

Deficiencies of the Low-Income Housing Tax Credit in Targeting the Lowest-Income Households and in Promoting Concentrated Poverty and Segregation

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Introduction

Affordable public housing has been an issue at the forefront of public policy in the United States since the Great Depression era. The social, political, and economic benefit of adequate housing for citizens at all income-levels has long been recognized. Nevertheless, despite almost seventy years worth of effort to remedy the dearth of affordable housing, there has been a failure to achieve Congress's stated goal of housing policy: "a decent home and a suitable living environment for every American family."¹

The low-income housing tax credit (LIHTC), which provides a tax incentive to private developers for the construction and rehabilitation of affordable housing, is currently the largest federal program to fund the production of rental housing for low-income families in the United States.² There are questions, however, regarding the ability of the tax credit to meet the needs of the lowest-income households and its role in promoting housing segregation and discrimination. If this is indeed the case, and if the LIHTC continues to be the primary program for the production of affordable housing, these are important deficiencies that must be addressed.

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1. See, e.g., 42 U.S.C. § 1441 (2002) (declaring the goals of U.S. housing policy).

2. See U.S. GEN. ACCOUNTING OFFICE, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW-INCOME HOUSING PROGRAM 1 (1997), <http://www.gao.gov/archive/1997/gg97055.pdf> [hereinafter GAO REPORT].

This Article takes a closer look at the overall effectiveness of the LIHTC as one of the primary mechanisms to deliver affordable housing. Part II briefly details the history of affordable housing in the United States. Part III elaborates on the basic mechanics, administration, and overall performance of the tax credit since its original implementation. Part IV looks closely at evidence of the tax credit's inadequacy in targeting affordable housing to the lowest-income households. Part IV also examines the high concentration of LIHTC projects in central-city areas with high concentrations of poverty and the role of the LIHTC in perpetuating segregation. Part V suggests measures that should be considered to remedy these inadequacies in order to achieve the aforementioned goal of housing policy. This Article ultimately concludes the following: (1) the LIHTC program, though possibly adequate in providing affordable housing to moderate-income households, is failing to target the lowest-income households and (2) the lack of oversight of the administration of the LIHTC may be leading to discrimination in housing practices, the perpetuation of segregation in violation of the Fair Housing Act of 1968, and the placement of LIHTC units in areas of concentrated poverty.

I. History of Affordable Housing

The recognition of the shortage of affordable housing and the first attempts by the government to deal with the problem came in the form of the United States Housing Act of 1937.³ This law focused on the plight of the heavily unemployed working class and proposed to correct the "acute shortage of decent, safe, and sanitary dwellings for families of low income."⁴ The government's first foray into development of affordable public housing was designed primarily to create jobs for unemployed building-trade workers during the Great Depression and to provide housing for the hard-working, "deserving," poor married couples going through temporary economic strife.⁵ The focus of housing policy shifted in the post-World War II era with the Housing Act of 1949,⁶ which gave priority to the very poor and those displaced by urban

3. United States Housing Act of 1937, ch. 896, 50 Stat. 888 (1937).

4. § 1, 50 Stat. at 888.

5. See LANCE FREEMAN, THE BROOKINGS INST., SITING AFFORDABLE HOUSING: LOCATION AND NEIGHBORHOOD TRENDS OF LOW-INCOME HOUSING TAX CREDIT DEVELOPMENTS IN THE 1990S 2 (2004), available at http://www.brookings.edu/metro/publications/20040405_freeman.htm.

6. Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413, 430 (1949) (codified at 42 U.S.C. § 1425(b) (repealed 1990)).

renewal.⁷ This era also witnessed the second wave of mass migration of Blacks from the South to the cities of the North and West.⁸ Many cities used public housing as a means to house Black migrants barred from White neighborhoods, and by the middle of the century, public housing served increasingly poor minority individuals and families.⁹ Regardless of the population that low-income housing policy intended to target, from its inception through the peak of construction in the late 1960s and early 1970s,¹⁰ the dominant trend in its implementation was the construction of public housing.¹¹

In 1973, as the problems of public housing became politically salient, President Nixon issued a moratorium on federally subsidized public housing programs.¹² From 1974 through the early 1980s the primary low-income housing program was the Department of Housing and Urban Development's (HUD) Project-based Section 8, through which HUD provided assistance to public housing authorities and private owners for twenty to forty years after construction or substantial rehabilitation of low-income rental units.¹³ During its tenure, Project-based Section 8 produced approximately 750,000 new and substantially renovated subsidized housing units—an average of about 83,000 per year.¹⁴

In the mid-1980s, Congress virtually replaced direct subsidies for low-income housing with a housing tax credit. The LIHTC program was created by the Tax Reform Act of 1986¹⁵ as a temporary “stop-gap” measure with the withdrawal of federal

7. FREEMAN, *supra* note 5, at 2.

8. *Id.*

9. *Id.*

10. BARRY G. JACOBS ET AL., GUIDE TO FEDERAL HOUSING PROGRAMS 20-21 (2d ed. 1986).

11. See JILL KHADDURI ET AL., ABT ASSOC., TARGETING HOUSING PRODUCTION SUBSIDIES: LITERATURE REVIEW 3 (2003) [hereinafter ABT LITERATURE REVIEW]. The construction of public housing is a supply-side or production program under which the federal government pays for the initial and ongoing capital costs of the development of housing and residents generally pay 30% of their income for rent. As of 2003 there were still around 1.2 million occupied public housing units, most of which were built from the 1950s to the early 1980s. *Id.*

12. See Rachel G. Bratt, *Public Housing: The Controversy and the Contribution*, in CRITICAL PERSPECTIVES ON HOUSING 335, 341 (Rachel G. Bratt et al. eds., 1986). Subsequently, construction of public housing declined dramatically and only those projects in progress prior to the moratorium were completed. *Id.*

13. NAT'L LOW-INCOME HOUSING COAL., 2005 ADVOCATES GUIDE TO HOUSING AND COMMUNITY DEVELOPMENT POLICY (2005), <http://www.nlihc.org/advocates/index.htm>.

