co-ops, Rsch. Update (2016). This leads one to believe that the number of cooperative units financed by LIHTC or CDBG is even smaller than 7,000.

235. Kneebone & Reid, *supra* note 159, at 2.

236. Ohio Hous. Fin. Auth., Lease Purchase Development: An Examination of Housing Credit Allocations, 1992-1999 8 (2015).

as was required by Ohio's QAP,[237] and more than half of these are located in Cleveland.[238] The most successful developer is CHN Housing Partners ("CHN"), a nonprofit affordable housing developer.[239] For several years, CHN has operated a lease purchase program that involves single-family homes financed by the LIHTC program.[240] According to CHN, it has sold approximately 1,266 single-family homes, and developed over 2,000, through the end of 2020, making it the nation's largest developer of single-family homes using the LIHTC program.[241]

From the beginning of each project, CHN's model anticipates eventual tenant ownership. CHN utilizes 9% tax credits exclusively, which means their projects are financed mostly through tax credit equity and less through conventional debt.[242] Less debt leads to lower purchase prices, in part because the statutory formula for resale is the sum of outstanding debt and taxes attributable to a sale.[243] Each of CHN's projects[244] receives a loan from the City of Cleveland, typically around $600,000 per project, funded by HUD's HOME program, with the remainder of the financing coming from a traditional bank loan.[245] The relatively low amount of debt enables relatively high debt service coverage ratios, meaning operating income is available to meet ongoing expenses—ensuring that homes are not in need of maintenance at the end of the compliance period. The high debt service coverage ratio created by the lower levels of debt also means that operating reserves are rarely used before the compliance period and can be used to pay down debt upon a sale.[246]

CHN's model engages residents from the beginning of a tenancy. Its homes are marketed as lease-to-purchase opportunities, and CHN requires homeownership counseling and a "contract of care" in which residents are involved in property management.[247] Counseling is required through CHN's "family success" program, which offers services to residents to encourage savings and improve credit.[248] The contract of care requires tenants to handle basic maintenance, with

237. 2022-2023 Ohio QAP, *supra* note 195, § III.A.3.

238. OHIO HOUS. FIN. AUTH., *supra* note 236, at 8.

239. *Id.* at 17. According to this study, while 72% of CHN's units successfully sell to residents, only 14% of non-CHN units do the same. *Id.*

240. CHN HOUS. PARTNERS, LEASE PURCHASE PROGRAM (2017); *see also* Telephone Interview with Kevin Nowak, *supra* note 196.

241. CHN HOUS. PARTNERS, *supra* note 240. An evaluation of Ohio credit allocations involving single family homes from 1992-1999, including CHN's Lease Purchase Program, found that 72% of CHN's lease purchase units were successfully sold to CHN tenants. OHIO HOUS. FIN. AUTH., *supra* note 236, at 14.

242. Telephone Interview with Kevin Nowak, *supra* note 196. Historically, CHN was able to utilize the LIHTC set-aside for single-family homes in Ohio's QAP. *Id*.

243. *See* I.R.C. § 42(i)(7)(B). The minimum purchase price prescribed relates specifically to the right of first refusal described in subsection (i)(7)(B); however, this has become the customary minimum for purchases by tenants or nonprofits, whether made pursuant to the right of first refusal or other purchase rights.

244. Note that "project" here does not refer to a single home but a number of single-family homes comparable to a multifamily project, developed and financed together.

245. E-mail from Kevin Nowak, Executive Director, CHN Housing Partners, to author (Aug. 24, 2022) (on file with author).

246. Telephone Interview with Kevin Nowak, *supra* note 196.

247. *Id*.

248. *Id*.

CHN's property management responsible for major maintenance.[249] According to CHN, the relationship between property management staff and residents serves to educate residents about the maintenance involved in homeownership.[250]

Eventually, homes are sold for approximately $20,000-$25,000, with a typical down payment of $1,200, approximating a 5% down payment.[251] The remaining debt attributable to the HOME loan from the City of Cleveland, typically around $8,000 per home, is assigned to the homeowner.[252] The rest of the purchase price, in the range of $11,000 to $15,000, is financed with a mortgage loan from a CHN loan fund, begun several years ago because many residents were not able to access traditional financing.[253] CHN employs an "equivalency principle," with the goal that monthly expenses after purchase—mortgage payments and fees—approximate the amount paid in rent before the purchase.[254] Essentially, the organization has designed a financing structure around buyers' budget constraints. According to CHN, all of this has led to a default rate of less than 1%, at least in the first five years of ownership.[255]

CHN only develops single-family homes in its lease purchase program, for several reasons. Foremost, Ohio's QAP has required it; most allocations of tax credits CHN has received came from the set-aside for single-family homes formerly included in Ohio's QAP.[256] The organization also believes that residents will only be patient enough to lease through the compliance period and manage the requirements of the program if they are able to own a single-family home at the end of the process.[257] Additionally, peeling off parcels from a larger project is fairly simple as a matter of real estate law and avoids challenges that might be involved in a condominium structure.

To summarize, CHN's model works because it is crafted for homeownership from the start—from the set-aside of credits in the Ohio QAP, to the financing structure designed to minimize debt, to the way CHN approaches tenancies, which involve regular counseling on property maintenance and financial preparedness, to the credit extended to residents through CHN's loan fund. It remains unclear whether this model could translate to other, more expensive markets, and to multifamily housing. And it relies on a significant amount of public subsidy. Nonetheless, the model manages to do something rare in the LIHTC program: transform tax credit financing into equity and ownership for residents.

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249. *Id.*

250. *Id.*

251. CHN HOUS. PARTNERS, *supra* note 240; Telephone Interview with Kevin Nowak, *supra* note 196.

252. E-mail from Kevin Nowak, *supra* note 245.

253. Telephone Interview with Kevin Nowak, *supra* note 196. According to CHN, the loan fund was started with seed capital but has been self-sustaining since then. *Id.*

254. *Id.*

255. *Id.* Note that not all tenants pursue homeownership after the compliance period. According to CHN, more than half do. The remainder of properties remain rental housing. *Id.*

256. *Id.*

257. *Id.*

B. Learning from Cleveland

An obvious factor in the success of CHN's model is the relatively low cost of housing in the Cleveland area. Like many Rust Belt cities, Cleveland has plentiful land and modest demand relative to many coastal cities.[258] This makes development less costly from the start. While credit awards are formulated to cover a percentage of development costs, meaning more subsidy is available in more expensive markets, it is still easier for low-income families to purchase homes in lower-cost markets.[259] But, there are other aspects of the Cleveland model with broader lessons for homeownership in the LIHTC program.

