**The Low-Income Housing Tax Credit (LIHTC): Addressing the Need but Not the Want**

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## Introduction

The low-income housing tax credit (LIHTC) program serves as the primary mechanism to construct and preserve affordable housing in the United States. Since it was introduced as part of the Tax Reform Act in 1986, the LIHTC program has been responsible for developing over 3.4 million housing units for low-income individuals, seniors, and families (HUD: PD&R., 2019). In Wisconsin alone, there are 1,241 LIHTC properties, each containing an average of 75 affordable housing units (HUD: PD&R., 2019). I currently serve as a Supportive Housing Associate at one such LIHTC property in the Washington Park neighborhood of Milwaukee. Each day, we receive an average of 15 calls from people looking for affordable housing, and each day, we inform people that we are at capacity and that we are not expecting any vacancies for six to twelve months. The sheer volume of calls we receive annually is a testament to the urgent need for affordable housing in Milwaukee – a need that we strive to meet yet can only offer for a select few. These select few are housed in one of our 72-units that range from 2-bedroom apartments to 3-bedroom townhomes. Even though the LIHTC property I work at meets a critical need for our tenants, not every tenant is satisfied with their living situation; not every want is met.

I have had conversations with tenants who conveyed a desire to leave Washington Park and reside in properties located in safer, more prosperous neighborhoods; yet they struggled to find affordable multi-family homes in these areas. Their desires and their frustrations are understandable. Washington Park is a black-majority neighborhood in Milwaukee that has a poverty rate of 47%, which is 13% higher than the Milwaukee average (Data You Can Use, 2016). Even though the strength and authenticity of the people who reside in Washington Park tell a story of resilience and perseverance, the clusters of dilapidated and vacant houses that

populate the neighborhood tell a story of an area that has clearly been disinvested in. Within the parameters of its zip code, Washington Park notably lacks a grocery store, schools, or many establishments where one can seek gainful employment. My conversations with tenants led me to wonder if LIHTC properties were disproportionally situated in locations with conditions that parallel those of Washington Park. If such a pattern was recognized, questions about confinement and mobility would arise. To what extent do LIHTC tenants have a choice in where they live and how many of those choices are "good"?

The conversations I had with tenants planted the seed for what became the thesis for this expository paper: the LIHTC program addresses the need but not the want. Here, I define the "need" as increasing the stock of affordable housing, with preference given to high poverty, distressed areas with high population densities. The "want" is defined as having at least two "good" choices - the choice to move to an "area of opportunity" or the choice to live in a "revitalized community." An area of opportunity is an area that has a neighborhood poverty rate below 10% while simultaneously possessing high quality of life indicators (Center on Budget and Policy Priorities, 2018). Examples of such indicators are: low crime, quality infrastructure, access to good education and employment opportunities, food security, high-rated healthcare systems, commerce, reduced commute time, and entertainment. A revitalized community is an area that has experienced, or is experiencing, investments that go beyond a cosmetic transformation. These investments include accessible human services that empower individuals to lead healthy lives, investments in the building of neighborhood coalitions that foster the development of social capital and cohesion, investments in the local economy that lead to sustainable education and employment opportunities, and investments in arts and entertainment that promote creativity and leisure (Planning Forum UT, 2022).

## Methodology

This paper aims to explore legal pitfalls of the LIHTC system and how they may be contributing to the LIHTC program addressing the need but not the want. After providing a historical overview of the LIHTC policy and an explanation of the LIHTC process, this paper explores two primary points concerning how the LIHTC system contributes to: 1) Concentrating poverty and furthering segregation, and 2) Undercutting successful community revitalization efforts. Tools to affirm fair housing and enact housing justice will then be discussed, which includes leveraging awareness of disparate impact, maximizing qualified allocation plans, and planning for recapitalization.

While this paper focuses on the disparities of LIHTC property distribution in the United States as a whole, I do zoom in on examples in Illinois and Wisconsin to compare distribution patterns and the actions of their LIHTC allocating agencies, when relevant. These two states were chosen primarily because of the difference of the LIHTC tenant populations they serve; Wisconsin's LIHTC users are majority white while Illinois's LIHTC users are majority black. These states were also chosen because of my familiarity with and proximity to Wisconsin and Illinois. As a final case study, the state of Texas will be examined with a focus on *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project* – a landmark case in the fight for housing justice.