14. Kevin M. Cremin, *The Transition to Section 8 Housing: Will the Elderly Be Left Behind?*, 18 YALE L. & POL'Y REV. 405, 409 n.23 (2000).

15. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

support for other subsidized affordable housing programs and tax incentives under earlier laws.¹⁶ Congress removed or reduced the benefits of various open-ended real estate investments such as Project-based Section 8, replacing them with "a fixed dollar amount of tax benefits for investors in income-targeted developments, with state agencies allocating the amount of the per capita credit for the state."¹⁷ The program was subsequently modified several times¹⁸ before being made permanent with the Omnibus Budget Reconciliation Act of 1993.¹⁹

The LIHTC was created as an incentive to private developers to construct new housing and rehabilitate dilapidated affordable housing by allowing owners of qualified rental properties to receive a tax credit over a period of ten years.²⁰ The tax credit's primary purpose was to increase the supply of affordable housing. Although one of the explicit criteria for allocation of the credit was to target the lowest-income households, nothing in the Internal Revenue Code (IRC)²¹ required that this criterion be met.²² While Congress recognized the need to continue some form of federal housing assistance, a key intention of the LIHTC was to reduce the overall cost to the federal government for the development and maintenance of housing through the allocation of a tax credit rather than direct government subsidy.

According to the General Accounting Office, the LIHTC is currently "the largest federal program for funding the development and rehabilitation of rental housing for low-income households."²³ The tax credit is administered by the Department

16. See Janet Stearns, *The Low-Income Housing Tax Credit: A Poor Solution to the Housing Crisis*, 6 YALE L. & POL'Y REV. 203, 208-12 (1988). The Tax Reform Act of 1986 eliminated favorable tax treatment for the construction of rental housing such as special accelerated depreciation. *Id.* at 208.

17. Jim Solem, *Affordable Housing Issues* 10 (October 2001) (unpublished and on file with author).

18. See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1002(l), 102 Stat. 3373, 3373-382; Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7108, 103 Stat. 2306, 2306-322; Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 1170, 104 Stat. 1388, 1388-505, 507; Tax Extension Act of 1991, Pub. L. No. 102-227, § 107, 105 Stat. 1687.

19. Omnibus Budget and Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.

20. 26 U.S.C. § 42(f)(1) (2002).

21. The LIHTC is laid out in 26 U.S.C. § 42 (2002).

22. See generally *id.*

23. GAO REPORT, *supra* note 2, at 1; see also ABT ASSOC., DEVELOPMENT AND ANALYSIS OF THE NATIONAL LOW-INCOME HOUSING TAX CREDIT DATABASE 1-2 (1996), available at <http://www.abtassoc.com/reports.D19960024.pdf> [hereinafter ABT REPORT 1996].

of Treasury through state and local agencies. Through 1994, approximately 700,000 units were placed in service.²⁴ Another 500,000 units were constructed between 1994 and 2002,²⁵ and currently the LIHTC accounts for between 60,000 to 80,000 units of new affordable housing each year.²⁶

Since its inception, the LIHTC has garnered increased attention as private developers have become familiar with the complexities of the tax credit and better at gauging the risks and return on their investments.²⁷ The program, by bringing together state housing agencies, private and non-profit developers, and the IRS (for monitoring and compliance), "is designed to bring the efficiency and discipline of the private market to the building of affordable rental housing."²⁸ Though the LIHTC program may not be well-designed to reach the lowest-income households, it is effectively the only federal housing production program.

II. The Basics of the LIHTC

A. Mechanics of the LIHTC

The LIHTC program, now more than 15 years old, has become the nation's primary mechanism to encourage the production of housing for low- or moderate-income households. The program represents a partnership between the federal, local, and state governments on one side and the local private sector on the other, and demonstrates the increased reliance on the private sector to supply affordable housing.²⁹

24. Sagit Leviner, *Affordable Housing & the Role of the Low Income Housing Tax Credit Program: A Contemporary Assessment*, 57 TAX LAW. 869, 870 (2004).

25. *Id.*

26. *Id.* Though the number of projects has remained fairly constant over the last few years, the number of units has grown from approximately 56,000 units annually between 1992 and 1994 to more than 90,000 units between 1995 and 2002, reflecting a boost in the size of the average LIHTC project from 42.1 units in the earlier period to 77.7 units in 2002. ABT ASSOC., UPDATING THE LOW-INCOME HOUSING TAX CREDIT (LIHTC) DATABASE: PROJECTS PLACED IN SERVICE THROUGH 2002 18 (2004), available at http://www.abtassociates.com/rports/2003630111505_16197.pdf [hereinafter ABT REPORT 2002].

27. See RECAPITALIZATION ADVISORS, INC., THE LOW INCOME HOUSING TAX CREDIT EFFECTIVENESS AND EFFICIENCY: A PRESENTATION OF THE ISSUES 3-6 (2002), <http://www.recapadvisors.com/pdf/report1.pdf> [hereinafter RECAPITALIZATION REPORT].

28. Jean L. Cummings & Denise DiPasquale, *The Low-Income Housing Tax Credit: An Analysis of the First Ten Years*, 10 HOUS. POLICY DEBATE 251, 252 (1999).

29. Leviner, *supra* note 24, at 871.

In order to receive the LIHTC, a property owner must generate enough funds to produce affordable housing and then sustain the housing over the period of the tax credit.³⁰ A property owner with the ability to generate the required capital may receive the LIHTC over a period of ten years as long as the property remains a rental unit and meets certain income and rent restrictions for a minimum of fifteen years.³¹ This last stipulation has recently been amended to a thirty-year extended agreement with certain contingencies permitting conversion to a market rate rental unit at an earlier date.³²

To receive the LIHTC, a property owner is required to set aside a specific proportion of units for lower-income tenants. The owner of an LIHTC rental property must elect to allocate either 20% of the units to households with income less than 50% of the area median income, or 40% of the rental units to households with income less than 60% of the area median income.³³

Under the LIHTC program the qualified property owner may claim tax credits over a period of ten years for 30% to 70% of the present value of new and substantially rehabilitated housing.³⁴ The percentage of the credit actually received by the owner of the property depends on whether the LIHTC project uses other sources of federal subsidies.³⁵ The 30% present value tax credit is used when other federal financing is used for rehabilitation or new construction.³⁶ The 70% present value credit is available to the

30. *Id.*

31. *Id.* at 873 (citing 26 U.S.C. §§ 42(g)(2), (h)(6) & (i)(1) (2002)).