To begin, it is striking that LIHTC's most successful homeownership model is not the result of a grassroots effort by tenants to purchase their homes, but a business model engineered over several years by a sophisticated, large-scale nonprofit housing developer. This may be instructive. The Cleveland model reflects the reality that eventual tenant ownership or equity-building models likely need a sponsor to navigate the LIHTC program, maintain relationships in the affordable housing industry, and guide tenants along a path to ownership.[260] While opportunities for more organic tenant purchases may occasionally arise, they are likely to remain the exception, given the complex nature of the LIHTC program.

The Cleveland model relies on developers planning projects with eventual tenant ownership in mind from the beginning.[261] CHN markets its homes as lease-to-purchase opportunities and does a lot to guide residents to an ultimate purchase, providing financial counseling and lessons in homeownership that come from its contract of care arrangements. CHN even makes a point to refer to "residents" and not "tenants" in its materials.[262] This highlights the reality that tenants need to plan for eventual ownership as well. And CHN provides them with resources to do so. But this has costs. Other organizations—without CHN's mission or experience—may not be able to provide the same level of services and guidance to residents.

Planning projects for eventual tenant ownership also involves project financing. Utilizing the more generous 9% credits minimizes debt and keeps

258. Jonathan Jones, *U.S. Cities with the Highest Home Price-to-Income Ratios in 2021*, CONSTR. COVERAGE (Apr. 26, 2022), https://constructioncoverage.com/research/cities-with-highest-home-price-to-income-ratios-2021 [https://perma.cc/YP8F-M887]; *see also Workforce Housing*, OHIO REALTORS (2020), https://www.ohiorealtors.org/workforce-housing-economic-indicators-housing-characteristics/ (last visited Feb. 27, 2024) [https://perma.cc/87RE-Z3WS].

259. *See* Jones, *supra* note 258 (presenting data on income from American Community Survey and data on housing prices from Zillow Home Price Index).

260. This reality was presaged by policy-makers like HUD Secretary Jack Kemp early in the program's history. *See LIHTC Hearing*, *supra* note 6, at 7 (statement of Sec'y Jack Kemp, U.S. Dep't of Hous. & Urb. Dev.) ("[T]he States can work with developers, particularly nonprofit developers to design projects to convert to tenant-ownership at the end of 15 years.").

261. Because planning from the beginning of a project is critical to resident ownership, expanding resident purchases is unlikely to present a solution to expiring affordability in current LIHTC developments. Instead, resident ownership presents an option for responding to this problem—which has been inherent in affordable housing programs since the 1960s—in the future.

262. Telephone Interview with Kevin Nowak, *supra* note 196.

purchase prices affordable. But 9% credits are competitive, so creating a model that relies on these credits may be unrealistic. To give the model stability, CHN advocated for the set-aside of credits in Ohio's QAP.[263] Expanding the model in other states may demand similar set-aside arrangements to provide assurance that 9% credits will be available. Finding public partners to provide additional financing, on favorable terms, as the City of Cleveland provides for CHN projects, is also critical to keeping ultimate mortgage payments low.

Another piece to the financial puzzle is helping tenants access the financing needed to ultimately purchase their homes. Many of the residents in projects developed by CHN have not been able to access traditional financing, and other low-income tenants are likely to face similar obstacles.[264] CHN's loan fund was effectively designed with its residents in mind, and it has proven sustainable after initial funding.[265] Other developers, however, may not be able to capitalize a loan fund or serve as a mortgage lender.

Even in a relatively low-cost market like Cleveland, the most successful homeownership model utilizing LIHTC financing requires significant subsidy. While the per-unit costs involved may be feasible in Cleveland, this is less likely in higher-cost markets. And, even in lower-cost markets, it is worth asking if the additional per unit cost involved in building single-family homes, as opposed to multifamily housing, is justified. Since the model allows some amount of tax credit financing to be transformed into equity for residents, there is a case to be made that some amount of premium is worth it. But expanding this model would require additional tax credits or less housing developed as long-term rental housing.

In higher-cost markets, homeownership models would likely need to involve multifamily housing, sold as condominiums or through a cooperative structure, to approach financial feasibility, especially in denser areas. Laws governing condominiums vary by state but typically require recording a condominium declaration or other property record, as well as creating governance documents required for a condominium association.[266] This could add complexity to an already complex model. Condominium conversions would involve carving up buildings as legal property and sorting out common area costs. Cooperative structures may avoid such complexities under real estate law but require tenant organizing and setting up new legal entities, which may explain why cooperatives are rare in the LIHTC program.

If homeownership programs utilizing LIHTC financing are most feasible in low-cost regions or low-cost sub-markets, it is worth asking whether encouraging homeownership primarily in low-cost areas, or distressed communities, is a sound policy choice. Research on the topic indicates that lower-cost segments of the housing market are no less likely to experience appreciation than higher-

263. *Id.*
264. *See supra* notes 253–55 and accompanying text.
265. *Id.*
266. *See, e.g.*, CAL. CIV. CODE § 4250; CONN. GEN. STAT. §§ 47-220, 47-244.

cost segments of the market.[267] At the same time, there is evidence that homes in predominantly Black neighborhoods experience less appreciation, though there is also evidence that this is connected to lower home values and shorter durations of ownership, as opposed to homes being located in a specific community.[268] These aspects of the housing market deserve attention but do not necessarily mean that encouraging homeownership in lower-cost areas is problematic due to lower appreciation.

Still, focusing tenant purchases in low-cost areas touches on long-existing concerns about the LIHTC's program's role in poverty concentration and racial segregation.[269] Concentrating tenant purchases in low-cost areas could represent an even further entrenchment of low-income families in certain neighborhoods, as investing in a home is a larger commitment than renting. While there have been efforts to expand LIHTC development to higher-cost, "higher opportunity" neighborhoods in recent years, expanded opportunities for eventual tenant ownership are likely to be concentrated in lower-cost neighborhoods, if not lower-cost regions.[270] This topic will merit additional examination if opportunities for eventual tenant ownership expand in the LIHTC program.

