

# Building Opportunity III:

## Affirmatively furthering fair housing in the Low Income Housing Tax Credit program

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## Introduction

PRRAC began tracking civil rights related provisions in state Qualified Allocation Plans (QAPs) in 2008,<sup>1</sup> out of concern for a growing concentration of LIHTC developments in high poverty, segregated neighborhoods, a trend which had already generated fair housing litigation in several states. Since that first 50-state survey, and a followup survey in 2015,<sup>2</sup> much has changed. Whether because of increasingly powerful public health and social science evidence, growing awareness of fair housing obligations, or positive leadership within the industry, an increasing number of states have eliminated potentially discriminatory provisions in their QAPs, added incentives for development in high opportunity communities, strengthened affirmative marketing and tenant selection practices, and defined requirements for concerted community revitalization plans accompanying developments in low income neighborhoods.

Strong incentives to support new LIHTC development in higher opportunity communities are especially important today, as an increasing share of LIHTC funds are going toward preservation of existing public and assisted housing developments, which are often located in high poverty neighborhoods. Preservation of existing affordable housing is critical, but to maintain balance and choice in affordable housing investment, even greater efforts must be made to expand *new* LIHTC family development in low poverty communities with high performing schools. Improved QAPs are an important first step toward this goal, but the true test of fair housing compliance is the program's performance in siting new developments, affirmative marketing, nondiscriminatory tenant selection, and community development.

This 50-state survey will report on current state trends in local contribution and approval requirements, incentives for siting developments in high opportunity neighborhoods, affirmative marketing and tenant selection, and the concerted community revitalization requirement.<sup>3</sup>

### 1. A dramatic decline in local contribution and approval requirements and incentives

Requirements or incentives for local government support of LIHTC developments have traditionally been viewed as the most exclusionary provision in state QAPs, effectively giving local governments veto power over any LIHTC development, and deterring developers from even attempting to propose family housing developments in known exclusionary communities.

In *Building Opportunity II* (2015),<sup>4</sup> we observed that, overall, provisions around local support were getting weaker, but were not less common. Following our 2015 review of state Qualified Allocation Plans and

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1 Sarah Bookbinder et al, *Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program* (PRRAC and the Lawyers' Committee for Civil Rights Under Law, 2008), <http://www.prrac.org/pdf/2008-Best-Practices-final.pdf>.

2 Sarah Oppenheimer et al, *Building Opportunity II: Civil Rights Best Practices in the Low Income Housing Tax Credit Program* (PRRAC, 2015), <http://www.prrac.org/pdf/BuildingOpportunityII.pdf>.

3 All data in this report are drawn from the most recent Qualified Allocation Plans available during our research window in 2022-2023; these were usually year 2022 QAPs.

4 *Supra* note 2.

LIHTC provisions, the IRS released Revenue Ruling 2016-29,<sup>5</sup> which confirmed that the LIHTC statute<sup>6</sup> does not require local support or contribution in state LIHTC plans. Around the same time, HUD and the Furman Center released research showing that QAP provisions have a measurable effect on the location of developments.<sup>7</sup> The IRS Revenue Ruling’s clarification of the local contributions and approval requirement was echoed in the National Council of State Housing Agencies (NCSHA)’ 2017 Recommended Practices in Housing Credit Administration report<sup>8</sup> and in bipartisan bills in the last two Congresses.<sup>9</sup>

### **The 2016 Revenue Ruling**

This 2016 IRS Revenue Ruling on the LIHTC statute confirmed that, while the Internal Revenue Code requires each jurisdiction to be notified and given a reasonable opportunity to comment on any LIHTC project proposal in the jurisdiction, there is no requirement for the project to obtain the jurisdiction’s approval. Thus, while the statutory minimum requirement is such that allocating agencies notify local jurisdictions and provide jurisdictions an opportunity to comment on the proposed project, *“this section does not require or encourage these agencies to reject all proposals that do not obtain the approval of the locality where the project developer proposes to place the project. That is, it neither requires nor encourages housing credit agencies to honor local vetoes.”*<sup>10</sup> Importantly, the revenue ruling also noted that LIHTC is subject to the Fair Housing Act and its Affirmatively Furthering Fair Housing obligation.<sup>11</sup> The ruling also stated that the practice of requiring local approval could create a pattern of “allocating housing credit dollar amounts” in a way that perpetuates residential segregation and, resultingly, has a discriminatory effect based on race in violation of the Fair Housing Act.<sup>12</sup>

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5 IRS Revenue Ruling 2016-29, [https://www.irs.gov/irb/2016-52\\_IRB#RR-2016-29](https://www.irs.gov/irb/2016-52_IRB#RR-2016-29).

6 26 U.S.C. § 42(m)(1)(A)(ii) (referred to as the LIHTC statute) states: “Notwithstanding any other provision of this section, the housing credit dollar amount with respect to any building shall be zero unless—(ii) such agency notifies the chief executive officer (or the equivalent) of the local jurisdiction within which the building is located of such project and provides such individual a reasonable opportunity to comment on the project.”