To provide a thoughtful examination of the LIHTC system, I have focused my research on information presented by the IRS, information preserved in legal documents, information presented by the United States Department of Housing and Urban Development (HUD), information commissioned by HUD., information communicated by state housing credit agencies, and supplemental information provided by 501(c)(3) and 501(c)(4) policy research

organizations. Qualitative information was gathered through analyzing the language and interpretation of legal statutes, states' qualified allocation plans, IRS notices, case law, and policy research articles. Of greatest relevance is 26 U.S. Code § 42 with a particular focus on 26 USC § 42(m)(1) - "Qualified Allocation Plan." Quantitative information was derived from analyzing the LIHTC property data and LIHTC tenant demographic data in HUD's low-income housing tax credit 2019 database. Further information was sourced from the Center on Budget and Policy Priorities' 2018 state data finding on the "Distribution of Housing Units by Poverty Rate." Lastly, American Community Survey data, last gathered in 2010, and the Distressed Community Index, created in 2020 by the Economic Innovation Group, helped me compare the prosperity markers of different neighborhoods.

It is important to note the limitations of this investigation. As a policy initiative birthed in 1986, LIHTC is still in its infancy, and we are just beginning to trace patterns and outcomes of LIHTC properties. Data tabulations of LIHTC property distributions that are referenced in this paper range from findings in 2011 to findings in 2019; thus, there is a 3-year gap that isn't fully accounted for. This could be significant when considering a heightened national consciousness about inequity and racial disparities in recent years, which may have influenced how states now choose to allocate their low-income housing tax credits. It is also worth noting that there is currently no tenant demographic information available for individual LIHTC properties. This makes it difficult to evaluate the extent that minority families *have* accessed LIHTC housing in high opportunity areas.

**History of LIHTC and How It Works**

The low-income housing tax credit (LIHTC) was enacted by Ronald Reagan as part of the Tax Reform Act of 1986. Reagan's tenure in office was marked with neoliberalism, an

ideology that emphasized deregulation, the encouragement of entrepreneurship, and a decline in government interference in the free market. With a sarcastic and critical view of government's role in public service, Ronald Reagan cut the budget for public housing and the Section 8 housing choice voucher program in half within his first year of office (Dreier, 2004). The LIHTC program, which was initiated several years later, played a key role in attempting to fill the low-income housing void that Reagan had left with his earlier budget cuts. The beauty of the LIHTC system was that it also perfectly aligned with Reagan's neoliberalist stance; it served as a way for the federal government to circumvent providing direct subsidies for the creation of affordable housing.

In the LIHTC system, the Internal Revenue Service (IRS) allocates tax credits to each state, the amount of which varies depending on a state's population size. Each state has its own housing credit agency, responsible for awarding tax credits to the developers whose applications best meet the stated priorities a housing agency sets in a given year (Stamm & LaJoie, 2020). These priorities are reflected in a state housing credit agency's qualified allocation plan (QAP), which outlines its selection criteria. Developers who manage to garner tax credits then exchange the tax credits for capital from their investor-partners, who can then claim the tax credits over the course of 10 years (Stamm & LaJoie, 2020). Developers benefit by using the capital to fund affordable housing projects and investors benefit by gaining valuable tax credits that reduce their personal tax liability. However, the party that perhaps benefits the most is the federal government. This is because LIHTC acts as an indirect subsidy that is only guaranteed if developers and their investor-partners successfully create and maintain affordable housing for a minimum of 15 years.

Both for-profit and non-profit developers have dual aims - addressing community housing needs and gaining the maximum tax credits available by meeting as much of the scoring criteria in a state's QAP as possible. With these dual aims come potential complications. Sometimes developers can become so focused on maximizing their tax credits that their applications may invertedly contribute to: 1) Concentrating poverty and furthering segregation and 2) Undercutting successful community revitalization efforts.

**Concentrating Poverty and Furthering Segregation**

26 USC § 42(m)(1) states that a qualified allocation plan (QAP) consists of "selection criteria" that align with the priorities of each state's housing credit agency. However each state must "give preference" to LIHTC projects that serve "the lowest income tenants," projects that "serve qualified tenants for the longest periods," and projects that "are located in qualified census tracts and the development of which contributes to a concerted community revitalization plan" (Legal Information Institute, n.d.-b). For the purpose of this section, the implications of the first clause – providing preference to projects "located in qualified census tracts" - will be explored while the veracity of the second clause - "concerted community revitalization plan" will be discussed in the next section.

