NATIONAL HOUSING LAW PROJECT
advancing housing justice
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Overview
Low-Income Housing Tax Credit (LIHTC) Program

Key Components

- **Number of Units**: about 2,000,000, growing at about 100,000 annually, at a foregone revenue cost of about $4 billion annually; Now the largest source of affordable housing in the country.
- **How Program Works:** fixed amount of tax credits allocated from the IRS to the states based on population. State housing agencies competitively allocate pursuant to the Qualified Allocation Plan (QAP); investors buy income tax credits in qualified properties that have received state allocation, creating cash equity for owner that reduces project development debt burden, in exchange for agreement to rent a specific number of units to qualified tenants at specified rents, usually below-market. Two tax credits are available: one at 9% of depreciable basis, competitively allocated; the other, at 4% of depreciable basis, comes with state bond financing, which is capped and allocated by a state agency, which may or may not be very competitive
- **Ownership**: During recapture period, usually limited partnerships, in which usually corporations invest as limited partners, with corporate, nonprofit, or individual general partners; properties often later sold to general partner or others, often with new credits & re-syndication.
- **Use Restrictions**: *Occupancy restrictions* (federal minimum): owner's choice of two: at least 20% of units occupied by tenants at no more than 50% of AMI, or 40% of units occupied by tenants at no more than 60% of AMI; many projects have 100% LIHTC units; *Rent restrictions*: those units must have "affordable" flat rents set at 30% of income of tenants at the top of the selected AMI category, with an assumed family size of 1.5 persons per bedroom. For properties developed between 1986 and 1989, these restrictions last only 15 years; post-1989 developments have at least 30 years, and up to 55 years in some states. Because tax credits are competitively allocated, *states may impose more restrictive requirements than the Code minimum*, *e.g.*, greater percentages of restricted units, deeper income targeting and rent levels, or longer use restrictions. In any event, LIHTC owners may not refuse to rent to Voucher holders because of their status, presumably at least so long as the rents are determined "reasonable" by the PHA. 26 U.S.C.A. § 42(h)(6)(B)(iv) and 26 C.F.R. § 1.42-5(c)(1)(xi).
- **Who's Involved?** IRS, state credit allocation agency, owner, management either owner or separate company. If there are additional subsidies, such as vouchers or Project-Based Vouchers, PHA may also be involved.
- **Key Regulatory Features**: State agency regulatory agreement, Treasury regulations at 26 C.F.R. §1.42, Lease. Owner files annual compliance certification with state agency.
- **Finding Out Where this Housing Is Located in Your Community:** available at: http://preservationdatabase.org or http://www.huduser.org/portal/datasets/lihtc.html. This HUD site will also provide general information about the characteristics of the program by state, prior to 2011. More accurate data may be available from your state agency, often via its website.

- **Tips for Determining What Kind of Housing Is Involved**: check data above; Lease; Rent Level; Owner type; Age of Housing (LIHTC can be used for new or rehab, but all post-1986); Ask manager
- **Getting Information**: 26 U.S.C. § 42 (part of Internal Revenue Code); 26 C.F.R. §1.42; state agency rules or guidance (if unpublished, ask state agency); IRS Guide, *Guide for Completing Form 8823 Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition* (Jan. 2011) (available at: http://www.irs.gov/businesses/small/article/0,,id=235488,00.html)
- **Related Subprograms or Set-Asides for Special Uses**: determined by state agency rules and Qualified Allocation Plan.

Major Applicant and Tenant Issues

- **Admissions**: [not much protection, unless from state allocation agency rules]
  - Code requirements concerning occupancy of certain units by tenants in specific income categories.
  - Requirement of non-discrimination against Voucher holders, *supra*.
  - Students: Special Rules on Student Eligibility. *See* 26 U.S.C. § 42 (i)(3)(D) (2013).
  - Protections (on common substantive criteria and procedural protections) from Fair Housing laws (e.g., Title VIII of the 1968 Civil Rights Act), from VAWA 2013, from any state-imposed requirements pursuant to the QAP and regulatory agreement, or possibly from constitutional sources, *e.g*., due process (note governmental action and property interest issues).
  - Owner tenant selection policies relating to Voucher holders. *See* 42 U.S.C. § 13661(c), § 13664(a)(2),(3) (2013) (reasonable time periods on criminal history look-back).