7 See “Effect of QAP Incentives on the Location of LIHTC Properties” (HUD, 2015), [https://www.novoco.com/sites/default/files/atoms/files/pdr\\_qap\\_incentive\\_location\\_lihtc\\_properties\\_050615.pdf](https://www.novoco.com/sites/default/files/atoms/files/pdr_qap_incentive_location_lihtc_properties_050615.pdf); Ingrid Gould Ellen and Keren Mertens Horn, “Points for Place: Can State Governments Shape Siting Patterns of LIHTC Developments?” (NYU Furman Center, December 2017), available at: [https://furmancenter.org/files/Can\\_State\\_Governments\\_Shape\\_Siting\\_Patterns\\_of\\_LIHTC.pdf](https://furmancenter.org/files/Can_State_Governments_Shape_Siting_Patterns_of_LIHTC.pdf).

8 National Council of State Housing Agencies, “Recommended Practices in Housing Credit Administration,” updated Dec. 2017. Available at: <https://www.ncsha.org/wp-content/uploads/2018/05/NCSHA-Recommended-Practices-in-Housing-Credit-Administration-Updated-Dec-2017.pdf>.

9 Affordable Housing Credit Improvement Act of 2021 (Cantwell-Hatch Act), S.1136 and H.R. 2573; Affordable Housing Credit Improvement Act of 2023 (AHCIA), S.1557 and H.R. 3238.

10 The Revenue Ruling specifies that “§42(m)(1)(A)(ii) ensures only the opportunity for local input to the allocation decision. It does not authorize an allocating agency to abandon the responsibility to exercise its own judgment. In particular, it does not require or encourage allocating agencies to bestow veto power over LIHTC projects either on local communities or on local public officials.” IRS Revenue Ruling 2016-29, <https://www.irs.gov/pub/irs-drop/rr-16-29.pdf>.

11 “The obligation to affirmatively further fair housing 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, “Affirmatively Furthering Fair Housing,” <https://www.hud.gov/AFFH>.

12 IRS Revenue Ruling, supra note 6.

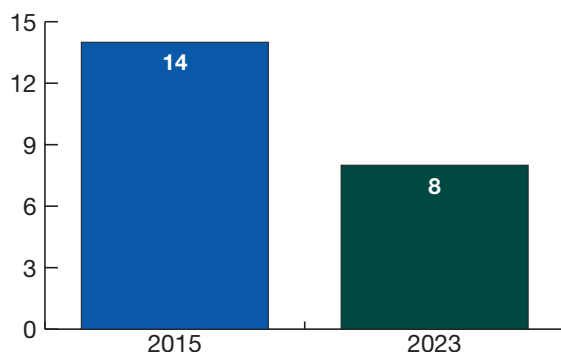
## The NCSHA Recommended Practices report

The NCSHA's 2017 "Recommended Practices" report recommended that "Agencies should not require local approval...as a threshold qualification or allocate points for local approval as part of a competitive scoring system."<sup>13</sup> The report also recommended that states not require local financial contributions as a condition for receiving housing credits.<sup>14</sup> These recommendations also recognized that giving localities the ability to actively or passively "veto" the development of LIHTC properties raised fair housing concerns.<sup>15</sup>

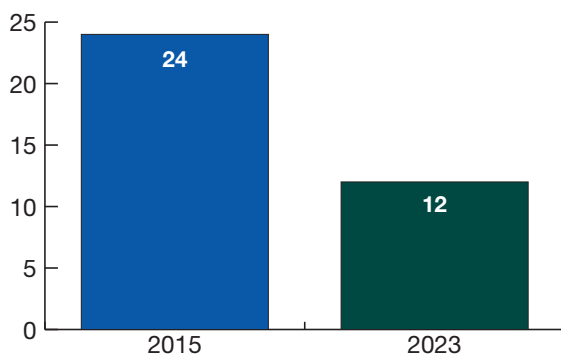
## Gradual phasing out of local contribution and approval incentives

Following the IRS ruling and the NCSHA report, more and more states are now following the minimum statutory requirements for local notification. A minority of states still maintain local contribution and approval as either a threshold requirement or the basis for competitive advantage in the QAP: Only eight states still have threshold requirements and only twelve states now allocate points for developments that can show local contribution or approval.

**Figure 1: Number of State QAPs with threshold local contribution and/or approval requirements**



**Figure 2: Number of State QAPs allocating points for local contribution and/or approval**



13 National Council of State Housing Agencies, supra note 8 at page 8.

14 Ibid.

15 Ibid.

## Examples of remaining local contribution and approval provisions

Though in the minority, several states insist on maintaining local approval as a threshold requirement. Arizona's QAP provides a good example:

“ADOH will notify the local government where the project is located and request that the local government provide a letter of acknowledgement and consent to the project. The local government will be required to respond to ADOH within 30 days from the date of the letter. *An application will be deemed ineligible in the event that the local government either fails to provide the letter or otherwise indicates that the proposed project is unfavorable.* ADOH will determine whether the objectionable characteristic(s) can be mitigated, before determining that a project is ineligible for an award.”<sup>16</sup>

Missouri's QAP appears to include a threshold requirement for local approval, albeit more ambiguously than Arizona:

“MHDC seeks to allocate funding to developments that appropriately and efficiently improve their communities. Impact may be weighed using...comments from the local jurisdiction, including but not limited to chief executive officers and community members.”<sup>17</sup>

Virginia does not treat local contribution and approval as a threshold requirement, but instead places a high point value on QAP provisions demonstrating local support,<sup>18</sup> and gives a major point deduction for local opposition based on inconsistency with local zoning laws, as long as the local attorney certifies that the opposition does not violate the Fair Housing Act (!).