In all, projects intended for eventual tenant ownership, as developed in the Cleveland model, involve greater costs and require more effort on the part of developers. CHN does not just develop housing; it runs counseling and education programs for residents, provides financial services to residents, and more.[271] And its lease purchase program involves single-family homes exclusively, a more expensive form of housing than the multifamily housing developments more common in the affordable housing industry.[272] In fact, many state QAPs require projects intended for eventual tenant ownership to utilize single-family homes exclusively.[273]

Thus, the Cleveland model, while successful, reveals a tension between maximizing the supply of affordable rental housing and providing low-income families with opportunities for homeownership. This tension between homeownership and rental housing has been part of the conversation about LIHTC since it was made permanent.[274] Given the insufficient supply of affordable rental

267. HERBERT ET AL., *supra* note 15, at 12–13.

268. *Id.*

269. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 589–90 (2015) (holding disparate impact claims cognizable under the Fair Housing Act in a case involving the concentration of LIHTC properties in predominantly Black neighborhoods and not in white suburban neighborhoods); *see also* Roisman, *supra* note 132, at 1021–22; Orfield, *supra* note 132, at 1781; Layser, *supra* note 132, at 948–52; Ellen et al., *supra* note 132, at 51.

270. Inclusive Cmtys. Project, 576 U.S. at 585.

271. *See* CHN HOUS. PARTNERS, *supra* note 240; *see also* Telephone Interview with Kevin Nowak, *supra* note 196.

272. *See id.* at 25.

273. QAP Survey, *supra* note 188.

274. *See LIHTC Hearing*, *supra* note 6, at 22 (statement of Rep. Brian J. Donnelly, D-MA):

> We are a little bit concerned that as we turn rental units into home ownership units and don't expand the base of rental units because of the demographic changes that are taking place in the country and a growing population, that on one hand we will help a small group of people get a small piece of the American pie but disadvantage a larger and larger group of poor people in the country.

housing in the country, homeownership projects, while enabling tenant purchasers to gain equity, may concentrate the benefits of public subsidies further. Requiring minimum durations of residency and restricting resale can mitigate the problem by ensuring that tenants remain for the long term. But the costs of these projects are likely to remain higher than the costs of purely rental housing, meaning that homeownership comes at a premium at a time when many need housing assistance.[275]

Ultimately, the fact that affordability restrictions will otherwise expire justifies some amount of premium for projects intended for eventual tenant ownership. Otherwise, there is a real risk that public investment will simply be lost after restrictions expire. Much of the rent paid by tenants goes toward debt service at a project. And because of LIHTC's minimum purchase price formula—debt plus taxes—the longer tenants are in their homes, the more affordable a potential purchase can become. In this way, tenant purchases effectively unlock potential equity accrued by tenants in paying their rent, maximizing the benefits of public investments in affordable housing.

C. Reforms to Expand Eventual Tenant Ownership

The circumstances in which homeownership in the LIHTC program can be expanded most readily include lower-cost real estate markets, less dense areas where single-family homes can be developed more easily, and places where public partners are available. These may include Rust Belt cities in the Midwest, regions of the South, rural areas, and Indian country.[276] Projects in many of these areas would have the potential to assist populations historically denied the benefits of federal housing policies, such as Black Americans and Native Americans.

Recent changes to section 42 may have practical effects on tenants' ability to purchase their homes. A longtime critique of the LIHTC program is that it does not serve the lowest-income tenants, in part because rents are tied to income limits and not actual tenant incomes.[277] In response, Congress approved an

275. Only one in four U.S. families eligible for rental assistance receive it. *Policy Basics: Federal Rental Assistance*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 11, 2022), https://www.cbpp.org/research/housing/federal-rental-assistance [https://perma.cc/Z8JP-DGV3].

276. While there are certain challenges to development in tribal communities, notably developing on land that is held in trust by the federal government, many tribal communities have potential to expand homeownership projects utilizing LIHTC financing. Real estate costs may be relatively low; land may not be densely developed, allowing for single-family homes; and LIHTC may be combined with assistance available specifically to federally recognized Indian tribes, such as assistance through the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). *See, e.g.*, Jacob Wascalus, *An Opportunity that No One Saw … and Then They Did*, FED RSRV. BANK OF MINNEAPOLIS (Oct. 10, 2018), https://www.minneapolisfed.org/article/2018/an-opportunity-that-no-one-saw-and-then-they-did [https://perma.cc/XJ2T-RURW]. Current legislation would add consideration of the affordable housing needs of tribal members to LIHTC's selection criteria and include Indian areas as difficult development areas, giving projects in these areas a basis boost. Affordable Housing Credit Improvement Act, *supra* note 105, §§ 401, 402.

277. *See, e.g.*, CORIANNE PAYTON SCALLY, AMANDA GOLD & NICOLE DUBOIS, URB. INST., THE LOW-INCOME HOUSING TAX CREDIT: HOW IT WORKS AND WHO IT SERVES 13 (2018) ("LIHTC does not serve the lowest-income households well on its own. Because of the program's requirements, LIHTC properties often serve households that make an average of 60 percent of AMI.").

"average income" test for occupancy in 2018, allowing for lower income limits while also expanding eligibility to higher-income residents, earning up to 80% of area median income.[278] Since homeownership is more accessible to relatively higher-income families, this change to the program has the potential to increase the number of families in LIHTC-financed housing who can afford to purchase their homes. Current legislation would also significantly increase allocations of tax credits under the program.[279] A LIHTC expansion could justify greater experimentation with homeownership in the program. But, reforms to the IRC and state QAPs are needed to expand eventual tenant ownership.

Clarify purchase rights for nonprofits and tenants. As scholars and practitioners alike have noted, a simple change that would remove ambiguity around purchases going forward is to clarify that the purchase rights in section 42(i)(7) of the IRC provide a safe harbor only where nonprofits or tenants are granted a purchase option.[280] While not directly related to resident ownership, this change could filter out investors less willing to agree to transfer control after the compliance period ends.[281] This would not fundamentally alter the financial or practical dynamics that make tenant purchases challenging, but greater clarity could help move investors back toward a model where transfers are assured, assisting eventual tenant ownership. In light of the program's history, the recent nature of aggregator attempts to challenge this historical understanding, and competition among investors, it seems unlikely that such a clarification would alter the program's ability to attract capital.