As defined in 26 USC § 42(d)(5)(ii), a "qualified census tract" (QCT) is any census tract "in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent" (Legal Information Institute, n.d.-b). For its part, HUD designates what a region's area median income (AMI) is for a given year and thus sets the standard by which to determine QCT eligibility (Stamm & LaJoie, 2020). 26 USC § 42(d)(5)(i) provides a specific incentive to creating new LIHTC properties in these higher-poverty, lower-income QCT areas by declaring

that the "eligible basis" of any new building located in a QCT is "130 percent" (Legal Information Institute, n.d.-b). This means that state housing credit agencies must not only give preference to LIHTC projects located in QCTs but also provide a 30% tax credit increase to developers who build in QCTs - an alluring benefit with potential complications.

These preferences and provisions have likely led to the high clustering of LIHTC properties in high-poverty areas. This is because developers and their investor partners have more to gain by constructing LIHTC properties in QCTs than in economically advantaged areas. A 2011 HUD-commissioned study, *Exploring the Spatial Distribution of Low Income Housing Tax Credit Properties*, provided a further basis for this line of reasoning. The report found that there are far greater clusters of LIHTC properties "in locations that have higher poverty rates and lower shares of non-Hispanic whites" and that "LIHTC programmatic rules" - particularly the 30% tax credit increase given to developers who build in QCTs - "may be contributing to these outcomes" (Dawkins & Assisted Housing Research Cadre Report, 2011). Ironically, mission-driven developers may also be contributing to these outcomes due to their predisposition to construct in QCTs so that they can fulfill an immediate need for affordable housing.

The crux of the matter is that if there is a disproportionate number of LIHTC properties built in QCTs and not in areas of opportunity – areas that have low poverty levels and high quality of life markers - then tenants who rely on LIHTC housing have fewer living choices and thus, less agency. If LIHTC tenants are confined to high-poverty areas and have little access to living in areas of opportunity, there exists a LIHTC housing disparity with implications of disparate impact[1]. This is because minority groups – specifically black and Latinx groups – are

[1] According to § 100.500(a), "Liability may be established under the Fair Housing Act based on a specific policy's or practice's discriminatory effect on members of a protected class under the Fair Housing Act even if the specific practice was not motivated by a discriminatory intent" (Legal Information Institute, n.d.-a).

statistically more likely to live in QCTs with high clusters of LIHTC properties (Dawkins & Assisted Housing Research Cadre Report, 2011). As such, the disparity of LIHTC property distribution can have the unfortunate effect of concentrating poverty and furthering segregation, which is in violation of the Fair Housing Act[2].

After examining data on disparities in LIHTC property distribution, it became clear that reality reflects this theory. A 2018 study by the 501(c)(3) nonprofit organization, the Center on Budget and Policy Priorities (CBPP), found that 33.7% of LIHTC properties in the United States are concentrated in areas where there is a neighborhood poverty rate of 30% or greater. This stands in contrast to the 15.1% of LIHTC properties that are built in areas where there is a neighborhood poverty rate of 10% or less, which are commonly regarded as areas of opportunity (Center on Budget and Policy Priorities, 2018). Yet not every state follows this national trend; an analysis of 2019 LIHTC tenant demographic data revealed that states where LIHTC tenants are predominately white have a greater propensity to construct LIHTC properties in areas of opportunity, whereas states that have LIHTC tenants that are predominately black are disposed to cluster LIHTC properties in high poverty areas. These findings are reflected below in **Figure 1** and **Figure 2**:

**Figure 1.** LIHTC disparities amongst the 8 states with the highest percentage of black LIHTC tenants (with Illinois serving as a mid-point). 7 of the 9 states show a trend of LIHTC properties being overly concentrated in areas where the neighborhood poverty rate is 30% or higher. *Informaton derived from CBPP tabulations and HUD LIHTC tenant demographic data.

| State | MS | DC | GA | SC | LA | DE | AL | MD | IL |
|---|---|---|---|---|---|---|---|---|---|
| White LIHTC Tenants | 12.4% | 1.4% | 19.4% | 21.1% | 13.9% | 25.6% | 34.2% | 21.1% | 39.7% |