“Up to 25-point DEDUCTION for a letter in response to its notification to the chief executive officer of the locality in which the proposed development is to be located opposing the allocation of credits to the applicant for the development. In any such letter, the chief executive officer must certify that the proposed development is not consistent with current zoning or other applicable land use regulations. Any such letter must also be accompanied by a legal opinion of the locality's attorney opining that the locality's opposition to the proposed development does not have a discriminatory intent or a discriminatory effect (as defined in 24 CFR 100.500(a)) that is not supported by a legally sufficient justification (as defined in 24 CFR 100.500(b)) in violation of the Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended) and the HUD implementing regulations.”<sup>19</sup>

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16 Arizona Department of Housing, “2022 and 2023 Qualified Allocation Plan.” Page 4. Available at: <https://housing.az.gov/sites/default/files/documents/files/Final-QAP-2022-2023.pdf>.

17 Missouri Housing Development Commission, “Qualified Allocation Plan for MHDC Multifamily Programs.” Page 34. Available at: <https://mhdc.com/media/jsnbq414/qualified-allocation-plan.pdf>.

18 “Up to 40 points for: Any funding source, as evidenced by a binding commitment or letter of intent that is used to reduce the credit request; Commitment to donate land or buildings or tap fee waivers from the local government; or Commitment to donate land (including a below market-rate land lease) from an entity that is not a principal in the applicant (p. 13).” Virginia Housing Development Authority, “The Plan of The Virginia Housing Development Authority for the Allocation of Low-Income Housing Tax Credits.” Page 13. Available at: <https://www.virginiahousing.com/partners/rental-housing/rental-housing-tax-credits>.

19 Virginia Housing Development Authority, “The Plan of The Virginia Housing Development Authority for the

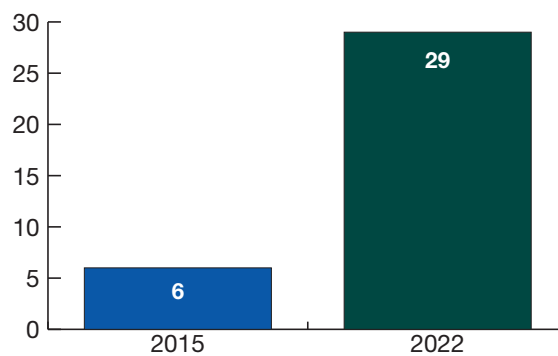
A significant remaining problem in many QAPs is the priority given to “other funding” committed to the LIHTC proposal. Given that the most common forms of additional funding are from the HOME program, Project-Based Section 8 (and sometimes CDBG and local bond financing), such provisions clearly favor HUD “Entitlement Jurisdictions,” which are by definition the areas that tend to have higher poverty rates than other towns in their regions. Missouri provides one example of an incentive for such local financial contributions that most low poverty, high opportunity communities cannot hope to match, even if they wanted to:

“Developments that have executed Letters of Intent (LOIs) for unaffiliated party grant funds, capital campaign funds, federal funds, energy/utility rebates/incentive program funds, and/or municipal funds will be awarded points based on the percentage of award as it relates to the Total Development Budget.”<sup>20</sup>

## 2. Encouraging siting in high opportunity areas

The use of the term “opportunity area” or similar language has expanded significantly across QAPs since the 2015 report. Then, we found that only six QAPs<sup>21</sup> included explicit incentives to encourage tax credit development in lower poverty neighborhoods offering access to jobs, high performing schools, healthcare, and other amenities. Twenty-nine QAPs now contain incentives for siting projects in areas of opportunity and many include detailed metrics as to what qualifies as an area of opportunity.<sup>22</sup>

**Figure 3: Incentives to site in high opportunity areas**



Allocation of Low-Income Housing Tax Credits.” Page 13. Available at: <https://www.virginiahousing.com/partners/rental-housing/rental-housing-tax-credits>.

20 Missouri Housing Development Commission, “Qualified Allocation Plan for MHDC Multifamily Programs.” Page 27. Available at: <https://mhdc.com/media/jsnbq414/qualified-allocation-plan.pdf>.

21 DE, IL, IN, MA, NY, WA (PA did not use the term “opportunity areas,” but awarded points based on metrics used by other QAPs to define “opportunity area”).

22 Several QAPs refer to areas of opportunity without any providing a clear definition or using any discernable metrics. See Chicago, IA summaries. KY and MI QAPs still measure and reference “area of opportunity” based on the former Enterprise Opportunity 360 Report.