32. *Id.* citing 26 U.S.C. § 42(h)(6)(D) (2002)). The requirement that the property meet these restrictions for thirty years can be terminated prior to the end of the thirty-year period either on the date the property is acquired in a foreclosure, or one year after the owner gives written notice to the allocating agency that it intends to dispose of the property. 26 U.S.C. §§ 42(h)(6)(D), (E) & (I) (2002). Written notice can be given at any point after the end of the fourteenth year of the agreement. 26 U.S.C. § 42(h)(6)(I) (2002). The allocating agency may avoid termination by finding a buyer for the property. *Id.* However, for three years following conversion, no existing low-income resident can be evicted other than for good cause and there can be no increase in gross rent above the rent allowable in the absence of termination. See 26 U.S.C. §§ 42(h)(6)(E)(i) & (ii) (2002).

33. See 26 U.S.C. §§ 42(g)(1)(A) & (B) (2002).

34. See 26 U.S.C. § 42(b) (2002). An existing property previously operated as an affordable property may qualify for the LIHTC if the property was acquired by purchase, did not receive the tax credit under the prior owner or a related party, and if there was no change in ownership or major improvements to the property in the last ten years. See 26 U.S.C. § 42(d) (2002).

35. See STAFF OF THE JOINT COMMITTEE ON TAXATION, 105TH CONG., PRESENT LAW AND LEGISLATIVE BACKGROUND RELATING TO THE LOW-INCOME HOUSING TAX CREDIT 2-3 (Comm. Print 1997) [hereinafter COMMITTEE REPORT].

36. ABT REPORT 2002, *supra* note 26, at 14.

developer of non-federally financed rehabilitation or construction.³⁷ An additional incentive, passed by Congress in 1989, awards a higher credit amount to a property built in a qualified census tract or a difficult development area.³⁸ A qualified census tract is defined as an area in which 50% or more of all households have an income lower than 60% of the area's median gross income.³⁹ Difficult development areas are those designated by HUD as areas with high construction, land, and utility costs relative to area median income.⁴⁰ The higher amount is achieved by increasing the property's eligible basis from which the tax credit is calculated to 130% of its original eligible basis.⁴¹

LIHTC units allocated to these lower-income households are rent-restricted. To continue receiving the credit, the rental property owner cannot charge rents that exceed 30% of the imputed income limitations chosen for those units, meaning 50% or 60% of the area's median gross income.⁴² It is important to note that rents are based on metropolitan household income and expense criteria, but not the income of the actual tenant renting the property.⁴³ Thus, "the program does not guarantee that an individual tenant household will not have to pay more than 30% of its income for rent, only that the rent will be held down to a level considered affordable by standards within the metropolitan area."⁴⁴

37. *Id.*

38. Thomas R. Wechter & Daniel L. Kraus, *The Internal Revenue Code's Housing Program: Section 42*, 44 TAX LAW. 375, 392 (1991).

39. 26 U.S.C. § 42(d)(5)(C)(ii) (2002).

40. 26 U.S.C. § 42(d)(5)(C)(iii) (2002).

41. See 26 U.S.C. § 42(d)(5)(C)(i)(I) (2002). For a new property built in either a qualified census tract or a difficult development area, the higher credit amount is 130% of total eligible basis. *Id.* For a rehabilitated property, the higher credit amount is 130% of total expenditures on the property. See 26 U.S.C. § 42(d)(5)(C)(i)(II) (2002).

42. 26 U.S.C. § 42(g)(2) (2002); GAO REPORT, *supra* note 2, at 25. The maximum rent limitation ensures that rent-restricted units remain affordable for low-income households. The rent includes utilities but excludes other sources of demand subsidies that may be available to the renter household such as payment made under the Section 8 housing vouchers program. See 26 U.S.C. § 42(g)(2) (2002).

43. Kirk McClure, *The Low-Income Housing Tax Credit as an Aid to Housing Finance: How Well Has It Worked?*, 11 HOUS. POL'Y DEBATE 91, 93 (2000). The actual rents for LIHTC units are determined by affordability standards in each metropolitan area and are based on what a family could afford if it paid 30% of its income for housing. *Id.*

44. *Id.*

B. Administering the LIHTC

Although the LIHTC program is subsidized entirely by the Department of Treasury, it is generally administered by the state housing finance agency through a competitive process.⁴⁵ States are authorized by the federal government to issue tax credits to qualified taxpayers for the acquisition, rehabilitation, or new construction of affordable rental housing.⁴⁶

The administration of the tax credit is deeply intertwined with state and local government action. The quantity of the credit available to a given state each year is determined by multiplying the state's population by \$1.75.⁴⁷ The credit is then allocated pursuant to a qualified allocation plan (QAP) created by the state government's designated agency—usually the state housing credit agency.⁴⁸ The QAP is federally mandated and used to explain the basis upon which the housing agencies distribute their tax credits.⁴⁹ Based on their QAP, states establish preferences and set-asides within their tax credit competitions so as to target the credits toward specific regions, such as rural areas, or specific populations.⁵⁰ The allocating agency's QAP details the criteria determining which projects are selected and how credits will be distributed by addressing issues, such as large pockets of poverty, and targeting inner-city areas.⁵¹ Each state's QAP for the LIHTC

45. *Id.* at 92-94.

46. ABT REPORT 2002, *supra* note 26, at 1.

47. 26 U.S.C. § 42(h)(3)(C)(ii)(I) (2002). Annual adjustments for inflation began in 2003. *Id.*

48. 26 U.S.C. § 42(m)(1)(A)(i) (2002).

49. JEREMY GUSTAFSON & J. CHRISTOPHER WALKER, ANALYSIS OF STATE QUALIFIED ALLOCATION PLANS FOR THE LOW-INCOME HOUSING TAX CREDIT PROGRAM 1 (2002).