[2] "Title VIII of the Civil Rights Act of 1968, known as the Fair Housing Act... requires recipients of HUD funds to take meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics" (U.S. Department of Housing and Urban Development, n.d.).

| Black LIHTC Tenants | 77.2% | 76.3 | 75.3% | 71.4% | 70.2% | 64.3% | 64.2% | 63.1% | 50.9% |
|---|---|---|---|---|---|---|---|---|---|
| LIHTC in <10% | 3.1% | 2.9% | 8.2% | 7.3% | 5.4% | 16.1% | 11.3% | 33.3% | 14.7% |
| LIHTC in >30% | 72.3% | 49.6% | 47.4% | 35.5% | 50.2% | 10.4% | 32.6% | 18.4% | 41.5% |

**Figure 2.** LIHTC disparities amongst the 8 states with the highest percentage of white LIHTC tenants (with Wisconsin serving as a mid-point). 6 of the 9 states reflect a trend of higher percentages of LIHTC properties being located in areas where the neighborhood poverty rate is less than 10% instead of 30% or greater. *Informaton derived from CBPP tabulations and HUD LIHTC tenant demographic data.

| State | ID | ME | VT | WV | MT | NH | ND | SD | WI |
|---|---|---|---|---|---|---|---|---|---|
| White LIHTC Tenants | 79.8% | 79.0% | 77.6% | 77.1% | 76.5% | 73.6% | 65.7% | 61.8% | 52.1% |
| Black LIHTC Tenants | 2.9% | 7.9% | 2.5% | 14.4% | 0.5% | 2.4% | 5.4% | 6.7% | 21.7% |
| LIHTC in <10% | 12.8% | 20.8% | 28.7% | 12.5% | 11.5% | 40.8% | 42.6% | 38.1% | 36.5% |
| LIHTC in >30% | 24.4% | 18.1% | 2.5% | 13.6% | 16.4% | 9.2% | 3.7% | 7.2% | 17.5% |

Despite identifiable patterns of racial segregation by LIHTC distribution, one could argue that the mere fact that LIHTC properties are constructed in areas of opportunity should be considered as a sign of progress. If LIHTC properties are built in areas of opportunity, it stands to reason that LIHTC tenants, particularly black LIHTC tenants, have the *option* of living in a more prosperous area. As seen in **Figure 2**, Wisconsin is one such state that bucks the trend of disproportionately concentrating LIHTC properties in QCTs. After analyzing HUD's LIHTC property database, I found a total of 41 LIHTC properties located in the top 50 Wisconsin zip codes with the lowest poverty rates – an encouraging result. As a comparison, Illinois only had 11 LIHTC properties located in its top 50 zip codes (HUD: PD&R., 2019). However, Wisconsin's numbers tell a deceptive story. After reviewing each LIHTC property's online profile, I discovered that 33 (80.5%) of the 41 LIHTC properties were exclusively designated for

senior living, only 6 (14.6%) offered multi-family housing, and 2 (4.9%) were unknown. It is also worth noting that each zip code analyzed had a population demographic that was, on average, over 95% white (Census Bureau - American Community Survey, 2022).

Who benefits from the construction of LIHTC properties in perceived areas of opportunity? The answer to that question depends on the type of properties created as well as the local (and target) population demographics. In the case of Wisconsin, my findings suggest that white seniors are the primary beneficiaries and that minority families have far fewer options for mobility. Thus, the want and ability of minority families to move to areas of opportunity remains unaddressed. Even though Illinois follows the same pattern as Wisconsin of designating the majority (63.6%) of the LIHTC properties in its lowest-poverty zip codes as senior living, more research needs to be done to confirm this national trend (Census Bureau - American Community Survey, 2022a). Nonetheless, to disrupt patterns of segregation, it is imperative to realize that the types of LIHTC properties created are just as important as the quantity and the locations.

**Undercutting Successful Community Revitalization Efforts**

Seemingly in recognition that stockpiling LIHTC properties in QCTs may not, as a standalone act, lead to the formation of a prosperous neighborhood, Section 42 specifies that state housing credit agencies must give preference to LIHTC projects that have a concerted revitalization plan (CRP). What Section 42 does not specify, however, is what a concerted revitalization plan is. As the IRS fails to provide a working definition of what a concerted revitalization plan is and makes no effort to set the basic standards that must be screened for, state housing credit agencies are left without a common roadmap to reference. The unfortunate result of this ambiguity is that the majority of state housing credit agencies have underdefined and undeveloped notions of what constitutes community revitalization. A 2013 study by the

Poverty & Race Research Action Council (PRRAC) found that amongst the qualified allocation plans (QAPs) of the 36 state housing agencies that were researched, only 6 bothered to explicitly define what community revitalization entailed (Khadduri, 2013). Without outlining clear standards of community revitalization that developers must respond to, housing agencies stymie the community revitalization efforts that they are federally mandated to provide preference to.