Provide a "basis boost" for projects intended for eventual tenant ownership. LIHTC projects located in "qualified census tracts"—low-income areas—and "difficult development areas"—areas with relatively high construction, land, or utility costs—are allowed an eligible basis equal to 130% of the otherwise eligible basis, meaning 30% more credit, to compensate for the higher costs of building presumed in those areas.[282] Projects intended for eventual tenant ownership could benefit from a similar, so-called "basis boost" under the same logic.[283] There are added costs for projects intended for eventual tenant ownership, so greater subsidy is required to make these projects work financially. Recall that the credits are allowed for depreciable costs, meaning that a basis boost could help compensate for costs that are not otherwise eligible for the subsidy provided by the LIHTC program.[284] This is similar to how a basis boost in high-cost areas may, in part, compensate for higher land costs, which are not included in basis and therefore not directly subsidized through the LIHTC program.

278. Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, § 103(a), 132 Stat. 348, 1157 (2018) (codified at I.R.C. § 42(g)).

279. *See* Affordable Housing Credit Improvement Act, *supra* note 105, § 101.

280. *See, e.g.*, Davenport & Johnson, *supra* note 10, at 84; Weiss, *supra* note 9, at 1177–79.

281. Weiss, *supra* note 9, at 1178–79.

282. I.R.C. § 42(d)(5)(B).

283. *See id.* Note that state housing credit agencies already may designate any building that requires a basis boost due to higher costs on a project-by-project basis. *Id.* § 42(d)(5)(B)(v).

284. *See supra* Section III.A.

A challenge is that credits are received long before it becomes clear whether, and how many, tenants will be able to purchase their homes at a given project. This creates some risk that the added subsidy provided by a basis boost will not actually support eventual tenant ownership. Some of the costs involved in a tenant purchase model—financial counseling and preparation, for example—would be necessary regardless of whether eventual tenant ownership is ultimately achieved. But if a basis boost serves to minimize debt—useful for a project intended for eventual tenant ownership—and fewer homes are actually sold to residents, the developer would receive most of the benefit. Most state QAPs that contemplate homeownership require ownership plans and other documentation.[285] A basis boost could be made subject to approval of such plans and documentation, to ensure that increased subsidies do, in fact, go toward increased costs. Restricting basis boosts to nonprofit-developed projects could also prevent profit-motivated developers from receiving unnecessary benefit, though it could reduce the market in tax credits for these projects, potentially decreasing the capital provided in return.

Increase QAP scoring and set-asides for projects intended for eventual tenant ownership or asset-building. One of the perceived strengths of the LIHTC program is the opportunity for QAPs to tailor the program to state-level contexts and policy priorities. In a sense, QAPs are discrete laboratories of democracy. Given the instability experienced by some tenants in the program, states could do more to use their QAPs to promote homeownership for residents. This would likely do the most to promote homeownership in the program. The QAP process represents a powerful, if blunt, instrument for achieving policy goals. QAPs are iterative documents that are revised regularly by states, often to adjust to new policy goals.[286] This allows for some amount of experimentation and may even make use of the sophistication of the industry. If there is sufficient room in the projected budgets of projects, competition for tax credit awards will lead developers to implement a QAP's priorities, whatever they are.

For competitive 9% credits, increasing scoring for projects intended for eventual tenant ownership, or even offering set-asides, is one way to encourage developers to pursue this goal. As described earlier, the IRC requires QAPs to include projects intended for eventual tenant ownership in selection criteria, and most already do.[287] But the scoring mechanisms in most QAPs are nominal and apparently not generous enough to make a difference in most states, given the small amount of projects intended for eventual tenant ownership.[288] Greater preferences—or set-asides—are needed to make an impact. The states that have utilized set-asides, Ohio and Utah, are two of the only states with notable numbers of LIHTC homeownership projects.[289] So long as a project is financially feasible,

285. *See* QAP Survey, *supra* note 188.

286. *See supra* note 106 and accompanying text.

287. I.R.C. § 42(m)(1)(C)(viii); QAP Survey, *supra* note 188.

288. QAP Survey, *supra* note 188.

289. OHIO HOUS. FIN. AUTH., *supra* note 236, at 8; *Special Housing Programs*, UTAH HOUS. CORP., https://utahhousingcorp.org/ar/housingPrograms [perma.cc/Z6PW-MVPU].

strong enough scoring preferences, or set-asides, will cause developers to integrate policy goals into their plans. States could experiment with increased preferences to make these projects a reality.

Accelerate tenant timelines for building equity in lease purchase projects. In the past, both CHN and the National Association of Home Builders have proposed shortening the compliance period for lease purchase projects to accelerate tenant purchases.[290] While this would certainly make tenant purchases easier—at least, quicker—under the Cleveland model, it would shorten the amount of time that investors monitor compliance. Given the structure of the program and the lack of enforcement mechanisms following the compliance period, this could have costs. But, in a scenario where the same resident lives in a unit long term, it would allow that resident to begin accruing equity earlier. At the same time, a shortened compliance period could further concentrate the benefits of the LIHTC program by shortening the amount of time projects provide affordable rental housing.

A better approach would allow for equity- or asset-building during the compliance period without necessarily shortening it. This would allow tenants to achieve equity regardless of whether their tenancies last until the end of the compliance period. In fact, and as described earlier, the IRC already contemplates this sort of arrangement in clarifying that de minimis contributions toward an eventual purchase price do not jeopardize a project being considered residential rental housing by the IRS, which could threaten the receipt of credits.[291] But such arrangements are rare, perhaps because LIHTC rents tend to be higher than 30% of tenants' incomes, since rents in the program are based on income limits and not actual tenant incomes. Thus, equity will likely need to come from the amounts tenants already pay in rent. An alternative would be to create some sort of savings program.

Enable savings mechanisms from rent payments. Given the financial and practical challenges to homeownership in the LIHTC context, equity- or asset-building models may offer more feasibility than outright ownership in some circumstances. And finding ways to enable savings in affordable housing programs, though a more modest measure than outright homeownership programs, may serve the same goal. This could encourage financial security or even help tenants eventually purchase a home.