50. Previous research demonstrated that the flexibility of the LIHTC program allows states to pursue a wide variety of housing policies and goals. "In Los Angeles, for example, state administration of the tax credit has favored single-room occupancy (SRO) projects which often serve as transitional housing for the homeless; 50 percent of the LIHTC units in the Los Angeles are efficiencies (compared with 16 percent efficiencies for the city's overall rental stock. . .)." Cummings & DiPasquale, *supra* note 28, at 272. In other cities, the emphasis has been placed on family housing. For example, "in Cincinnati, 58 percent of LIHTC units have three bedrooms or more (compared with 17 percent of the metropolitan area's rental housing stock). In metropolitan Philadelphia, 42 percent of the LIHTC units have three or more bedrooms, compared with 22 percent in the rental stock." *Id.*

51. See COMMITTEE REPORT, *supra* note 35, at 5-6. Specifically, the IRC specifies that criteria for selection of the projects are to include:

project location (e.g. broad geographic distribution, designated targeted areas such as inner cities . . . pockets of poverty, and rural areas), housing needs characteristics (e.g. low vacancy rate, income mix of tenants within the project), project characteristics (e.g. whether the project increases the

must then be reviewed as part of a state's consolidated plan submitted to HUD that involves all Section 8 housing and public housing that receive federal funds.⁵²

The tax credit statute explicitly requires that each state's QAP must give preference to "projects serving the lowest income tenants . . . for the longest period of time."⁵³ It further requires a QAP to specify a procedure for monitoring compliance with the statute and notifying the IRS in cases of non-compliance.⁵⁴ The LIHTC states that the amount of the credit allocated to selected properties must not exceed the amount that the state agency deems necessary to ensure viability of the project and a fair return to investors.⁵⁵ Finally, the LIHTC requires the state agency to allocate at least 10% of the credit to properties in which non-profit entities own an interest or substantially participate in the development of the property.⁵⁶

If a property that receives the tax credit fails to meet the minimum requirements mentioned above, ceases to qualify as low-income rental housing, or is disposed of before the end of the fifteen- or thirty-year compliance period, a portion of the credit with interest for all years prior to breaking compliance may be recaptured.⁵⁷ In order to ensure compliance with the Treasury Department's regulation, the IRC contains reporting requirements for both state agencies and owners of the project developments receiving the tax credit. Each state agency is required to submit to the Treasury Department an annual report specifying the amount of the credit allocated to it, the buildings and developers receiving the credit, and any other information "as the Secretary [of Treasury] may require."⁵⁸ In addition, development owners must certify that they meet the LIHTC requirements and must provide other information mandated by the Treasury Department.⁵⁹ Due to the confidentiality of tax-related matters, however, little information regarding households occupying

stock of low-income housing, whether substantial rehabilitation expenditures are needed by the project, energy conservation, quality of units, and type of financing) . . . [.]

Id. at 14-15; see U.S.C. § 42(m)(1) (2002).

52. GAO REPORT, *supra* note 2, at 55-56.

53. 26 U.S.C. § 42(m)(1)(B)(ii) (2002).

54. 26 U.S.C. § 42(m)(1)(B)(iii) (2002).

55. 26 U.S.C. § 42(m)(2)(A)-(B) (2002).

56. See 26 U.S.C. § 42(h)(5) (2002).

57. See 26 U.S.C. § 42(j) (2002).

58. 26 U.S.C. § 42(1)(3)(C) (2002).

59. 26 U.S.C. § 42(1)(1)(E) (2002).

LIHTC units is required or made available for analysis.⁶⁰

C. Summary Statistics of the LIHTC Program

The LIHTC has been administered for nearly twenty years—an adequate duration of time in which to examine the program's performance in achieving explicit goals, such as increasing the overall supply of affordable housing, as well as its side effects on segregation and concentrations of poverty. In order to evaluate the program, an overview of its overall performance is necessary.

LIHTC implemented its tax credit program in 1987.⁶¹ Since the program began, it has operated on an annual budget of approximately \$5 billion and has provided much of the support for producing new and rehabilitated low-income rental housing.⁶² Between 1995 and 2002, approximately 1,300 projects and 90,000 units were placed into service each year.⁶³ Of all the units produced by developers receiving the tax credit, the vast majority were LIHTC qualifying units, meaning units for low-income use with restricted rents for which the tax credit could be claimed.⁶⁴ Approximately two-thirds of all new units were newly constructed, while the remaining units were rehabilitated structures.⁶⁵ Although the program requires only 10% of all projects to be allocated to non-profit sponsors, approximately 30% of projects have been initiated by non-profits since 1987.⁶⁶

Of all LIHTC projects awarded between 1995 and 2002, just under half were located in central-city areas, approximately 38% were located in metro region suburban areas, and 13% were located in non-metro areas.⁶⁷ LIHTC units are more often built in areas of concentrated poverty, defined as areas where over 30% of people are below the poverty line.⁶⁸ While 12.3% of rental units nationally are built in areas of concentrated poverty, 18.8% of all

60. See COMMITTEE REPORT *supra* note 35, at 5-6. See also Leviner *supra* note 24, at 882 (discussing the Code and the Treasury's lack of enforcement of their objective of targeting lowest-income households through the LIHTC).

61. ABT REPORT 2002, *supra* note 26, at 2.

62. *Id.*

63. *Id.* at 11-12.

64. *Id.* at 11. The units qualifying for the tax credit in these projects comprised 95.3% of all units.

65. *Id.* at 12.

66. *Id.*

67. ABT REPORT 2002, *supra* note 26, at 24, 27. Approximately three-fourths of all LIHTC projects in metro suburban and non-metro areas are new construction, while new construction accounts for less than one-half of the central-city LIHTC projects. *Id.* at 27.

68. *Id.* at 36.