If developers are not provided with specific guidelines of what constitutes community revitalization, the LIHTC applications they submit are more likely to reflect general, lackluster efforts of community revitalization; proverbially, ambiguity begets ambiguity. Such a trend was identified by the IRS in Notice 2016-77, entitled "Satisfying the Required Qualified Allocation Plan Preference in Section 42(m)(1)(B)(ii)(III)." The principal author of the notice, James W. Rider, states that in some cases, "because development of new multifamily housing benefits a neighborhood, the development of a LIHTC project, without more, has been treated as if it were such a plan" (Rider & IRS, 2016). This alludes to a common occurrence of developers communicating that the mere existence of new affordable in a neighborhood was enough to constitute a concerted community revitalization effort. Such revitalization efforts are largely ineffective due to a lack of alternative resources provided to a community in "interventions in areas other than housing" (Khadduri, 2013). Simply put, housing is not enough.

Perhaps more troubling was a statement in Notice 2016-77 that read, "in some cases, state or local agencies allocating housing credit dollar amounts have given preference to projects that are located in qualified census tracts without regard to whether the projects contribute to a concerted community revitalization plan" (Rider & IRS, 2016). Further research confirmed this pattern, relaying that "most QAPs simply ignore the qualifier 'with a concerted community revitalization plan'" and will do little more than simply list the Section 42 requirements of

preferences in their QAP (Khadduri, 2013). As an example, the state housing agency of Wisconsin – the Wisconsin Housing and Economic Development Authority (WHEDA) - clearly states in its 2021-2022 QAP that it must give preference to the three criteria outlined in 26 USC § 42(m)(1); yet, when looking at its scoring system, it is unclear how all three of the criteria are prioritized. This scoring system is reflected in **Figure 3**.

**Figure 3.** WHEDA's Scoring Categories for its 2021-2022 QAP (WHEDA, 2021).

| Scoring Category | Max Points |
| --- | --- |
| 1. Lower-Income Areas | 5 |
| 2. Energy Efficiency and Sustainability | 20 |
| 3. Mixed-Income Incentive | 12 |
| 4. Serves Large Families (Three bedroom or larger units) | 5 |
| 5. Serves Lowest-Income Residents | 60 |
| 6. Supportive Housing | 15 |
| 7. Veterans Housing | 5 |
| 8. Rehab/Neighborhood Stabilization | 25 |
| 9. Universal Design | 18 |
| 10. Financial Leverage | 36 |
| 11. Eventual Tenant Ownership | 3 |
| 12. Project Team | 12 |
| 13. Areas of Economic Opportunity | 28 |
| 14. Rural Areas Without Recent HTC Awards | 8 |
| 15. Workforce Housing Communities | 12 |
| 16. Community Service Facilities | 5 |

Recalling the provisions in 26 USC § 42(m)(1), each state must "give preference" to LIHTC projects that serve "the lowest income tenants," projects that "serve qualified tenants for the longest periods," and projects that "are located in qualified census tracts and the development of which contributes to a concerted community revitalization plan" (Legal Information Institute, n.d.-b). Observably WHEDA's 2021-2022 QAP provides a preference to "the lowest income tenants" by allocating 60 max points to projects that fulfill this criterion – by far the highest point category. However, scoring criteria that provide preference to the other two provisions – serving qualified tenants for the longest periods and projects located in QCTs with a concerted

community revitalization plan – are not as visibly reflected (WHEDA, 2021). After reviewing WHEDA's 2020 self-scoring application to get clarity on the scoring category terms, I was unable to find any mention of serving qualified tenants for the longest periods, but I was able to find a brief overview on the category term, "Lower-Income Areas."