- **Rents (NHLP Green Book 4th ed. 2012, §4.2.9)**
  - Income-based rents? No, gross rents under program are flat rents based on AMI, not individual tenant income; for restricted units, unless owner has agreed to lower rents with state agency, gross rents are set at either 30% of 50% of AMI, or 30% of 60% of AMI, in both cases with an assumed family size of 1.5 persons per bedroom (one person for 0-BR unit). Rents can increase upward with changes in AMI. 26 U.S.C. § 42(g)(2). Some tenants in LIHTC may have Vouchers (Project-Based or Housing Choice), with their contributions determined under Voucher program, and total rent may exceed LIHTC limits, if market-reasonable, up to local payment standard.
  - Recertification: once annually (for 9% credit units, tenant right to continued occupancy unaffected by increases in income until >140% of income limit (i.e., 140% of 50% AMI, or 140% of 60% AMI)) for required compliance certification, unless all units LIHTC.
  - Utility Allowance: flat rents are gross rents, and where utilities are tenant-paid, tenant must receive a utility allowance based usually on the local PHA's allowance for comparable units with similar utility mix. 26 C.F.R. §1.42-10. *See also* 73 Fed. Reg. 43863-868 (July 29, 2008) (final utility allowance regulations) (now codified at 26 C.F.R. § 1.42-10; § 1.42-12) (may use engineering study).

- **Grievance Procedures:** none required by statute or regulation, although regulatory agreement for a particular project could do so.

- **Evictions and Terminations**
    - Notice: no federal statutory or regulatory requirements re length and content. Due process (where cause required)? State rules or policies may require certain notice.
    - Good cause required at end of lease term. *see* IRS Revenue Ruling 2004-82 (July 30, 2004) (statutory interpretation), or by due process, or by the terms of the state's regulatory agreement. Possibly reflected in lease agreement if required by state agency. *See also, e.g.*, *Carter v. Maryland Mgmt. Co.*, 2003 WL 22533198, 2003 Md. LEXIS 740 (Md. Ct. App. Nov. 10, 2003) (good cause required for termination of LIHTC/Voucher tenancy, but good cause found); *Cimarron Village Townhomes*, *Ltd. v. Washington*, 1999 WL 538110, 1999 Minn App LEXIS 890 (Minn. App. 1999) (good cause eviction protection required under LIHTC statute), 659 N.W.2d 811 (Minn. App. 2003) (finding good cause); *Bowling Green Manor v. LaChance*, 1995 Ohio App. LEXIS 2767 (because eviction of Section 8 Voucher tenant from LIHTC unit constituted state action, owner could therefore not refuse to renew lease absent good cause); *Mendoza v. Frenchman Hill Apts.*, No. CS-03-0494-RHW (E.D. Wa. order Jan. 20, 2005) (finding § 1983 claim unavailable to challenge HFA's and owner's failure to include required prohibition on no-cause evictions in regulatory agreement); Jolin, "Good Cause Eviction and the Low Income Housing Tax Credit," 67 U. Chi. L. Rev. 521 (2000); *see also* info on NHLP website <http://nhlp.org/resourcecenter?tid=106>.
    - Pre-judicial administrative review?: None.
    - VAWA 2013 extends eviction protections to LIHTC, but implementation is spotty. Some states have implemented with a lease rider informing tenants of their rights.
    - Effect of eviction on future application to federally assisted housing: no ban, just impact on prior tenant history.

- **Current Important Issues:**
    - Will LIHTC survive budget pressure to restrict various "tax preferences"?
    - Use restrictions (15 years) on pre-1990 units have expired, possibly causing displacement; next wave should occur after 2020 (30 years). Watch for: (1) owners seeking to exit after 14th birthday under "qualified contract' process, and (2) performance issues and regulatory oversight during the last 15 years of the compliance period after credits have been taken.
    - Fair Housing considerations in location of units (*e.g., Inclusive Communities Project v. Texas Dep't of HCA* litigation)
    - Basic tenants' rights often lacking
        - Good cause eviction in the lease or regulations of tax credit allocation agency?
        - Creeping confusion re GC for nonrenewal due to IRS Guide language in Ch. 26
        - Implementation of VAWA 2013 protections
    - ! If data demonstrates low voucher utilization, evidence of violation of LIHTC non-discrimination duty or of Fair Housing laws?
    - ! Seek to influence your state housing agencies policies? (state agency develops QAP annually after public hearing)
        - ! Advocacy in QAP process to ensure:
        - LIHTC subsidy linked with others available (e.g., vouchers or PBVs) to reach needs of very low-income tenants
        - Fair Housing considerations in unit locations and marketing
        - VAWA Implementation
        - Set asides for the disabled, vets, extremely low-income families