LIHTC units are built in such areas.⁶⁹ This pattern is accentuated in central cities, where approximately 32% of all LIHTC units are in areas of concentrated poverty, while only one-fifth (20.8%) of central-city rental units nationwide are located in areas of concentrated poverty.⁷⁰ The percentage of rental units constructed in areas of concentrated poverty is much lower in suburban areas.⁷¹ Only 5.2% of LIHTC units in suburban areas are located in high-poverty areas compared to 3.5% of rental units nationwide.⁷²

The percentage of LIHTC units built in areas of high-minority concentration⁷³ between 1995 and 2002 is also greater in central-city areas than in suburban areas. Approximately 58.4% of all LIHTC units are built in areas of high-minority concentration as compared to 28.4% of LIHTC units in suburban areas and 14.6% in non-metro areas.⁷⁴

III. The Effectiveness of the LIHTC in Targeting Lowest-Income Households and the Promotion of Concentrated Poverty and Segregation

A. Reaching the Lowest-Income Households

While administration of the LIHTC through state housing agencies appears to be targeting units in areas with concentrations of poor households, recent empirical research points out that the program is generally producing units with rents that only moderate-income households can afford. Thus, the program may be serving only families with the highest incomes in the eligible population while failing to reach households most in need of assistance. If this is true, and if the LIHTC continues to be the *de facto* program for the production of affordable housing, the inability of the tax credit to reach the lowest income families—whether by design or as an inadvertent result of the program's structure—is an important deficiency that must be addressed.

The LIHTC is subject to budget constraints, as are all other

69. *Id.*

70. *Id.* "In addition, 7.1 percent of tax credit units are located in tracts where more than 40 percent of the people are poor (compared to 3.1 percent of households and 5.6 percent of rental units nationally)." *Id.* at 32.

71. ABT REPORT 2002, *supra* note 26, at 36.

72. *Id.*

73. High-minority concentration is defined as greater than 50% minority. *Id.* at 37.

74. *Id.* at 33.

federal housing programs. This means that the tax credit is available for only a limited number of properties.⁷⁵ Therefore, limitations are placed on investors in low-income housing to ensure they do not profit solely because they were fortunate enough to be awarded the credit.⁷⁶ The LIHTC creates a system of regulations and constraints—the most important being the limitations on the tenant's income and the rents property owners can charge on tax-credit qualifying units.⁷⁷ Unfortunately, as discussed below, these limitations are the main reason that owners of LIHTC units fail to rent to the lowest-income families.

Although the LIHTC, as laid out in the IRC, explicitly states that one of the program's objectives (to be carried out through state housing agencies' allocation of the tax credit) is targeting the lowest-income households,⁷⁸ neither the IRC nor the Treasury Department penalizes investors for failing to do so.⁷⁹ Rather, the LIHTC regulations seem to achieve the opposite result by failing to require that owners of qualified property rent to households with incomes substantially below the income limits of the area median income.⁸⁰ Since the owners of the qualified rental properties can generate the greatest revenues by renting to households with the largest incomes while still complying with the LIHTC guidelines, there is little motivation to offer units for rent to poorer households whose income fall below the lower limits of the guideline set by the program.⁸¹ As illustrated in numerous empirical studies cited below, this results in rents that are beyond the means of many poor households.

One comprehensive study of the LIHTC conducted by the National Council of State Housing Agencies (NCSHA) in 1997 concluded that unless LIHTC occupants are receiving additional subsidies, their household incomes are generally between 40% and 60% of the median national income.⁸² Another study similarly concluded that owners of LIHTC properties receiving no other federal subsidies charged rents that are affordable to households

75. COMMITTEE REPORT, *supra* note 35, at 14-15.

76. *Id.*

77. *See supra* note 42 and accompanying text.

78. *See* GAO REPORT, *supra* note 2, at 1.

79. Leviner, *supra* note 24, at 882.

80. *Id.*

81. *Id.*

82. E & Y KENNETH LEVENTHAL REAL ESTATE GROUP, NATIONAL COUNCIL OF STATE HOUSING AGENCIES, THE LOW-INCOME HOUSING TAX CREDIT: FIRST DECADE 7 (1997). According to the report, tenants without rental subsidies (69% of the sample) had an average yearly income of 45% of the national median income.

between 45% and 60% of the area median income.⁸³

A 1999 study conducted by Cummings and DiPasquale of over 120,000 LIHTC units in nineteen metropolitan areas found the median rent charged to households to be approximately \$436.⁸⁴ Working under the assumption that the property owner was charging a rent equal to 30% of the household's income, the income of the household paying the median rent in their sample was \$17,440. This income level was approximately 48% of the national median household income of \$37,216.⁸⁵ Although well within the income limitation which owners of LIHTC units are required to follow,⁸⁶ it illustrates that in the absence of additional subsidies the median rents charged for tax credit units are affordable only to households with incomes just below the upper limit of the mandatory guidelines. Cummings and DiPasquale emphasize this lack of affordability by examining the bottom one percentile of the unit rent distribution in their sample, with a rent of \$203 per month.⁸⁷ Even though this rent is well within the maximum allowed by the LIHTC program, they point out that approximately 36% of the nation's renter households in 1990 would not have been able to afford that rent.⁸⁸ This indicates that a significant portion of the nation's low-income households are incapable of affording units produced by the nation's *de facto* affordable housing program.

The Cummings and DiPasquale study also points out that the measure for the area median income used in the LIHTC program may lead to rent limits which are too high for the lowest-income households.⁸⁹ The LIHTC program is dependent on the federal definition of the applicable area median income for setting rent and income limits, using the Section 8 HUD adjusted median family income (HAMFI).⁹⁰ This measure reflects incomes of all households in the area, both renters and homeowners, and fails to consider that average income for renters is considerably lower than for homeowners.⁹¹ While the median income for renter households nationwide was approximately \$31,000 (in 1996

83. RECAPITALIZATION REPORT, *supra* note 27, at 26.

84. Cummings and DiPasquale, *supra* note 28, at 274. All calculations in the study were done in 1996 dollars.

85. *Id.*

86. See 26 U.S.C. § 42(g)(1)(A) & (B) (2002).

87. Cummings and DiPasquale, *supra* note 28, at 279-80.

88. *Id.* at 280.

89. *Id.*

90. *Id.*

91. *Id.*

dollars), the nationwide HAMFI for a four-person household was approximately \$41,600 (in 1996 dollars), or 135% of the actual renter median income.⁹² Basing income limits on the income distribution of all households rather than on renter households pushes the LIHTC program toward higher-income renters.