The scoring category of "Lower-Income Areas" lists a maximum of 5 points to be awarded to "properties in a QCT that have a Concerted Community Revitalization Plan (CCRP) that specifically addresses the need for affordable and/or rental housing in the area of the proposed HTC project." To claim these 5 points, developers must simply "attach a print-out of census tract from American Fact Finder or similar program" and "provide the website location for the [CCRP] or provide a hard copy of the plan" (WHEDA, 2020). While WHEDA goes on to specify in its self-scoring application what a CCRP must entail,[3] the lack of priority given to "Lower-Income Areas" is epitomized in its low point value - tied for the second lowest scored category.

A primary issue arising from WHEDA's 2021-2022 QAP is that it might be more time and point-efficient for developers to simply prioritize other categories in lieu of meeting the full list of CCRP requirements that come with the "Lower-Income Areas." For instance, developers can gain over five times as many points for developing projects in Areas of Economic Opportunity. With regards to the first section of this paper, such a point incentive can be an

[3] "Concerted Community Revitalization Plans (CCRPs) must: 1. be geographically specific (the proposed HTC development must be within the identified planning area) 2. include a strategy for obtaining commitments of public and private investment for infrastructure, amenities, or services beyond the proposed HTC development 3. clearly demonstrate the need for revitalization in the planning area 4. include elements such as outcome goals, timelines and benchmarks, and identification of community partners 5. have been approved within the past 10 years. CCRPs do not necessarily need to be approved by the local municipality. CCRPs completed by neighborhood groups (which meet the criteria noted above) will be acceptable" (WHEDA, 2020).

effective way of disrupting patterns of segregation; however, one goal should not be prioritized at the expense of another. The notions of priorities and efficacy come to light when challenging the outcomes of previous attempts, or non-attempts, at community revitalization via the LIHTC program in Wisconsin.

How truly revitalized are communities in Wisconsin after the construction of LIHTC properties? As a preliminary assessment, I examined the zip codes in Milwaukee with the highest concentrations of LIHTC properties per square mile. The zip code with the greatest number of LIHTC properties relative to its size was 53233, containing 15 LIHTC properties within 1.69 square miles – 4 of which were constructed in the last 10 years (HUD: PD&R., 2019). The unfortunate reality is that 53233 also has a "distress score" of 97.9 according to the 2020 Distressed Communities Index[4] (Economic Innovation Group, 2020). Despite the presence of 15 LIHTC properties, each of which should have theoretically come with its own CCRP, 53233 has the second-highest distress score in all of Milwaukee. Is this ineffectual revitalization the result of a lack of federal guidance that "effectively makes the [CCRP] provision a nonbinding, nominal requirement," the result of flawed QAPs that favor certain categories above others, or the result of a lack of accountability once CCRPs are approved (Planning Forum UT, 2022)? Further research must be done to respond to this question and truly assess the success of LIHTC properties in QCTs in spurring community revitalization beyond providing affordable housing.

It is also worthwhile to consider if developers of affordable housing should be tasked with the tall order of community revitalization, especially without government guidance and funding. Are LIHTC developers, some of whom do not have work or lived experience in the

[4] The Distressed Community Index (DCI) measures distress according to 7 metrics: No high school diploma, Poverty rate, Adults not working, Housing vacancy rate, Median household income, Change in employment, and Change in establishments (Economic Innovation Group, 2020).

communities they're hoping to construct in, asked too much of? A criticism of the LIHTC program is that it is both over and underregulated. Over, as developers must be aware of intricate LIHTC guidelines that run over 300 pages; under, as LIHTC properties are free from government oversight after a mere 30 years, at which point affordable housing units can be transitioned to market-rate units if local demand allows (IRS, 2015). Is adding on the role of community organizer to affordable housing developers the result of governments shirking their responsibilities to care for their locales in favor of clinging to their neoliberal tendencies? What are the long-term effects of overburdened developers whose half-hearted attempts at community revitalization involve neither the "community" or a sense of "revitalization"?

## Tools to Affirm Fair Housing and Enact Housing Justice

In an ideal world, LIHTC tenants – and more specifically, minority families - would have multiple "good" choices for where to live. In an ideal world, there would be true access to areas of opportunity as well as true investment in distressed neighborhoods so that they no longer rank as "distressed." The three tools discussed below - leveraging awareness of disparate impact, maximizing qualified allocation plans, and planning for recapitalization - can be used to help us move towards an ideal world.

