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Poverty & Race Research Action Council

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CIVIL RIGHTS MANDATES IN THE LOW INCOME HOUSING TAX CREDIT (LIHTC) PROGRAM

The Federal Low Income Housing Tax Credit (LIHTC) Program, which is currently the nation's largest housing production program, has operated with little civil rights oversight since its inception in 1986. The mandate of the Fair Housing Act – that all federal agencies take steps affirmatively to further fair housing – while binding on the Department of Treasury, is not directly incorporated in the LIHTC statute, and the Treasury has provided no fair housing guidance to the state housing finance agencies that administer the program. The program's fair housing responsibilities are alluded to only once in the Internal Revenue Service (IRS) regulations, in a broad incorporation by reference to HUD regulations. There are no specific site selection or affirmative marketing requirements in the Department of Treasury's LIHTC regulations, and decisions about which projects to fund are entirely delegated to state housing finance agencies (HFAs).

The two primary fair housing critiques of the LIHTC program have to do with geographic concentration of family units (a significant problem in the Northeast and Mid-Atlantic, on the West Coast, and parts of the South and Midwest) and concerns about meaningful access to suburban developments by housing voucher holders and minority applicants (which is a special concern in those states where LIHTC units are widely dispersed geographically). These two fair housing issues are complementary, and if left unaddressed, could lead to a highly segregated LIHTC program over time.

Geographic concentration of units: The Department of Treasury's failure explicitly to require compliance with fair housing policy is accompanied by specific competing incentives in the LIHTC statute that promote low income housing development in "qualified census tracts," which are often the poorest census tracts in a jurisdiction. The statute also directs states to give priority to projects that serve "the lowest income tenants… for the longest periods," and further encourages developers to fill these projects with the poorest of the poor. The LIHTC statute fails to give direction as to how much priority to assign these two goals, or how to reconcile them with the compelling goals of poverty deconcentration and racial integration mandated by the Fair Housing Act. The lack of civil rights controls in the LIHTC program has foreseeably led to a geographic distribution of LIHTC housing in many states that mirrors existing conditions of racial and economic segregation. As Professor Florence Roisman concluded in 1998, based on the first national study of the program, by 1995 most LIHTC units were located in central cities, and of these units, 74% were located in predominantly low-income neighborhoods. These findings are reinforced by the most recent national assessment of the LIHTC Program, which documents, between 1995 and 2000, a continuation of this trend, with substantial numbers of tax credit units still placed in predominantly low income and minority communities, especially in the Northeast. Evidence also suggests this concentration is even more pronounced when multifamily LIHTC projects are distinguished from those designated for elderly use.

Access to units in low poverty areas: Not all states have high concentrations of LIHTC family units in higher poverty neighborhoods. As set out in a recent analysis by Jill Khadduri of Abt Associates (see www.prrac.org/projects.php), in many metro areas, particularly in the South and Midwest, there are significant numbers of units in low poverty neighborhoods (defined as units with less than 10% poverty). The important fair housing issue in these metropolitan areas is whether very low income and minority families from higher poverty central city neighborhoods have meaningful access to these units. Is there active affirmative marketing underway to attract low income minority residents? Are the developments working in tandem to recruit Section 8 housing voucher holders? Are voucher holders living in these apartments in meaningful numbers, or do they face routine discrimination? One problem in answering these questions is that the IRS does not require such basic demographic data to be collected (see discussion below).

Legal Background

The Fair Housing Act applies directly to the Department of Treasury, to all state HFAs that administer the LIHTC program, and to all owners and managers of tax credit properties. The duty "affirmatively to further" fair housing, as set out in 42 U.S.C. § 3608(d), and in Executive Order 12892 (Jan. 17, 1994), requires the Department and state HFAs to closely monitor tax credit properties for discriminatory practices; it also requires the Department and state HFAs to affirmatively promote non-discrimination and racial integration in other ways, including but not limited to analyzing the racial concentration effects of LIHTC siting and adopting procedures to avoid perpetuating racial segregation in the program. *See Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970). The duty to affirmatively further fair housing is also delegated to state HFAs and owners by I.R.S. regulation 26 CFR § 1.42-9, which incorporates HUD non-discrimination and site selection rules. LIHTC owners and HFAs are also covered by Title VI of the Civil Rights Act of 1964, and its implementing regulations, which forbid discrimination based on race, color or national origin, either by intent or as a result of a seemingly neutral policy or practice. HUD's Title VI regulations, like the Fair Housing Act, also obligate HFAs and tax credit owners to administer their programs affirmatively to overcome conditions of discrimination and to take other steps to accomplish the purposes of Title VI.