Additionally, implementation of “opportunity maps” has also increased, with nineteen states using these visual tools to delineate opportunity areas. Opportunity maps/indices are most frequently developed by state housing finance agencies, sometimes through partnership with universities or nonprofits.<sup>23</sup>

There are several commonly used measures appearing in definitions of opportunity areas and in opportunity maps and indices, with variations in the types of additional metrics, the weight given to each metric, the source of data, and the total number of metrics considered. Frequently used metrics in opportunity maps include: poverty rate (18 states), unemployment rate (12), job proximity/accessibility or commute time (11), and school performance (17).

While most states provide specific, concrete measures to guide development (usually in the form of statistics, or census or demographic data), a few give only general direction in vague terms. For example, most states using employment or access to employment as a metric to designate opportunity areas specify that the unemployment rate in a defined geographic area (usually a census tract) must be below a certain percentage for the area to qualify. Missouri and Pennsylvania, however, only state that an area of opportunity must have “access to... employment” and “employment opportunities,” respectively. In Arkansas, Connecticut, Delaware, New Hampshire, and Tennessee’s definitions, it’s clear that there are metrics involved, but the methodologies for designating opportunity areas are not readily available.

Opportunity incentives in QAPs have been shown to make a difference in siting of LIHTC developments,<sup>24</sup> even though they can be undermined by other incentives and priorities.<sup>25</sup> Ultimately, a state’s actual performance in siting family developments in lower poverty areas of opportunity is what matters, but QAP incentives are an important start.

### **Examples of the most frequently used metrics**

Excerpt from the Idaho 2022 QAP:

“Areas of Opportunity: Developments must be *located in a census tract with a poverty rate that is equal to or less than the State of Idaho’s overall average of 11.2%* to receive points in this category (p. 31)” Idaho 2022 QAP

Excerpt from Mississippi 2023 QAP:

“Census tract that met the following conditions...*2022 Unemployment Rate [less than or equal to] 3.8%* (p. 60)” Mississippi 2023 QAP

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23 The opportunity mapping approach to affordable housing siting originated with John Powell’s work in the 1990s at the Institute on Race & Poverty at the University of Minnesota and later at the Kirwan Institute at Ohio State University. See *Opportunity and Location in Federally Subsidized Housing Programs: A New Look at HUD’s Site & Neighborhood Standard As Applied to the Low Income Housing Tax Credit* (PRRAC, Kirwan Institute, and The Opportunity Agenda, October 2011) <http://www.prrac.org/pdf/OpportunityandLocationOctober2011.pdf>.

24 “Effect of QAP Incentives,” supra note 7.

25 Jill Khadduri et al, *Creating Balance in the Locations of LIHTC Developments: The Role of Qualified Allocation Plans* (PRRAC, 2013), [http://www.prrac.org/pdf/Balance\\_in\\_the\\_Locations\\_of\\_LIHTC\\_Developments.pdf](http://www.prrac.org/pdf/Balance_in_the_Locations_of_LIHTC_Developments.pdf).



Excerpt from Maryland 2022 Multifamily Rental Financing Program Guide:

“Employment opportunity is measured by the following variables...*Median commute time to work obtained from the ACS 2007-2011, five-year estimate.* The commute time measures proximity to regional employment opportunities and is inversely related with economic opportunity (p. 60)”  
Maryland 2022 Multifamily Rental Financing Program Guide

Excerpt from Opportunity Index used by Washington State:

“*The education index indicators include reading test scores, math test scores, student poverty, teacher qualifications, and graduation rates.*” Puget Sound Regional Council Comprehensive Opportunity Index Interactive Report

California, Indiana, and Ohio deserve special recognition for including a fair housing metric in their definitions and maps that is explicitly designed to encourage development outside areas of racial segregation and concentrated poverty.

Excerpt from California 2023 TCAC-HCD Opportunity Mapping Methodology:

“This mapping tool uses “filtering” to *identify those areas in each region that are both non-white racially segregated and high-poverty.* The use of a filter is grounded in the guiding policy goals of the tool: *to avoid further segregation and poverty concentration,* and to increase access to opportunity for low-income families... Census tracts and rural block groups that have both a poverty rate of over 30 percent and that are designated as being racially segregated are filtered into the “High Segregation & Poverty” category (p. 14-15)” 2023 TCAC-HCD Opportunity Mapping Methodology

Other metrics used to define areas of opportunity and as a component in opportunity maps and indices include:

- Population growth (AR, KS, MD, MS, NJ)
- Healthcare access (IN, MA, UT)
- Income (IN, KS, MD, MS, NE, NJ, OH, OK, OR, TX, UT, WI)
- Percent with public assistance (NE, NJ, UT)
- Life expectancy (IL, IN, OH)

### ***How school data is being used in opportunity indices***

Education is an important metric referenced in state opportunity indices. Of the 27 states with opportunity indices (or the functional equivalents), 17 states include some mention of education proficiency, school quality, or school/student performance as a metric of the index. However, not every state that includes education in their opportunity index provides an operational definition of the metric or how it is measured. Eleven states provide a measurable definition (CA, CT, DE, IL, MA, MD, MS, NY, SD, WA, WI), some of

which are more specific than others. California and Maryland provide good examples of a well-defined education metric.