### Leveraging Disparate Impact

In 2012, The Inclusive Community Project (ICP), a 501(c)(3) nonprofit organization, sued the Texas Department of Housing and Community Affairs (TDHCA), the housing credit agency of Texas, claiming that TDHCA's LIHTC allocations were racially discriminatory and had a disparate impact. At issue was TDHCA's pattern of "disproportionately approving LIHTC in predominantly minority neighborhoods and disproportionately denying LIHTC in

predominantly Caucasian neighborhoods" (*Texas Department of Housing and Community Affairs v. The Inclusive Communities Project,* 2012). Evidence provided by ICP showed that "from 1999–2008, TDHCA approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas" (*Texas Department of Housing and Community Affairs v. The Inclusive Communities Project,* 2012). As non-elderly projects typically have more minority residents, the LIHTC allocating patterns of TDHCA were regarded as furthering segregation and limiting the abilities of minorities to access potential areas of opportunity. The District Court of Texas did not find TDHCA guilty of racial discrimination but did find that there was a proven disparate impact and subsequently ordered TDHCA to file a remedial plan to affirmatively further fair housing.

*Texas Department of Housing and Community Affairs v. The Inclusive Communities Project* ignited a national discourse about disparate impact in housing. In 2015, the Supreme Court of the United States held that disparate impact claims are cognizable under the Fair Housing Act – a landmark moment that validated the use of disparate impact claims to challenge harmful housing policies (Henneberger, 2016). This is especially significant when considering that rulings about disparate impact in housing had previously been steered by common law. Only in the years after *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project* would formal guidelines about disparate impact become codified in 24 CFR § 100.500 (85 FR 60288, 2020). Even though the revised burden of proof procedure in 24 CFR § 100.500 disadvantages plaintiffs by requiring overwhelming evidence of policy malfeasance, the mere fact that disparate impact claims are cognizable is enough to galvanize

state housing credit agencies to adjust their approach in issuing LIHTC credits for fear of a potential disparate impact claim (Henneberger, 2016).

**Maximizing Qualified Allocation Plans**

TDHCA's remedial plan centered on maximizing its qualified allocation plan to disrupt patterns of segregation. The agency's aim was to incentivize the development of LIHTC properties in high opportunity areas while simultaneously issuing "co-equal incentives" to developments in QCTs that have "true concerted revitalization plans" (*Texas Department of Housing and Community Affairs v. The Inclusive Communities Project,* 2012a). One of the major incentives that TDHCA, and every other state housing credit agency, has at their disposal is found in 26 USC § 42(d)(5)(B)(v), which allows for a discretionary 30% tax credit increase for any LIHTC building that an agency deems needing an increase in credit to become "financially feasible" (Legal Information Institute, n.d.-b). Other methods to spur change include modifying a state's QAP by designating a "set-aside" of a portion of tax credits to be exclusively dedicated to developing LIHTC properties in areas of opportunity, as well as simply restructuring a state's QAP scoring criteria to assign more points to an areas of opportunity category, as previously exemplified by WHEDA's 2021-2022 QAP (Khadduri, 2013). Ultimately, by leveraging federal incentives and restructuring their QAPs, state housing credit agencies have the power to allocate low-income housing tax credits in ways that go beyond meeting the need but the want as well.

However, in order to fully meet the want, standards for community revitalization need to be more rigorous. In a 2013 PRRAC investigation into the role of QAPs in creating balance in the LIHTC system, Jill Khadduri suggested that community revitalization plans implement the following requirements: "an assessment of the current condition of the neighborhood, a description of the plans for overcoming the neighborhood's problems, [and] a description of the

resources that are being or will be devoted to the revitalization effort (other than local government financial support for the LIHTC property itself).” The last point is perhaps the most pertinent. Without providing an economic investment into a community beyond the provision of affordable housing, a community revitalization plan is merely text. Encouragingly, the revisions in TDHCA’s QAP from 2012 to 2015 seem to recognize this. In 2012, there was only 1 maximum point (out of a total of 226 maximum QAP points) assigned for community revitalization and there was no budget required (Planning Forum UT, 2022). In 2015, there were 6 maximum points (out of a total of 179 maximum QAP points) assigned for community revitalization and these 6 points were only available to CCRPs that have a budget equal to or greater than $6 million (Planning Forum UT, 2022). Whether such a budget is too high of a threshold and a potential disincentive for developers is subject to debate.