As described, LIHTC tenants pay a higher proportion of their incomes in rent, relative to other affordable housing programs, because rents are tied to income limits and not actual incomes.[292] As an example, if a tenant lives in a unit where occupancy is restricted to people earning less than 60% of the area median income, that tenant will pay 30% of 60% of the area median income in rent, as opposed to paying 30% of their actual income in rent, which is how most other

290. J. MICHAEL COLLINS, ERIC L. BELSKY & NICOLAS P. RETSINAS, TOWARDS A TARGETED HOMEOWNERSHIP TAX CREDIT 24 (1999).

291. I.R.C. § 42(g)(6).

292. FURMAN CTR. & MOELIS INST., *supra* note 134, at 5–6.

federal rental assistance programs work.[293] This makes saving more difficult for tenants. In this context, policy-makers could engineer a savings program whereby a portion of the rent paid by LIHTC tenants is directed to a savings or equity account that becomes available when a tenancy ends, whether because tenants move or are able to purchase their home.

Again, one way to do this would be to increase QAP scoring criteria for projects with some type of prescribed savings program. While affordable housing programs have sometimes served as vehicles for policy goals only indirectly related to housing, a fundamental goal of affordable housing is to allow residents to find financial stability. Therefore, a savings mechanism that allowed for modest appreciation based on interest is consistent with the fundamental goal of providing affordable housing. Indeed, one of the primary benefits of homeownership itself is the savings mechanism it provides.

Reforms like these would not change the LIHTC program overnight. An unsatisfying reality for tenants in projects where affordability restrictions will expire in the coming years is that tenant purchases are unlikely, with many projects subject to existing ownership interests and purchase rights. But reforms could lead to higher numbers of projects intended for eventual tenant ownership in the future, counteracting the expiring affordability problem inherent in LIHTC and earlier generations of affordable housing programs. Otherwise, history will continue to repeat itself.

D. Beyond LIHTC

Challenges to homeownership in the LIHTC context reveal challenges to low-income homeownership in general. This makes it difficult to consider homeownership in the LIHTC program without noting several changes to the tax code that could assist current and prospective homeowners with lower incomes, beyond the LIHTC program. Several of these policies could also complement policy reforms specific to the LIHTC program.

To begin, reforming tax law to treat rental housing and owner-occupied housing in the same manner would increase parity between renters and homeowners. Taxing the imputed rental income from owner-occupied housing is one way to do this, though it would face political and practical challenges. Excluding rental income from taxation would provide another way to reduce the cost of rental housing relative to owner-occupied housing.[294] This could also make housing subsidies go farther.[295] Another way to achieve a similar result would be to allow renters a tax credit or deduction based on rent paid.[296] In constrained

293. *See, e.g.*, 42 U.S.C. § 1437f(o)(2).

294. *See* Ky & Nunn, *supra* note 34, at 2 n.1.

295. *Id.* at 12.

296. *See, e.g.*, Daniel Teles & Christopher Davis, *Tax Credits for Renters Could Increase Racial and Economic Equity*, URB. INST. (Dec. 9. 2020), https://www.urban.org/urban-wire/tax-credits-renters-could-increase-racial-and-economic-equity [https://perma.cc/GLW3-9Z3C]; Will Fischer, Barbara Sard & Alicia Mazzara, *Renters' Credit Would Help Low-Wage Workers, Seniors, and People with Disabilities Afford Housing*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 9. 2017), https://www.cbpp.org/research/housing/renters-credit-would-help-

markets, where the housing supply is relatively inelastic, economic theory predicts that benefits like these will be eaten up by higher rents.[297] Still, though the size of benefits may differ by market, this policy shift would allow renters to benefit to some degree—including renters in LIHTC projects—in the way that homeowners currently benefit, which could enable increased saving, better preparing renters to become homeowners.

Because the lower returns to homeownership for low-income homeowners are partially explained by these homeowners' inability to take advantage of tax benefits, tax scholar Dorothy Brown, among others, has recommended several relevant changes in tax policy.[298] Most relevant, Brown suggests changing the home mortgage interest deduction into a refundable home mortgage interest credit.[299] This change to a credit would equalize the benefits of the current deduction among income levels because lower-income homeowners are more likely to use the standard deduction and less likely to itemize, as is necessary to use the mortgage interest deduction. And because deductions benefit higher-income households, with higher marginal tax rates, more than lower-income households, with lower marginal tax rates, a credit would benefit taxpayers more equitably.[300] Additionally, for lower-income homeowners, who may not have the tax liability to fully benefit from a credit, a refundable credit would allow homeowners at all income levels to benefit in the same way that higher-income homeowners benefit.[301]

Finally, the New Markets Tax Credit ("NMTC")[302] program presents a financing alternative to the LIHTC program. The NMTC program operates similarly to the LIHTC program; it is a federal tax credit utilized by developers who ultimately receive financing, in part, from investors that use the tax credits.[303] NMTC financing is restricted to qualified businesses that operate in or benefit low-income communities.[304] Projects made up entirely of residential rental

low-wage-workers-seniors-and-people-with-disabilities [https://perma.cc/8RNQ-W23Z]. Many states have renter's tax credits but they are generally modest. *See, e.g.*, CAL. REV. & TAX. CODE § 17053.5 ($60 tax credit for individuals, $120 for spouses filing joint returns, if adjusted gross income is under $25,000 or $50,000, respectively).

297. Dorothy Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 377 (2009).

298. *Id.* at 368–74.

299. *Id.* at 368–70. Brown notes that in 2005 the President's Advisory Panel on Federal Tax Reform suggested changing the deduction to a credit, albeit a non-refundable credit. *Id.*; *see also* COLLINS ET AL., *supra* note 290, at 25.

300. *See, e.g.*, HERBERT ET AL., *supra* note 15, at 10–11.

301. Brown also recommends allowing losses on the sale of a home used as a personal residence to offset ordinary income, to a greater extent than currently allowed. Brown, *supra* note 297, at 370–71.

302. I.R.C. § 45D.

303. *See New Markets Tax Credit Program*, U.S. DEP'T OF TREASURY (Sept. 16, 2020), https://www.cdfifund.gov/sites/cdfi/files/documents/nmtc-fact-sheet-english-16sept2020-final.pdf [https://perma.cc/LKT2-JCKT]; *What is the New Markets Tax Credit and How Does It Work?*, TAX POL'Y CTR. (Jan. 2021), https://www.taxpolicycenter.org/briefing-book/what-new-markets-tax-credit-and-how-does-it-work [https://perma.cc/AMT3-KUZK].