From California's 2023 TCAC-HCD Opportunity Mapping Methodology:

Education Indicators:

- Math proficiency<sup>26</sup>: Percentage of 4th graders who meet or exceed math proficiency standards.
- Reading proficiency: Percentage of 4th graders who meet or exceed literacy standards.
- High school graduation rates: Percentage of high school cohort that graduated on time.
- Student poverty rate: Percent of students not receiving free or reduced-price lunch.

From Maryland's 2022 Multifamily Rental Financing Program Guide:

Educational Opportunity: Educational opportunity measures the outcomes of student performance and educational attainment in the community. This indicator is measured by the following variables:

- Maryland School Assessment (MSA) scores, proficient and advanced, for elementary, middle, and high school students obtained from Maryland Department of Education for the 2011/2012 academic year. These scores play a key role in determining educational advancement as well as opportunities available to students. The MSA scores are positively correlated with educational opportunity.
- Percent of population with a college degree (both undergraduate and graduate degrees) obtained from the ACS 2007-2011, five-year estimate. This variable is positively related to educational opportunity.
- Percent of population with no high school diploma, obtained from the ACS 2007-2011, five-year estimate. This variable is inversely related with educational opportunity (p. 60-61)

### **Encouraging housing for families with children in high opportunity areas**

In spite of the overall increased proportions of 9% tax credits going toward preservation deals to redevelop public housing properties in high poverty neighborhoods, we also saw an increased emphasis in several states on developing housing for families with children in high opportunity areas. Ten QAPs contain incentives for family developments in high opportunity areas. Massachusetts considers family housing production in areas of opportunity to be a priority funding category. Massachusetts further promotes economic deconcentration by requiring family housing projects to be located in a census tract with a poverty rate below 15% to be eligible to receive points within the category (MA QAP, p. 50). Rhode Island “encourages” sponsors to develop housing that provides opportunity to households with children, and Missouri gives a preference in funding to family developments that meet opportunity area criteria. The most common incentive is a small to moderate point award, with nine states awarding points on this basis.<sup>27</sup> Maryland also provides eligibility

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26 “Proficiency” is defined as the percent of students that are performing at grade-level in the 4th grade in each school.

27 CA, CT, DE, MD, MA, MO, NY, OH, VA

for a 30% basis boost to family projects located in “Communities of Opportunity.” Some positive examples of incentivizing the development of family housing in areas of opportunity include:

Excerpt from Delaware 2021-2022 QAP:

In order to balance housing investments and encourage the creation of affordable housing opportunities within areas of the state that contain little or no affordable rental housing opportunities but may offer economic opportunity, proximity to workplaces, high performing schools, and/or supportive infrastructure, points will be awarded to family development proposals located in Areas of Opportunity:

- 0 points for 0%-49.9% of total units located in areas of opportunity
- 7 points for 50%-99.9% of total units located in areas of opportunity
- 15 points for 100% of total units located in areas of opportunity (p. 43)

Excerpt from Maryland 2022 Multifamily Rental Financing Program Guide –

Communities of Opportunity. 16 points will be awarded to family projects with reasonable access to jobs, quality schools, and other economic and social benefits, as demonstrated by meeting at least 1 of the following 2 criteria:

- Be located in a Community of Opportunity (see notes)
- Be located in a geographic area defined by applicable law as a community of opportunity for affordable family housing or identified as such by an order or consent decree entered by a federal or State court of competent jurisdiction or by a settlement agreement to which DHCD or a local government in Maryland is a party. (p. 59-60)

Excerpts from New York 2021 QAP and Fall 2022 Multifamily Finance 9% LIHTC RFP:

Up to 7 points for projects serving HH's with children. Includes consideration of whether the project is a housing opportunity project. Housing opportunity project definition includes location in an area of opportunity that meets or exceeds other measures of opportunity, including, but not limited to, the rate of poverty (QAP, pp. 4, 17). Family projects located in census tracts with poverty rates below 10% (among other criteria) qualify as Housing Opportunity Projects (RFP, p. 10).

These locational incentives could make a difference, if states also commit to a significant portion of larger bedroom sized units.<sup>28</sup>

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28 NCSHA tracks the percent of LIHTC units designated for “families,” and also the percent allocated to 3+ bedroom size; the differences across states on the latter metric are quite significant. National Council of State Housing Agencies, *State HFA Factbook* (2021).

### **High opportunity area set-asides**

Most state QAPs allocate points for developments in high opportunity areas. But three states – Pennsylvania, New York, and Ohio – go further to designate development in high opportunity areas as a set-aside funding category, thus guaranteeing some balance in project siting, in spite of other priorities in the QAP that might counteract opportunity area incentives.

Excerpt from Pennsylvania 2022 QAP:

“The Agency will reserve Tax Credits to, at a minimum, three (3) developments in the Suburban/Rural Pool which expand housing opportunities and design choices in areas suitable for long-term economic growth with an existing or planned infrastructure to support future growth in the area, in order to promote mixed-use and/or mixed-income development within a community setting. These developments will be located in areas of strong schools and employment opportunities and in communities which may have not received representative resources in the past.” (p. 30)

Excerpt from New York 2021 QAP:

“‘Housing Opportunity Projects’ are a set aside category. Housing opportunity projects shall mean family projects in an area of opportunity linked to schools that meet or exceed minimum performance standards and that meet or exceed other measures of opportunity, including, but not limited to, the rate of poverty, as may be set forth in a request for proposals.”