**Planning for Recapitalization**

LIHTC properties must not only be built in areas of opportunity and in QCTs, but they should also be maintained. Affordability restrictions on LIHTC properties are lifted after 30 years, at the end of the “extended use period” (Stamm & LaJoie, 2020). At risk is the transition of LIHTC properties to market rates and subsequently, the ousting of tenants who may not be able to afford the increased rent. But is this risk truly substantial or likely? According to a 2012 study commissioned by HUD’s Office of Policy Development and Research, “the most likely properties to have been repositioned as unaffordable, market-rate housing are properties in low-poverty locations” (Abt Associates Inc. et al., 2012). Nevertheless, over the last seven years, non-profit managed LIHTC properties located in QCTs have also become at-risk, with investors refusing to transfer over ownership to their nonprofit partners at year 15, which is typical procedure in the LIHTC system (Washington State Housing Finance Commission, 2019). Thus,

LIHTC properties are at-risk both in areas of opportunity and in QCTs experiencing, or likely to experience, gentrification. LIHTC properties conform to the conditions of the local market they serve, so if there is enough of a demand for housing from individuals with more expendable incomes, LIHTC properties can be transformed to properties that no longer address needs or wants but the demands of the more affluent.

To mitigate the risks of LIHTC properties becoming unaffordable, state housing credit agencies can set aside a portion of their credits towards the recapitalization of existing LIHTC properties. With recapitalization, LIHTC properties receive additional tax credits to help offset the cost of providing low-income housing and any capital improvements that may be needed. As a condition of receiving these additional credits, affordability standards must be maintained for an additional 30 years (Abt Associates Inc. et al., 2012). Multi-family LIHTC homes in areas of opportunity should be a priority for recapitalization; doing so would provide a pathway for low-income minority families to reside in low-poverty areas beyond a trivial number of years. LIHTC properties in gentrifying, or soon to be gentrifying neighborhoods, should also be a priority so that tenants can experience community revitalization without being ousted from their neighborhoods just as improvements are being made.

## Conclusion

During the Supreme Court trial of *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, Justice Anthony Kennedy remarked that courts should strive to "eliminate racial disparities through race-neutral means" (*Texas Department of Housing and Community Affairs v. The Inclusive Communities Project,* 2015). The issue is that one cannot combat disparate impact with colorblind policies; affirmative housing cannot exist without race-conscious decisions. This paper explored how the LIHTC legal system has

contributed to: 1) Concentrating poverty and furthering segregation and 2) Undercutting successful community revitalization efforts. Ambiguous terms in Section 42, a lack of federal guidance, and the absence of meaningful accountability from state housing credit agencies have likely led to this reality. The other culprit is simply a lack of want; not from minority families who want multiple good options of where to live but a lack of want from state agencies to truly create inclusive communities and overcome historical patterns of racial confinement. What I have learned through this journey is that the LIHTC system can address more than the need – it can fulfil the want – but it simply hasn't been used to do so. At least not yet.

The case between TDHCA and the Inclusive Communities Project proved nonprofits can play a key role in the fight for housing justice. Tools to affirm fair housing that were gleaned from the case included leveraging disparate impact, maximizing QAPs, and planning for recapitalization. The inciting incident for longstanding change though, is simply... clarity. What does it truly mean to give "preference" to projects in QCTs, according to 26 USC § 42(m)(1)? As state housing agencies each devise their own state-specific QAPs, each state can interpret what giving "preference" means without being held accountable to a federally defined standard. This ambiguity has bred confusion and that confusion has led to inaction – a perpetuation of a status quo of disparate impact where LIHTC properties are highly clustered in QCTS. To date, the IRS has also failed to provide any further guidance on the term "concerted community revitalization plan" and merely conveyed an abstruse message that "the preference fails to apply unless... a plan exists that contains more components than the LIHTC project itself" (Rider & IRS, 2016).

Aside from the want of a more just housing landscape and the clarity to help achieve that want, it is important to outline what is being advocated for and what isn't. I am not advocating that LIHTC be used for a "black and brown flight." An exodus to the suburbs doesn't ignore the

issue of communities in need of revitalization and emphatically, revitalization without gentrification. It is also imperative to not fall into the trap of pursuing solutions with a deficit-based mindset. Successful community revitalization augments what is already great about a community, and in most cases, I would argue that a community's greatest asset is its people. These people have the power to inform policy but only if listened to. So, this is where I stop writing and just listen.

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