

August 14, 2023

James Tassos
National Council of State Housing Agencies
444 North Capitol Street NW
Washington, DC 20001

RE: Proposed 2023 Revisions to NCSHA Recommended Practices in Housing Credit Administration

Dear colleagues,

We are writing to provide comments on the NCSHA's proposed revisions to the LIHTC Best Practices guide, from the perspective of fair housing and civil rights best practice. Our organizations have many years of experience working with state housing agencies (SHAs), individual LIHTC developments, tenants' groups, and financing entities on these issues.

First, we want to commend NCSHA for its leadership role in the LIHTC program. NCSHA's 2017 Recommended Practices Guide helped to highlight the fair housing problems associated with local contribution and approval provisions in state Qualified Allocation Plans (QAPs), and the importance of giving meaningful content to the "concerted community revitalization plan" requirement for LIHTC developments located in Qualified Census Tracts (QCTs). While a number of states were beginning to address these issues at that time, NCSHA's leadership accelerated reform, to the point where a vast majority of states now follow these recommended civil rights practices. With its upcoming revisions to the Recommended Practices Guide, NCSHA is once again in a position to lead, and to help state SHAs address long-standing fair housing issues which continue to undermine the LIHTC program.

Section 41: Encouraging Fair Housing Compliance

We support the inclusion of tenant selection plans that include procedural protections for tenant screening and admissions, and the continuing reference to affirmative marketing plans, but we urge NCSHA to be more specific about some of the basic elements of these plans,¹ and to encourage Agencies to *require*, not just "incentivize," the adoption of tenant selection and affirmative marketing plans.² Specifically, in addition to aligning with federal fair housing guidance and best practices on the use of criminal records, prior eviction judgments, and credit

¹ PRRAC has previously laid out basic elements of tenant selection and affirmative marketing in "Accessing Opportunity: Affirmative Marketing and Tenant Selection in the LIHTC and Other Housing Programs" (December 2012), <http://www.prrac.org/pdf/affirmativemarketing.pdf>.

² Basic tenant selection and affirmative marketing plans are required by the Fair Housing Act's Affirmatively Furthering Fair Housing provision, which applies to LIHTC, and by the LIHTC's incorporation of the Fair Housing Act and its tenant selection rules and guidebook at 26 CFR § 1.42-9. As part of their AFFH responsibilities, SHAs should provide stronger guidance to LIHTC owners on these requirements and develop a system to monitor and ensure compliance.

history,³ the Recommended Practices Guide should describe the following elements of tenant selection and affirmative marketing plans:

- > elimination of first-come, first-served procedures for initial occupancy and waitlist management – initial occupancy should be based on a lottery of eligible applicants after affirmative marketing efforts have been implemented;
- > extended application periods and use of multiple application modes (mail, online, in-person);
- > elimination of local residency preferences;
- > clarify that the goal of an affirmative marketing plan for initial occupancy is to ensure that the initial applicant pool fairly reflects the demographics of the eligible population in the housing market region, including adequate representation by persons least likely to apply (based on the local demographics of the community the LIHTC development is located in).

We also strongly support the reference to discrimination against Housing Choice Vouchers in the Recommended Practices Guide, and we urge NCSHA to go further in its recommendation, by urging Agencies to prohibit *all* practices that limit access for families with vouchers,⁴ and by requiring compliance with all federal, *state and local* non-discrimination requirements, and to indicate that Agencies should also make referrals of voucher discrimination to state enforcement agencies in states where discrimination against families with vouchers is prohibited. In addition, NCSHA should specify the types of screening practices that effectively discriminate against families with vouchers and should be eliminated, including minimum income requirements and use of credit scores. State Agencies' monitoring of compliance with voucher non-discrimination requirements should include a review of all LIHTC developments to identify properties with few or no residents with vouchers, and to work with those properties to encourage affirmative outreach to nearby public housing agencies with voucher programs. NCSHA should also recommend outreach to voucher households (via PHAs) as part of affirmative marketing policies.

Collection of racial and ethnic (and Housing Choice Voucher) occupancy data of LIHTC developments – at the individual development level – is a key aspect of fair housing monitoring and enforcement. In spite of recent improvements, enforcement of the project-level demographic reporting requirements of 42 U.S.C. § 1437z-8 is still lagging in many states, making it virtually impossible to identify developments where there may be issues with discriminatory tenant selection, weak affirmative marketing, or discriminatory screening requirements for families with Housing Choice Vouchers. NCSHA's recommended practices should underscore this

³ See, e.g., U.S. Department of Housing and Urban Development, "Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records," April 4, 2016; NCRC Letter to FTC and CFPB re Equity in Tenant Screening, May 30, 2023, available at <https://ncrc.org/ncrc-comment-letter-to-the-ftc-and-cfpb-on-equity-in-the-tenant-screening-process/>.

⁴ The Recommended Practices Guide's ambiguous reference to "unlawful" practices suggests that there are lawful practices that owners might utilize to exclude families with vouchers, which is misleading.

statutory requirement and encourage SHAs to obtain project-level data from all LIHTC developments in their states.

Section 4: Reducing Local Barriers to Development

To strengthen this section, we urge NCSHA to encourage SHAs to affirmatively support developers facing NIMBY opposition, for example, by rolling over tax credit allocations for developers facing opposition, by allowing modifications to approved applications, or by providing additional state financial and legal support.

Section 9: Promoting Resident Choice and Opportunity

We support the Recommended Practices' reference to the Affirmatively Furthering Fair Housing obligation, the continuing encouragement of new housing development in areas of opportunity, and the instruction to SHAs to consider the cumulative concentration of LIHTC housing in higher poverty areas. To strengthen these points, and to reflect current social science conclusions, we suggest the following language changes:

Agencies should develop QAP and/or other program policy documents (including set-asides of credits or significant point incentives in QAPS) to facilitate the siting of new affordable housing for families with children in diverse locations, including low-distress, low-poverty areas that provide residents with access to various amenities—typically considered “areas of opportunity”—as well as preserving existing affordable housing in areas that historically have had higher poverty and distress rates, but in which housing and other stakeholders seek to create new opportunities for residents through holistic community revitalization.

Notwithstanding the balance between opportunity siting and preservation in other areas, we urge NCSHA to encourage SHAs to develop and employ basic siting standards for any new development. For example, new family LIHTC properties should not be sited in proximity to environmental health burdens, or in neighborhoods served by the lowest performing schools in their region.

Section 3: Concerted Community Revitalization Plans

We support NCSHA's encouragement to SHAs to include meaningful criteria in assessing compliance with the Concerted Community Revitalization Plan preference. However, in this section and elsewhere in the recommended practices document, the preference is inadvertently mischaracterized as a preference for developments located in QCTs. That is not the way the preference is stated in the LIHTC statute – it is a preference for proposals with concerted community revitalization plans *among* applications for developments located in QCTs. We urge NCSHA to avoid this ambiguity in its Recommended Practices document, as it will continue to perpetuate the myth among some SHAs that there is a statutory preference for developments located in high poverty neighborhoods.

Thank you for the opportunity to comment. We appreciate NCSHA's efforts to promote affirmative fair housing activities among its members – and we would be happy to meet to provide further input into the process.

Sincerely,

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