It is also possible that the income limitation may lead to the tax credit serving households that are not truly in financial need. This flaw stems from the program's use of area median income rather than national median income to determine the qualifying income limitations.⁹³ Through the use of area median incomes, the owners of properties in relatively wealthy areas may be eligible for the tax credit while renting units to households with income at or above the national median income.⁹⁴ Cohen illustrates this in his 1998 study by pointing out that though the national median income was roughly \$37,000, the median family income for a family living in Marin County, California was over \$59,000.⁹⁵ This meant that owners of properties in Marin could receive the tax credit if they were to rent 40% of their units to households whose income was 60% of the area median income, or approximately \$35,500, an income level approaching the national median income.⁹⁶ Thus, properties built in relatively affluent areas may qualify for the LIHTC even though they provide housing to relatively well-off households rather than to truly low-income households.

B. Discriminatory Impact and Concentrations of Poverty

Since the inception of federally subsidized housing, each federal housing program has been criticized for fostering both racial segregation and greater concentrations of the poor in low-income neighborhoods.⁹⁷ The Federal Fair Housing Act of 1968 (FHA)⁹⁸ was drafted in response to state government housing agencies that resisted promoting integration by building low-income housing in poor, segregated neighborhoods.⁹⁹ The Act gave

92. *Id.*

93. Leviner, *supra* note 24, at 882.

94. David P. Cohen, *Improving the Supply Side of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL'Y 537, 556-57 (1998).

95. *Id.* at 556.

96. *Id.*

97. See generally Michelle Adams, *Separate and [Un]equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 434-37 (1998) (critiquing earlier federal housing programs).

98. 42 U.S.C. §§ 3601-3631 (2002).

99. Myron Orfield, *Racial Integration and Community Revitalization: Applying*

an explicit mandate to these agencies to "affirmatively further" fair housing through the promotion of non-discrimination and desegregation practices.¹⁰⁰

While housing policy continues to place importance on these practices,¹⁰¹ recent scholarship highlights the difficulty in reconciling the LIHTC program's preference for construction of units in the most impoverished areas, i.e. qualified census tracts, with the duties of fair housing.¹⁰² This preference becomes even more difficult to justify since many scholars and policy experts advocate mixed-income housing as a central objective of housing policy.¹⁰³ The argument is that just as living in a poor community "can have negative effects on the life chances of the children in low-income households, living among households with relatively higher incomes can create benefits for low-income children."¹⁰⁴

In contrast to previous federal housing policy, the administration of the LIHTC does not require the collection of racial data on the placement of LIHTC units.¹⁰⁵ This is consistent with the Treasury Department's general lack of information regarding implementation of the tax credit. Although state

the Fair Housing Act to the Low-Income Housing Tax Credit, 58 VAND. L.R. 1747, 1750 (2005).

100. 42 U.S.C. § 3608(d), (e)(5) (2002). According to Orfield, "[t]his duty to affirmatively further fair housing was interpreted by the courts . . . to require the federal government . . . to support racial integration and to prohibit . . . the federal government and its grantees from developing low-income housing projects in areas where minority and low-income residents were concentrated." Orfield, *supra* note 99, at 1750.

101. See, e.g., Terry A.C. Gray, *De-Concentrating Poverty and Promoting Mixed-Income Communities in Public Housing: The Quality Housing and Work Responsibility Act of 1998*, 11 STAN. L. & POL'Y REV. 173 (1999).

102. See Florence Wagman Roisman, *Mandates Unsatisfied: The Low-Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1012-13 (1998).

103. See JILL KHADDURI ET AL., LIHTC AND MIXED INCOME HOUSING: ENABLING FAMILIES WITH CHILDREN TO LIVE IN LOW POVERTY NEIGHBORHOODS? 1 (2004), available at <http://www.appam.org/conferences/fall/atlanta2004/sessions/downloads/3401.pdf>.

104. *Id.* Khadduri further notes that "[t]he mechanisms through which this comes about—for example, adult role models, reduction of negative peer influences, networks that lead to jobs and services, or low levels of crime and violence--[sic] are not well understood and continue to be the subject of intensive study." *Id.* at 1 n.1. The characteristics of city or suburban communities can have profound impact on the opportunities for people living there. MYRON ORFIELD, AMERICAN METROPOLITICS 28-48 (2001).

105. See Roisman, *supra* note 102, at 1012-13. However, if the LIHTC units are mixed with funds from HUD or the Department of Agriculture, racial data must be collected. *Id.* at 1038-39. Since 1994, HUD has contracted with Abt Associates, Inc., to collect data on the number and location of units and the characteristics of the tenants of qualifying units. See ABT REPORT 1996, *supra* note 23, at 1-4.

agencies and property owners are required to report to the Treasury Department on tax credit projects, little information is actually provided for analysis due to the confidentiality requirements of tax-related submissions.¹⁰⁶ The Treasury Department, therefore, lacks basic information on the number of units built each year, and tenant characteristics such as ethnicity, household size, and income.¹⁰⁷ The administration of the LIHTC program, therefore, lacks substantial information regarding the extent of discrimination, segregation, and poverty within tax-credit units.¹⁰⁸ Furthermore, the federal and state agencies responsible for fair housing and for administering the LIHTC program have not provided specific rules or regulatory guidance to prevent these conditions.¹⁰⁹ Thus, in addition to the failure of the LIHTC rent and income limitations to target the tax credit to the lowest-income households, the opaqueness of the program may permit landlords the liberty of choosing from the pool of potential tenants in a manner that is discriminatory or that promotes segregation in violation of federal housing law.¹¹⁰

Recent evidence indicates that the LIHTC is promoting housing riddled with both poverty and segregation. One study by the NCSHA concluded that one-third of all LIHTC allocations go toward rehabilitation of inner-city projects for minorities in high-poverty neighborhoods.¹¹¹ Although the distribution of LIHTC units across central-city, suburban, and non-metropolitan areas is similar to the distribution of all rental units nationally,¹¹² LIHTC units are more likely to be located in areas where more than 60%

106. *Id.* at 1-5.

107. *Id.* at 1-2.