Incorporating Civil Rights Mandates into the LIHTC Program

The fair housing obligations of state HFAs fall into two broad categories: procedural and substantive. The IRS as the federal administering agency in turn has reciprocal obligations to announce, monitor and ensure compliance with these obligations, with appropriate enforcement action as necessary.

Procedural requirements

Racial and economic data: The foremost procedural requirement is the collection and reporting of meaningful racial and economic data on project residents and applicants, in reference to project location and housing market data. This type of data collection activity is routine for HUD projects, but has generally not been required of LIHTC developments (unless they receive other funding that requires collection of demographic information). The types of data on each project that should be maintained by the state HFA and the IRS include:

> Each LIHTC development should be identified as a family development, elderly development, or other special category so that location and demographic data may be easily assessed (the absence of this basic information makes it difficult to assess the true degree of racial concentration in many states).
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> Race/ethnicity data should be reported for all applicants and persons on waitlist
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> Race/ethnicity data should be reported for all residents/households
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> Race/ethnicity data should be reported for census block, census tract, and MSA of LIHTC projects
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> The income mix of LIHTC applicants and tenants residing in the development should be reported
>
> Number of section 8 voucher holders residing in each property should be reported (26 USC § 42(h)(6)(iv) prohibits discrimination against Section 8 voucher holders in LIHTC properties)
>
> For family developments, the distribution of bedroom sizes in all units should be reported.
>
> Data also is needed regarding the language preference of applicants and tenants who are limited-English proficient.
>
> Developers should be required to submit projected race/ethnicity and income data, and a description of their proposed affirmative marketing plan, with each LIHTC application

Each state HFA and the IRS has a duty to keep this data current and to make it accessible to the public; periodic analyses should be made of the data, assessing, *inter alia*, whether the program in each state is becoming more or less segregated.

<u>Reporting of discrimination complaints</u>: owners should be required to report *all* fair housing actions and administrative complaints filed against them (including settled cases), along with a copy of the complaint, and the status or disposition of each claim. Tax credit sanctions must be imposed where there is any violation of civil rights obligations.

<u>Disclosure of potentially discriminatory admissions practices</u>: Owners should disclose any geographic based admissions preferences, along with racial and ethnic data on the preference area as compared to the larger housing market area, so that the IRS may fulfill its statutory obligation to assess the racial impact of such restrictions.

Notice and training: The IRS should provide regular notice and training to state HFAs and owners (and the state HFAs should correspondingly give notice and training to owners and developer-applicants) of each civil rights obligation applicable to LIHTC properties, including but not limited to non-discrimination by race, national origin, ethnicity, sex, familial status, disability, and source of income; the owner's duty to affirmatively market LIHTC units; and the duty to make appropriate accommodations for persons with disability, victims of domestic violence and persons with limited-English proficiency.

Substantive requirements

Affirmative marketing and access to units in low poverty areas: Title VIII and its accompanying regulations, which are incorporated by reference in 26 CFR § 1.42-9 and Form 8823, require owners to affirmatively market LIHTC units to those groups least likely to apply. See 24 CFR § 200.600-640.

> Affirmative marketing should include more than simply advertising in media with high minority circulation; owners should also be required to solicit applicants from existing assisted housing waitlists and from among Section 8 voucher holders.
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> Clear affirmative marketing expectations should be supplemented by economic incentives to developers who meet or exceed their affirmative marketing goals.
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> Affirmative marketing efforts should also be targeted to regional housing mobility programs, to ensure that low income city residents are encouraged to take advantage of and actually benefit from developments in lower-poverty areas.
>
> Owners in predominantly white communities should be required to maintain and submit evidence that they have aggressively marketed units in nearby minority communities (equivalent data should be reported for projects in predominantly minority communities).
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> The state HFA responsible for the development should routinely assess and report the number of units rented to voucher holders at each project address and begin to "'test" those developments that are seriously underrepresented.