304. I.R.C. §§ 45D(d)(1)(A), (d)(2).

housing are not eligible, though qualified businesses may use the NMTC program to develop mixed-use rental projects or for-sale housing.[305]

In some ways, the NMTC program is even more complex than the LIHTC program.[306] But, the period in which the credits are subject to recapture is only seven years, as opposed to fifteen years.[307] Perhaps more importantly, the credits are not recaptured unless the proceeds cease to be invested in a qualifying business benefiting low-income people.[308] This means the program can be used to create homeownership opportunities from the beginning of a project, without the need to wait out a 15-year compliance period. This has the potential to make it a more immediate vehicle for low-income homeownership opportunities. Indeed, a small number of developers and attorneys have created models that use the program for low-income homeownership opportunities.[309] The NMTC program would need to be expanded to increase the use of these models, since annual NMTC allocations are a fraction of LIHTC allocations and finance a variety of economic development projects.[310]

VI. CONCLUSION

LIHTC is a financing program designed to attract capital. Capital, in turn, enables affordable rents and can ensure quality housing through the oversight of investors.[311] By many measures, LIHTC is among the most successful federal housing and community development programs, expanding the supply of affordable housing while often contributing to the revitalization of low-income neighborhoods.[312] But capital comes with costs. In the context of the LIHTC program, these costs involve complexity and the control required by investors. This has led to a program that is difficult for residents to penetrate, even while ownership and equity-building opportunities are built into LIHTC's statutory and regulatory schemes.

305. *See id.*; I.R.C. §§ 45D(d)(3), 1397C(d)(2) (restricting eligibility to property that is not residential rental property, defined with reference to section 168(e)(2) of the I.R.C. as property where 80% or more of the gross rental income is derived from dwelling units).

306. The NMTC program involves intermediaries called community development entities ("CDEs"), which are allocated the tax credits. I.R.C. §§ 45D(a), (c). Investors provide equity to CDEs in exchange for the use of the tax credits. In turn, CDEs use the equity proceeds to make loans on favorable terms to qualified businesses. *New Markets Tax Credit Program*, *supra* note 303.

307. *New Markets Tax Credit Program*, *supra* note 303.

308. *See* I.R.C. § 45D(g)(3).

309. *See, e.g.*, Jim Morrison, *A Model for Neighborhood Renewal*, WASH. POST (Aug. 18, 2022, 7:00 AM), https://www.washingtonpost.com/business/2022/08/18/for-sale-homes-for-low-income-buyers/ [https://perma.cc/AV6L-Y5L7].

310. TAX EXPENDITURES, *supra* note 41; *What Is the New Markets Tax Credit and How Does It Work?*, *supra* note 303 (reporting the annual cost of the NMTC program over the last few years to be $1.4 billion to $1.9 billion).

311. Kristin Niver, *Changing the Face of Urban America: Assessing the Low-Income Housing Tax Credit*, 102 VA. L. REV. ONLINE 48, 59 (2016).

312. *See, e.g.*, *id*. at 56–62 (responding to criticisms of the LIHTC program); Rebecca Diamond & Tim McQuade, *Who Wants Affordable Housing in Their Backyard? An Equilibrium Analysis of Low-Income Property Development*, 127 J. POL. ECON. 1063 (2019) (finding that low-income neighborhoods with LIHTC developments experience increases in property values and decreases in crime rates).

Despite LIHTC's strengths, ownership structures and the time-limited nature of affordability restrictions have led to uncertainty about residents' ability to afford the rent into the future. And, in a repeat of the past, the expiration of affordability represents a forfeit of public investment. The participation of nonprofit developers in the LIHTC program can protect residents and ensure affordability continues.[313] But eventual tenant ownership has the potential to realize even more benefits for low-income families, providing financial benefits and giving them control over their homes.

In response to current issues in the LIHTC program, policy-makers at federal and state levels should explore ways to increase eventual tenant ownership as an additional tool for assisting residents. The Cleveland model provides a template for nonprofits and other developers. The model plans for the needs of residents from the beginning and tailors financing structures to facilitate eventual tenant ownership. In lower-cost markets, the model has the potential to expand homeownership, maximizing public investment by transforming tax credits into equity for low-income families. Moreover, several lower-cost regions of the country where the model could work—Midwestern cities, regions of the South, and Indian Country—have populations with lower rates of homeownership due to historical discrimination in housing markets.

In higher-cost markets, where affordable housing is in dire need, models of eventual tenant ownership will continue to face challenges. The premium required to finance homeownership in these markets may be too high. And complications involved in duplicating the model for multifamily housing likely make the model unworkable. The most critical function the affordable housing industry can play in these higher-cost markets is to continue producing decent, safe, and affordable housing, which may provide at least some residents the stability they need to save and one day experience the benefits of homeownership.

Owning one's home may be an outsized goal in the American psyche, but research indicates it has real benefits, notably its positive impacts on wealth-building and housing security, both critical to lower-income families.[314] Yet public policy has skewed the tax benefits of homeownership toward higher-income people. If the purpose of these benefits is to encourage homeownership, then housing policies need to become more balanced, providing expanded benefits to lower-income families, regardless of whether they rent or own. This will require a number of policy changes due to the fragmented nature of federal housing policy. In the context of a tax code that favors owners over renters, and high-income owners over low-income owners, expanding homeownership in the LIHTC program would represent one step toward fairness and equity.

313. Weiss, *supra* note 150, at 550–53.
314. *See supra* Section II.A.

APPENDIX 1: QUALIFIED ALLOCATION PLANS

ALABAMA HOUSING FINANCE AUTHORITY, 2024 HOUSING CREDIT QUALIFIED ALLOCATION PLAN 1, Addendum A at A-2 (2023).

ALASKA HOUSING FINANCE CORPORATION, GOAL PROGRAM RATING AND AWARD CRITERIA PLAN 28 (2022).

ARIZONA DEPARTMENT OF HOUSING, 2024 AND 2025 QUALIFIED ALLOCATION PLAN 29-30 (new construction), 35-36 (tribal projects) (2023).