108. See Roisman, *supra* note 102, at 1012-13. Although LIHTC requires each state's housing agencies to include "selection criteria" in their allocation plan, neither the Code nor the Treasury Department adequately define the criteria or provide substantial guidance regarding how they should be administered. GAO REPORT, *supra* note 2, at 55; see also Leviner, *supra* note 24, at 885; Roisman, *supra* note 102, at 1018.

109. See Memorandum of Understanding Among the Department of the Treasury, the Department of Housing and Urban Development, and the Department of Justice (August 11, 2000), available at <http://www.usdoj.gov/crt/housing/mou.htm> (secretaries agreeing to "promote enhanced compliance with the Fair Housing Act for the benefit of low-income housing tax credit properties and the general public").

110. See Leviner, *supra* note 24, at 884.

111. ABT ASSOCIATES, INC., UPDATING THE LOW-INCOME HOUSING TAX CREDIT (LIHTC) DATABASE: PROJECTS PLACED IN SERVICE THROUGH 2000 29-30 (2002) [hereinafter ABT 2000 REPORT].

112. *Id.* at 32-33. Among rental units nationally, 48.2% are located in central cities, 38% are in suburbs, and 13.8% are in non-metro areas. *Id.* at 23.

of households would qualify to live in a tax credit unit, i.e. poor neighborhoods.¹¹³ More than half (54%) of all tax credit units are located in the central cities, while only 26% are located in the suburbs, meaning that LIHTC units are also more likely than other types of rental housing to be located in the central cities.¹¹⁴ More than 73.9% of qualifying units in the central cities are located in areas with more than 50% low-income households.¹¹⁵ In comparison to central-city housing, areas with LIHTC units in the suburbs contain a lower percentage of poor households, although even in the suburbs, 48% of the units are in areas where over 50% of the households qualify as low-income.¹¹⁶ However, while 32% of all LIHTC units in the central cities are in neighborhoods with concentrated poverty, the corresponding proportion of suburban LIHTC units is only 5.2%.¹¹⁷ The statistics are evidence that the LIHTC is promoting high concentrations of poverty in the central cities.

The statistics dealing with minority concentration in areas where tax credit units are constructed are also revealing. Though areas in which LIHTC units are located are not as highly segregated as those with other forms of federally assisted housing, LIHTC areas contain a disproportionate number of Blacks and Latinos when compared with overall averages in areas containing rental units throughout the country.¹¹⁸ About 48% of all central-city units are located in areas with a minority concentration of more than 50%, while the corresponding number is 20% in the suburbs and 14.4% in non-metro areas.¹¹⁹ Overall, around 34% of all LIHTC units are situated in tracts where minorities comprise more than 50% of the population.¹²⁰ In contrast, only approximately 18% of all tracts at the national level have a similar characteristic.¹²¹ Thus the LIHTC may also be playing a significant role in perpetuating segregation in the central-city areas.

It is possible that state housing agencies are currently trying

113. ABT 2000 REPORT, *supra* note 111, at 29.

114. *Id.* at 23.

115. ABT REPORT 1996, *supra* note 23, at 4-16. Additionally, almost two-thirds of LIHTC units constructed as family units are placed in neighborhoods with greater than 10% poverty. KHADDURI ET AL., *supra* note 103, at 5.

116. ABT REPORT 1996, *supra* note 23, at 4-16.

117. ABT REPORT 2002, *supra* note 26, at 36.

118. FREEMAN, *supra* note 5, at 6-8.

119. ABT REPORT 1996, *supra* note 23, at 4-15.

120. *Id.*

121. *Id.*

to use the LIHTC to promote more mixed-income housing among certain subsets of potentially eligible households, such as those with children. For example, the number of family units (units with more than two bedrooms) in low-poverty¹²² metropolitan areas—meaning both central-city and suburban areas—produced by the LIHTC program increased steadily between 1995 and 2001, reaching 35,000 units in 2001.¹²³ The percentage of all LIHTC units that these family units represented steadily increased in this time period and reached 39% of all LIHTC units in 2001.¹²⁴ Moreover, these low poverty areas with LIHTC family housing were not areas of high minority concentration and were primarily located in the suburbs.¹²⁵ Though conscious policy choices by state allocating agencies is among the possible reasons for the upward trend during the time period, it is also possible that these units are simply being occupied by households without children and with incomes close to the LIHTC income limits. It is impossible to tell without more information who actually lives in these LIHTC units.

In summary, tax credit units are more likely to be located in areas with a greater incidence of poverty and higher concentration of minorities. Although some evidence hints that state housing agencies may be trying to use the tax credit to promote mixed-income housing in areas of low minority concentration among certain low-income households, the emphasis on credit allocations to units built in qualified census tracts and the larger body of statistics suggests that the LIHTC perpetuates poverty and segregation.

IV. Recommendations to Target Lowest-Income Households and Ensure the LIHTC Does Not Promote Concentrations of Poverty and Segregation

If the low-income housing tax credit continues to be the *de facto* program for the production of affordable housing, adjustments are necessary to ensure it strives to attain the housing policy goal of decent housing for all American families while remaining in compliance with the FHA. Although treating

122. HUD defines a low-poverty neighborhood as a census tract in which fewer than 10% of the residents live in households with incomes below the poverty line. See KHADDURI ET AL., *supra* note 103, at 3. Metropolitan census tracts with poverty rates below 10% are solidly middle class neighborhoods. *Id.*

123. *Id.* at 6.

124. *Id.*

125. *Id.* at 17.

the weaknesses of the LIHTC program in a comprehensive fashion is beyond the scope of this Article, this section offers two recommendations for improving the problematic areas previously discussed: (1) targeting the lowest-income households and (2) enhanced monitoring of the LIHTC's administration to guarantee compliance with program requirements and to ensure it is not promoting higher concentrations of poverty and increased segregation.