Excerpt from Ohio 2022-2023 QAP:

“For each of the three geographic Pools, OHFA will award at least one housing development outside of a HUD-defined Racially- or Ethnically-Concentrated Area of Poverty (R/ECAP) meeting all of the following criteria: The proposed development is located in a High or Very High Opportunity or Moderate Opportunity Census tract (the latter must also have a Community Change Index rating of Strong Growth or Growth).” (p. 30)

See Appendix B [Opportunity Maps & Indices Table] for the full list of definitions and opportunity maps/indices, with links to online tools and methodologies.

## **3. Tenant selection and affirmative marketing**

Locating a family LIHTC development in a high opportunity, low poverty community is an important first step, but the next step is ensuring that all low income families in the housing market have access to the development (especially families who have been excluded from these communities in the past). Inadequate affirmative marketing and exclusionary tenant selection policies can have the effect of disproportionately excluding Black and Latino applicants, families with Housing Choice Vouchers, and applicants with disabilities.<sup>29</sup>

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29 See generally, Megan Haberle et al, *Accessing Opportunity: Recommendations for Marketing and Tenant Selection in LIHTC*

Examples of practices that are likely to disproportionately exclude low income families of color and applicants with disabilities, particularly in higher opportunity communities, include first come–first served waitlist management, in-person applications, leasing up through in-person “grand opening” type events, limited duration application periods, and residency preferences.<sup>30</sup> Unfortunately, these discriminatory practices are rarely addressed in QAPs, but they may be partly ameliorated by strong affirmative marketing requirements.

## **Affirmative marketing**

A majority of states (31) reference the need for affirmative marketing in their QAPs. Most simply refer to the term “Affirmative Fair Housing Marketing Plan” (which is generally understood to be the HUD AFHMP form<sup>31</sup>), without any further instruction. But some states go further, requiring marketing that targets (or prioritizes) applicants with special needs, very low income families, applicants with limited English proficiency, applicants with vouchers or on public housing authority waitlists (see below), and families with children (see below).

Some best practices that we observed include early outreach to targeted populations prior to general marketing in Oklahoma (applicants with special needs) and Iowa (families with Housing Choice Vouchers). New York State requires review and approval of the AFHMP by the fair housing office of the state housing department, and Pennsylvania requires all LIHTC units to be listed on the state affordable housing search database. The strongest affirmative marketing requirement we found was in Missouri, which expressly references the desegregative goal of AFHMPs by requiring family developments proposed in opportunity areas to proactively target families currently living in census tracts where the poverty rate exceeds 40%. In addition, Missouri requires in its developers’ guide that the management company must identify how it intends to comply with the HUD requirements to Affirmatively Further Fair Housing beyond what may be included in the Affirmative Fair Housing Marketing Plan.

At least five states specifically target families with children in their QAPs (NY, ID, AR, WV, VA), with West Virginia and Virginia giving the most significant point allocations. Priority for families with children is also apparent from targets for larger unit sizes in some states.

A majority of states (32) specifically mention public housing authorities, PHA waitlists, and families with Housing Choice Vouchers, for outreach and marketing, though most of these provisions simply require marketing or notice to PHAs.<sup>32</sup> Some states go further, with actual preferences or priorities for families with

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*and Other Housing Programs* (PRRAC, December 2012), <http://www.prrac.org/pdf/affirmativemarketing.pdf>.

30 HUD has discouraged these types of practices for public housing authority programs – see HUD PIH Notice 2012-34, <https://www.hud.gov/sites/documents/PIH2012-34.PDF>, and HUD Office of Fair Housing and Equal Opportunity (FHEO), “Guidance on Compliance with Title VI of the Civil Rights Act in Marketing and Application Processing at Subsidized Multifamily Properties” (April 2022), <https://www.hud.gov/sites/dfiles/FHEO/documents/HUD%20Title%20VI%20Guidance%20Multifamily%20Marketing%20and%20Application%20Processing.pdf>; HUD Office of Multifamily Housing Programs, “Implementation Sheet for HUD’s Title VI Guidance Regarding Marketing and Application Processing at Subsidized Multifamily Properties” (April 2022), [https://www.hud.gov/sites/dfiles/Housing/documents/Multifamily\\_Title\\_VI\\_Guidance%20Implementation\\_Sheet4522\\_FINAL.pdf](https://www.hud.gov/sites/dfiles/Housing/documents/Multifamily_Title_VI_Guidance%20Implementation_Sheet4522_FINAL.pdf).

31 HUD Form 935.2A, <https://www.hud.gov/sites/documents/935-2A.PDF>. See also HUD’s Affirmative Marketing Guidance, <https://www.hud.gov/sites/documents/80251C2FHEH.PDF>.