ARKANSAS DEVELOPMENT FINANCE AUTHORITY, 2024 QUALIFIED ALLOCATION PLAN 25 (2023).

CAL. CODE REGS. tit. 4, §§ 10300-10337, § 10325(c)(8)(F) (2023).

COLORADO HOUSING AND FINANCE AUTHORITY, QUALIFIED ALLOCATION PLAN 2023 TO 2024 at 42 (2022).

CONNECTICUT HOUSING FINANCE AUTHORITY, LOW-INCOME HOUSING TAX CREDIT 2024 AND 2025 QUALIFIED ALLOCATION PLAN 10 (2023).

DELAWARE STATE HOUSING AUTHORITY, STATE OF DELAWARE LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN 2023-2024 at 39 (2022).

DEVELOPMENT BANK OF AMERICAN SAMOA, QUALIFIED ALLOCATION PLAN 4, 9 (2008).[315]

DISTRICT OF COLUMBIA, DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, 2023 LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN 32, 34-35 (2023).

FLORIDA HOUSING FINANCE CORPORATION, 2023 QUALIFIED ALLOCATION PLAN 1 (2023).

GEORGIA DEPARTMENT OF COMMUNITY AFFAIRS, STATE OF GEORGIA 2024-2025 QUALIFIED ALLOCATION PLAN 84 (2023).

GUAM HOUSING AND URBAN RENEWAL AUTHORITY, GUAM 2021 LOW-INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN 8, 15 (2021).

315. A final QAP for American Samoa could not be located.

HAWAII HOUSING FINANCE AND DEVELOPMENT CORPORATION, STATE OF HAWAII LOW-INCOME HOUSING TAX CREDIT PROGRAM 2024 QUALIFIED ALLOCATION PLAN 11, 23 (2023).

IDAHO HOUSING AND FINANCE ASSOCIATION, QUALIFIED ALLOCATION PLAN FOR THE STATE OF IDAHO 27-28 (2023).

ILLINOIS HOUSING DEVELOPMENT AUTHORITY, 2024-2025 LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN 59 (2023).

CHICAGO DEPARTMENT OF HOUSING, QUALIFIED ALLOCATION PLAN 2023 at 15, 29 (2023).

INDIANA HOUSING AND COMMUNITY DEVELOPMENT AUTHORITY, STATE OF INDIANA 2023-2024 QUALIFIED ALLOCATION PLAN 76-77 (2023).

IOWA FINANCE AUTHORITY, 2024 – 9% QUALIFIED ALLOCATION PLAN 30 (2023).

KANSAS HOUSING RESOURCES CORPORATION, 2024 QUALIFIED ALLOCATION PLAN 19-20, 31 (2023).

KENTUCKY HOUSING CORPORATION, 2023-2024 QUALIFIED ALLOCATION PLAN EXHIBIT B, FY 2023 QAP SCORING at NEW SUPPLY, § 1 (2022).

LOUISIANA HOUSING CORPORATION, 2024 QUALIFIED ALLOCATION PLAN 43 (2023).

MAINE STATE HOUSING AUTHORITY, 2023-2024 LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN 18 (2023).

MARYLAND DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, MARYLAND QUALIFIED ALLOCATION PLAN 15 (2023).

MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, LOW INCOME HOUSING TAX CREDIT PROGRAM 2023-2024 QUALIFIED ALLOCATION PLAN (2023).

MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY, LOW-INCOME HOUSING TAX CREDIT PROGRAM 2024-2025 QUALIFIED ALLOCATION PLAN (2023); 2024-2025 LIHTC SCORING CRITERIA § C.7 (2023).

MINNESOTA HOUSING FINANCE AGENCY, 2024-2025 HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN 38, 45 (2022).

MINNEAPOLIS/SAINT PAUL HOUSING FINANCE BOARD, HOUSING TAX CREDIT 2024-2025 QUALIFIED ALLOCATION PLAN 7 (2023); Attachment 1 (Minneapolis Self-Scoring Worksheet–9% HTC); Attachment 2 (Saint Paul Self-Scoring Worksheet 9%).

MISSISSIPPI HOME CORPORATION, 2024 QUALIFIED ALLOCATION PLAN (2024).

MISSOURI HOUSING DEVELOPMENT COMMISSION, QUALIFIED ALLOCATION PLAN FOR MHDC MULTIFAMILY PROGRAMS 24 (2023).

MONTANA BOARD OF HOUSING, 2024 QUALIFIED ALLOCATION PLAN (2022).

NEBRASKA INVESTMENT FINANCE AUTHORITY, 2024-2025 QUALIFIED ALLOCATION PLAN TAB 3 (2024/2025 HOUSING CREDIT ALLOCATION PLAN FOR 9% LIHTC/AHTC) at 6 (2023).

NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY HOUSING DIVISION, LOW-INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN (FINAL 2023 QAP) (2022).

NEW HAMPSHIRE HOUSING FINANCE AUTHORITY, NEW HAMPSHIRE QUALIFIED ALLOCATION PLAN 22 (2022).

N.J. ADMIN. CODE § 5:80-33, § 5:80-33.15(a)(1) (2023).

NEW MEXICO MORTGAGE FINANCE AUTHORITY, STATE OF NEW MEXICO LOW-INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN 45 (2023).

N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2040.1-2040.13 (2021).

CITY OF NEW YORK DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, 2023 LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN 18 (2023).

NORTH CAROLINA HOUSING FINANCE AGENCY, THE 2024 LOW-INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN FOR THE STATE OF NORTH CAROLINA 23 (2023).

NORTH DAKOTA HOUSING FINANCE AGENCY, 2024 LOW-INCOME HOUSING TAX CREDIT PROGRAM ALLOCATION PLAN 11 (2023).

NORTHERN MARIANAS HOUSING CORPORATION, LOW-INCOME HOUSING TAX CREDIT PROGRAM 2023-2024 QUALIFIED ALLOCATION PLAN 7 (2023).

OHIO HOUSING FINANCE AGENCY, 9% LIHTC QUALIFIED ALLOCATION PLAN (PROGRAM YEARS 2024-2025) (2023).

OKLAHOMA HOUSING FINANCE AGENCY, AFFORDABLE HOUSING TAX CREDITS PROGRAM 2024 APPLICATION INSTRUCTIONS 24-26 (2023).