Encouraging project siting that avoids perpetuation of segregation and furthers fair housing goals: Examples of steps to encourage project siting and design to promote integration in state QAPs:

> Within metropolitan areas, state Qualified Allocation Plans should include substantial set-asides for projects to be located in communities with low poverty concentration and require those projects to be open to all applicants, including those from outside the local community. The LIHTC program should be part of a metropolitan-wide strategy working towards more desegregated housing patterns;

More flexible site control and financing standards should be adopted for scattered site developments, so that they are financially competitive with larger single-site developments;

In QAPs where it still is still included, the approval of the municipality's "chief elected official" should be eliminated as a threshold requirement or as one of the bases upon which projects will be evaluated;

Tax credits that remain unutilized due to challenges to a locality's exclusionary zoning policies should be carried over or reissued when the developer is ready to go forward;

Developer fees and administrative support for non-profit developers facing significant community opposition should be increased;

Bonus points should also be awarded in state Qualified Allocation Plans for projects with greater than 50% LIHTC if they will be sited in higher-income suburban communities and will be open to all applicants;

Special emphasis should be placed on locating family LIHTC units in suburban communities;

Bonus points should be awarded in state Qualified Allocation Plans for housing acquisition in suburban areas where there are serious zoning obstacles;

The IRS should permit suburban areas with serious zoning obstacles or high land costs to be designated as "difficult to develop areas";

Tax credit programs should be combined with land write-down programs to aquire development sites in lower poverty areas;

A disproportionate share of points should not be awarded to projects that will be developed in Qualified Census Tracts (QCTs); Developers of projects in QCTs must demonstrate that such projects are part of an effective, real and comprehensive neighborhood improvement plan (see discussion below);

The QAP should describe which QCTS are preferred and why (e.g in strong or gentrifying neighborhoods or close to employment);

Bonus points should be awarded in state Qualified Allocation Plans for mixed-income projects (containing 50% or fewer LIHTC units) in communities with high poverty concentration;

<u>Performance standards, incentives, and goals</u>:

A complementary approach to promoting racial and economic diversity in LIHTC siting is the use of clear performance goals, backed by incentives to attract appropriate development proposals. In this system, the state HFA sets an annual deconcentration goal, possibly in conjunction with a setaside of a percentage of tax credits for use in suburban communities, and includes additional financial incentives (such as state bond eligibility, access to state land bank program, etc) for developers who actually build suburban family rental housing that is marketed to inner city residents. To the extent that goals are not met in any given 1-2 year period, the incentives should be continually adjusted and strengthened until the targeted goal is met. If progress is particularly slow, the state HFA should also consider partnering with private developers on its own opportunity developments.

<u>Standards for development in higher poverty neighborhoods</u>

Fair housing is not only about giving poor families access to housing outside of segregated neighborhoods; it is also about protecting poor and predominantly minority neighborhoods from harmful development. Development of additional low-income housing, if well planned, can be beneficial to some poor neighborhoods, but that is not always the case. A recent HUD study cautions that "states should be skeptical about claims that an LIHTC project will revitalize a neighborhood," especially where the proposed housing development is the only intervention:

> The choice of LIHTC developments in such areas should be made only when part of a well designed revitalization strategy for that neighborhood. Where such strategies are not present, the LIHTC resource may be better used to expand housing opportunities for low-income families in relatively higher-income parts of the metropolitan area.

Abt Associates, *Making the Best Use of Your LIHTC Dollars: A Planning Paper for State Policy Makers* (HUD Office of Policy Development & Research, July 2004) (citing potential harmful effects of placing additional low income housing in high poverty neighborhoods). In selecting among proposals in higher-poverty neighborhoods, state planners should be careful to avoid overconcentration of the poorest of poor families in neighborhoods already burdened with high concentrations of poverty. Whenever possible, tax credit developments in poor neighborhoods should include higher-income eligible families, along with a mix of market-rate units, if economically feasible. In addition, LIHTC development should be linked to home ownership and economic development (small business) initiatives that are part of a community-based revitalization plan. A good example of this kind of planning is set out in Alan Mallach's proposal for the New Jersey program , *Toward A Policy Framework For The Allocation Of Low Income Housing Tax Credits* (2003, New Jersey Institute for Social Justice).

<u>Selected References</u>

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Abt Associates, *Updating the Low-Income Housing Tax Credit (LIHTC) Database: Projects Placed in Service Through 2000* (December 2002).

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