32 At least 12 states mandate notice/marketing to PHAs, while 9 states give additional points for PHA outreach.

vouchers or families on the PHA waitlist. Eight states mandate selection preferences for these PHA families, and seven give point advantages in the QAP for proposals that include preference for PHA families.<sup>33</sup>

### **Enforcement of source of income discrimination protections**

The 1993 Tax Act bars discrimination against Housing Choice Voucher families in LIHTC properties, but most QAPs simply reference this requirement, without more. At least a dozen states require specific annual certification that the owner has not refused to lease to an applicant based on the applicant's status as the holder of a Housing Choice Voucher, and two states (DE and WI) require "documentation" or keeping of records that the owner has not discriminated.

Stronger provisions can be found in a few states – for example, Illinois and New York disqualify applicants who have been found to have discriminated on the basis of source of income, and Wyoming clarifies that owners may not use income target screening to exclude voucher holders.

See Appendix C [Tenant Selection], D [Affirmative Marketing], and E [QAPs mentioning SOID] for additional detail.

## **4. “Concerted Community Revitalization Plans” and fair housing**

A 2016 IRS Revenue Ruling on § 42(m)(1)(B)(ii)(III) of the Internal Revenue Code (“Code”) reminded taxpayers that preferences for LIHTC projects located in Qualified Census Tracts (QCTs) do not satisfy that section of the code unless the development contributes to a concerted community revitalization plan.<sup>34</sup> Some state QAPs had been giving preference to projects in QCTs without regard to whether they contributed to a concerted community revitalization plan (CCRP). However, the statutory preference is not a preference for developments located in QCTs, it is a mandate to give preference to proposals with concerted community revitalization plans *among* applications for developments located in QCTs.

The 2016 Revenue Ruling notes that the Department of the Treasury and the IRS have not provided a definition of “concerted community revitalization plan,” but at minimum, according to the Revenue Ruling, “the preference fails to apply unless... a plan exists that contains more components than the LIHTC project itself.”

The need for specific criteria and content for CCRPs was also reflected in two bipartisan bills<sup>35</sup> in the last two Congresses, as well as the National Council of State Housing Agencies’ Recommended Practices in Housing Credit Administration report.<sup>36</sup> HUD-designated QCTs are areas of high poverty by definition,<sup>37</sup> and state

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33 States with mandatory preferences for PHA families include CT, ME, MD, MI, MS, ND, WY, and VA. States allotting additional points to PHA families include AK, CO, ID, KY, SD, TN, and VA (SD and VA allocate the most significant point incentives).

34 Rev. Rul. 2016-77, 2016-52 I.R.B. 914.

35 Affordable Housing Credit Improvement Act of 2021 (Cantwell-Hatch Act), S.1136 and H.R. 2573; Affordable Housing Credit Improvement Act of 2023 (AHCIA), S.1557 and H.R. 3238.

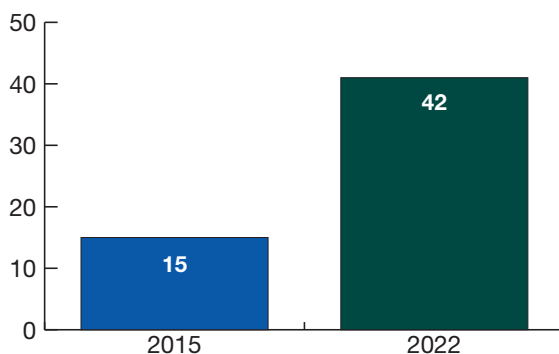
36 National Council of State Housing Agencies, *supra* note 8.

37 The term “qualified census tract” means any census tract which is designated by the Secretary of Housing and

housing agencies that choose to give preference to LIHTC projects in QCTs must provide a robust definition of CCRP to ensure those projects do not contribute further to the concentration of poverty in QCTs.

In Building Opportunity II, we noted that fifteen QAPs provided explicit details on the meaning of “concerted community revitalization plan” or what should be included in such a plan. Since then, we estimate that an additional twenty-seven QAPs have included a definition of CCRP, so *now all but eight states have included a definition for a CCRP in their QAPs.*

**Figure 4: Specific direction on content for concerted community revitalization plans**



While the inclusion of a definition should be considered progress in itself, quality and substantive content varies widely among the state definitions. The best of these approaches focus on *non-housing development and infrastructure*, with requirements for specific investment from the private sector or government entities. Seventeen states require this in some form in order for CCRPs to be eligible plans. These provisions generally fall into one of two buckets – either a requirement to demonstrate that investments have been committed (AZ, CA, CO, CT, DE, MD, OR, PA, SC, UT), or a requirement to provide a strategy for obtaining investment commitments (LA, MN, NE, NH, RI, WV, WI).

Excerpt from Delaware 2023-2024 QAP:

“When evaluating whether a proposed CCRP is eligible, DSHA will consider... Whether the CCRP describes commitments or strategies for obtaining public and private investment other than housing such as for infrastructure, transportation, open spaces, or commercial amenities (p. 9).”

Excerpt from Nebraska 2022-2023 QAP:

“CCRP must... Provide strategies for investment of, both public and private resources for infrastructure, amenities, and services in the area of the proposed development (p. 10).”

Urban Development and, for the most recent year for which census data are available on household income in such tract, either 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. 26 U.S.C. § 42(d)(5)(B)(ii).