OREGON HOUSING AND COMMUNITY SERVICES, STATE OF OREGON QUALIFIED ALLOCATION PLAN FOR LOW INCOME HOUSING TAX CREDITS 39, 46 (2022).

PENNSYLVANIA HOUSING FINANCE AGENCY, ALLOCATION PLAN FOR PROGRAM YEAR 2024 LOW INCOME HOUSING TAX CREDIT PROGRAM 23-24 (2023).

PUERTO RICO HOUSING FINANCE AUTHORITY, LOW-INCOME HOUSING TAX CREDITS 2022 QUALIFIED ALLOCATION PLAN 35, 43 (2022).

RHODE ISLAND HOUSING AND MORTGAGE FINANCE CORPORATION, STATE OF RHODE ISLAND 2024 QUALIFIED ALLOCATION PLAN (2023).

SOUTH CAROLINA STATE HOUSING FINANCE AND DEVELOPMENT AUTHORITY, 2024 QUALIFIED ALLOCATION PLAN APPENDIX C1 at 12-13 (2024).

SOUTH DAKOTA HOUSING DEVELOPMENT AUTHORITY, LOW INCOME HOUSING TAX CREDIT 2022-2023 QUALIFIED ALLOCATION PLAN 29 (2022).

TENNESSEE HOUSING DEVELOPMENT AGENCY, LOW-INCOME HOUSING CREDIT 2024 QUALIFIED ALLOCATION PLAN [43, 51-52, 75] 55, 62 (2023).

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, 2024 QUALIFIED ALLOCATION PLAN 90 (2023).

UTAH HOUSING CORPORATION, 2024 FEDERAL AND STATE HOUSING CREDIT PROGRAM ALLOCATION PLAN 19-20 (2023).

VERMONT HOUSING FINANCE AGENCY, STATE OF VERMONT QUALIFIED ALLOCATION PLAN 21 (2023).

VIRGINIA HOUSING DEVELOPMENT AUTHORITY, THE PLAN OF THE VIRGINIA HOUSING DEVELOPMENT AUTHORITY FOR THE ALLOCATION OF LOW-INCOME HOUSING TAX CREDITS 20-21 (2022).

VIRGIN ISLANDS HOUSING FINANCE AUTHORITY, U.S. VIRGIN ISLANDS LOW INCOME HOUSING TAX CREDIT PROGRAM 2015 QUALIFIED ALLOCATION PLAN 10 (2015).

WASHINGTON STATE HOUSING FINANCE COMMISSION, LOW-INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN 1-2 (2012).

WEST VIRGINIA HOUSING DEVELOPMENT FUND, LOW-INCOME HOUSING TAX CREDIT PROGRAM 2023 AND 2024 ALLOCATION PLAN 61-62 (2023).

WISCONSIN HOUSING AND ECONOMIC DEVELOPMENT AUTHORITY, QUALIFIED ALLOCATION PLAN FOR THE STATE OF WISCONSIN 2023-2024 at 13 (2023).

WYOMING COMMUNITY DEVELOPMENT AUTHORITY, 2024 AFFORDABLE HOUSING ALLOCATION PLAN (2023).

APPENDIX 2: SUMMARY OF QAP PROVISIONS RELATED TO EVENTUAL TENANT OWNERSHIP

QAP	Points/Possible	Tiebreaker	Considered	Set-Aside	No Criteria
Alabama		x			
Alaska	1/231				
American Samoa	1/79				
Arizona	10/200 (new construction); 30/190 (tribal)				
Arkansas	6/115				
California	1/109				
Chicago			x		
Colorado	34/117+[316]				
Connecticut					x
Delaware	10/233				
District of Columbia	8/100				
Florida			x		
Georgia	1/190				
Guam	2/120				
Hawaii	1/120				
Idaho	1/113				
Illinois		x			
Indiana	2/159				
Iowa		x			
Kansas	15/140 (new construction)[317]				
Kentucky	0.5/33.9670 (urban); 0.5/32.9670 (rural)				
Louisiana	1/91				
Maine		x			
Maryland			x		
Massachusetts					x
Michigan	2/222				
Minneapolis/ St. Paul	1/132 (Minneapolis); 5/151 (St. Paul)				
Minnesota		x			
Mississippi					x
Missouri	5/141				
Montana					x
Nebraska	2/88				
Nevada					x
New Hampshire		x			
New Jersey	10/93				
New Mexico	2/135				
New York					x
New York City	1/100				
North Carolina		x			

316. The amount of points depends on the number of units, which makes calculating a theoretical maximum difficult. COLORADO HOUSING AND FINANCE AUTHORITY, QUALIFIED ALLOCATION PLAN 2023 TO 2024 at 39–41 (2022). The housing credit agency accepts no more than two applications for homeownership projects each year. *Id.* at 42.

317. This point total is in addition to the 310 points required under Appendix A categories. KANSAS HOUSING RESOURCES CORPORATION, 2024 QUALIFIED ALLOCATION PLAN 19 (2023).

QAP	Points/Possible	Tiebreaker	Considered	Set-Aside	No Criteria
North Dakota	1/121				
Northern Mariana Islands	10/123				
Ohio					x
Oklahoma	10/91				
Oregon	1/93 (new construction/ acquisition/ rehabilitation); 1/103 (preservation)				
Pennsylvania					x
Puerto Rico	1/100				
Rhode Island					x
South Carolina		x			
South Dakota	20/1000				
Tennessee	3/100 (new construction); 5/100 (rehabilitation)				
Texas	1/195				
U.S. Virgin Islands	5 (bonus)/100				
Utah				x	
Vermont	1/33				
Virginia	5/400+[318]				
Washington			x		
West Virginia	5/1000				
Wisconsin	3/273				
Wyoming					x

318. The Virginia QAP uses several calculations, such as providing 200 points multiplied by the percentage in which a project's per unit credit amount is lower than the standard per unit credit amount, which make defining a maximum theoretically possible but not terribly helpful. Projects must meet a threshold amount of 400 points. VIRGINIA HOUSING DEVELOPMENT AUTHORITY, THE PLAN OF THE VIRGINIA HOUSING DEVELOPMENT AUTHORITY FOR THE ALLOCATION OF LOW-INCOME HOUSING TAX CREDITS 20-21 (2022).