A. Targeting the Lowest-Income Households

One possible remedy to the inability of the LIHTC to target the lowest-income households is to increase the amount of the credit for owners of LIHTC properties that rent to households below 40% of the area median income.¹²⁶ This could be done in the same way that the program encourages investments in qualified census tracts and difficult development areas by increasing the properties' eligible basis that qualifies for the tax credit.¹²⁷ However, this may not be entirely satisfactory to target households near the low end of the income spectrum. Evidence shows that private owners of LIHTC qualifying properties seeking to increase profit will continue to rent to households with income levels near the maximum permitted under the LIHTC.¹²⁸ The LIHTC, without the provision of other federal subsidies, on its own may be insufficient to reach the lowest-income renters.

By using a single measure of area median income to determine maximum rent levels for units receiving the tax credit, the LIHTC program essentially permits properties in relatively wealthy areas to qualify for the credit, even though the rents affordable at the increased rent and income levels may not be accessible to the lowest-income households.¹²⁹ This could be remedied by determining income limitations through a dual approach: areas where the median income is above the national median income would use the national median income to determine applicable income limitations, while those areas with median income below the national median income would still apply the area median income.¹³⁰ Since this measure would lower income and rent limits in affluent areas, it may help assure that the administration of the LIHTC in a particular area is serving

126. Leviner, *supra* note 24, at 898.

127. *Id.*

128. *Id.* at 898-99.

129. *Id.* at 898.

130. *Id.*

those families most in need.¹³¹

The LIHTC program's use of HAMFI to define area median income may lead to income limits that push rent levels toward higher-income households. Although the ability to charge higher levels of rent may make LIHTC projects more financially viable,¹³² this should be weighed against the inability of low-income renters to afford the resulting higher rents.

B. Compliance and Monitoring

Although the IRC requires that each state submit a QAP detailing criteria on the basis of which the tax credit will be allocated, neither the IRC nor Treasury regulations mandate that any particular criteria be required, and no regulatory body monitors the program to make sure that the states are following their QAPs.¹³³ Although this lack of specified criteria may provide a desirable degree of flexibility that allows states to mold their programs to unique local conditions, this is a highly volatile potential source of both race and class discrimination.

One potential remedy is to require that state housing agencies submit yearly reports addressing if and exactly how the criteria detailed in their QAPs were met.¹³⁴ These reports could be made public (along with the QAPs) to promote the transparency of the LIHTC program and simultaneously provide a disincentive for discrimination in its administration.

The weight of evidence seems to suggest that the LIHTC perpetuates the housing placement of low-income households in high-poverty areas and race segregation in direct contradiction to the mandates of the FHA. Current housing policy shaped by recent research suggests that placing low-income households in low-poverty areas with a lower concentration of minorities may have a beneficial impact.¹³⁵ The administration of the LIHTC could therefore include measures to promote mixed-income and mixed-race neighborhoods. This could mean a system of quotas planned annually by state housing agencies and included in QAPs to promote diversity in residential communities.¹³⁶

131. Cohen, *supra* note 94, at 561-62.

132. Cummings and DiPasquale, *supra* note 28, at 280.

133. See COMMITTEE REPORT *supra* note 35, at 5-6; see also Leviner, *supra* note 24, at 882 (discussing the Code and the Treasury's lack of enforcement of their objective of targeting lowest-income households through the LIHTC).

134. Leviner, *supra* note 24, at 900.

135. See KHADDURI ET AL., *supra* note 103, at 1.

136. Leviner, *supra* note 24, at 901.

Finally, state agency compliance with the above recommendations and any discretion in the administration of the LIHTC should be monitored by a central and independent body consisting of members from state housing agencies, federal administrators of the LIHTC, and non-profit members or community activists.¹³⁷ The reports by state housing agencies recommended above would be submitted to this body that would also be responsible for verifying its contents.

Although implementing the above recommendations would certainly increase the administrative costs of the LIHTC, it would enhance oversight of the program and ensure that it is achieving the policy objectives of providing affordable housing that is not segregated and poverty-stricken—housing that would be in direct contradiction to federal housing policy. The establishment of the centralized body would ensure better operation of the LIHTC and stimulate its improvement.

Conclusion

In a recent declaration of United States housing policy, Congress emphasized the importance of providing “a decent house and a suitable living environment for every American family.”¹³⁸ This not only underscores the importance of providing safe and affordable housing to even the lowest-income households, but also implies that suitable housing may include additional features such as the absence of segregation and high concentrations of poverty, the availability of jobs and educational opportunities, and a low crime rate.

Since the inception of the LIHTC in 1987, the program “has become the principal mechanism for supporting the production of new and rehabilitated rental housing for low-income households,”¹³⁹ and now accounts for almost 90% of affordable housing constructed with the aid of federal funds.¹⁴⁰ With an average production of almost 90,000 units each year, by 2004 the total number of LIHTC units produced (1.3 million) was quickly approaching the number of units produced by all combined public housing construction subsidized by the federal government and subject to federal siting requirements over the last sixty plus

137. *Id.*

138. 42 U.S.C. § 1441 (2000) (declaring Congressional U.S. housing policy goals).

139. ABT 2000 REPORT, *supra* note 111, at 2.

140. RECAPITALIZATION REPORT, *supra* note 27, at 3. Note that this figure does not include the federal commitment for voucher-based housing programs.

years.¹⁴¹

While this mass production of housing illustrates the program's potential in stimulating private investment in the affordable housing market, the inability of the LIHTC to target the lowest-income households is a glaring deficiency that needs to be addressed if it is to remain the *de facto* program for the production of affordable housing. The dearth of federal housing assistance is illustrated in a 1996 study by HUD's Office of Policy and Development and Research which reported that of over fifteen million families eligible for some form of housing subsidy, only a little over four million received any government assistance.¹⁴²

Furthermore, the data seem to suggest that the LIHTC program is perpetuating neighborhoods with high concentrations of poverty and segregation, in direct violation of the FHA. In light of current housing policy and the research pointing to the beneficial effects of mixed-income housing, greater oversight and enhanced transparency of the LIHTC may be desirable measures to simultaneously achieve these goals and stem the tide of discriminatory practices.

142. ABT LITERATURE REVIEW, *supra* note 11, at 1.

142. OFFICE OF POL'Y DEV. & RES., U.S. DEP'T OF HOUS. & URBAN DEV., CHARACTERISTICS OF HUD-ASSISTED RENTERS AND THEIR UNITS IN 1993 4 (1997).