Requirements for goal setting with respect to measurable impact on the community are relatively common throughout the QAPs, with twenty-three states (AZ, CO, DE, GA, ID, IL, IA, KY, LA, ME, MD, MI, MN, NE, NH, NJ, NY, OH, SC, TN, UT, WV, WI) requiring goals in CCRPs. Goal requirements are expressed both in terms of redevelopment and production of housing, and other policy goals, such as economic redevelopment (ME, OH) or increased numbers of jobs (NJ, OH). Many states also mandate timelines in the CCRP for achieving these goals.

Most states incorporate components into their definition of CCRP which give the term some meaning and effect. Ten states (DE, GA, IA, ME, MI, NJ, NY, OH, TN, WV) require<sup>38</sup> that a CCRP describe features of the community, demographic characteristics and pressures, and/or its existing infrastructure.

Excerpt from New York 2021 QAP:

“Plans and/or efforts [for community revitalization] will be evaluated based on whether they seek to fundamentally improve the quality of life and opportunities for neighborhood residents based on the following criteria:... identifies existing neighborhood strengths upon which the revitalization plan and/or effort is based, including, but not limited to, access to employment opportunities and proximity to viable commercial districts, stable neighborhoods, and cultural institutions” (p. 16).

Other examples:

“The Revitalization Plan must include...an assessment of the existing conditions of the community (p. 18).” Ohio 2022-2023 QAP

“A CCRP must... include an assessment of the targeted area’s existing infrastructure needs (p. 5)” Tennessee 2023 QAP

Twenty-five states require CCRPs to have clear, specific, delineated geographic boundaries. Clear boundaries help to facilitate effective allocation of resources and can improve coordination between the proposed LIHTC and the broader community revitalization effort.

Fifteen states (DE, IL, LA, ME, MD, MA, MN, NE, NH, NJ, NY, OH, RI, UT, WV) include reference to public input or support from local stakeholders and/or community partners in the development of a CCRP.<sup>39</sup>

Delaware, Minnesota, New Jersey, New York, and Ohio stand out as states with strong CCRP definitions, with each containing at least 4 of the 6 positive components mentioned above.

Provisions encouraging “affordable housing” as part of a CCRP continue to raise civil rights concerns, where a LIHTC development is already adding additional low income housing units to an already high poverty, segregated neighborhood. Seventeen states’ CCRP definitions contain requirements for explicit reference to

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38 South Carolina gives extra points for this but does not require it.

39 Georgia and South Carolina give extra points, but do not require this.



housing as a key component: GA, ID, IL, IA, ME, MI, MN, NV, NJ, ND, OH, PA, SC, SD, TN, UT, WY.<sup>40</sup> Iowa, Michigan, and Maine’s definitions require, in nearly identical language, “detailed policy goals that include the redevelopment and production of affordable housing,” while Maryland notes explicitly “[i]f there is a housing component in the plan, the plan should include rehabilitation or new construction of rental housing as a goal for the community.” More proactively, New York, Pennsylvania, and South Carolina’s CCRP definitions include provisions encouraging development of mixed income housing.

Ten states’ definitions provide little guidance other than essentially restating the Treasury Department’s own guidance that the plan contain more components than the LIHTC project itself. These states’ (AK, HI, IN, MA, MS, NM, TX, VT, WA) definitions are fairly circular, defining a CCRP as a designated area by a public entity that is targeted for revitalization by a plan or program.

See Appendix F [CCRP Definition Table] for the full list of CCRP definitions.

## Conclusion

The recent fair housing advances in many states’ Qualified Allocation Plans will be key markers of state compliance with the soon-to-be-reinstated Affirmatively Furthering Fair Housing rule.<sup>41</sup> But there is still room for improvement, and ultimately, it is each state’s fair housing performance that will matter – in a more geographically balanced portfolio of LIHTC developments (especially for families with children), stronger affirmative marketing requirements, and a greater focus on economic and community development in low income communities where the LIHTC program is supporting public housing redevelopment.

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40 Most problematically, Idaho, Iowa, Michigan, and Tennessee’s CCRP definitions focus on housing without requiring other investment.

41 See *How States Can Affirmatively Further Fair Housing: Key Leverage Points and Best Practices* (PRRAC, January 2022).

## Appendices

(Available at <https://www.prrac.org/pdf/BuildingOpportunityIII.pdf>)

***Appendix A: State by State Summaries***

***Appendix B: Opportunity Maps & Indices***

***Appendix C: Tenant Selection***

***Appendix D: Affirmative Marketing provisions***

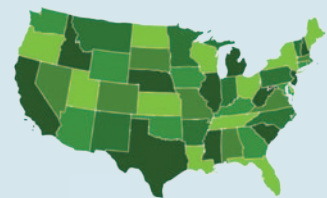
***Appendix E: QAPs Mentioning SOID***

***Appendix F: CCRP Definition Table***

For more background on fair housing issues in the LIHTC program, go to:  
[www.prrac.org/fair-housing/the-low-income-housing-tax-credit](http://www.prrac.org/fair-housing/the-low-income-housing-tax-credit)

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