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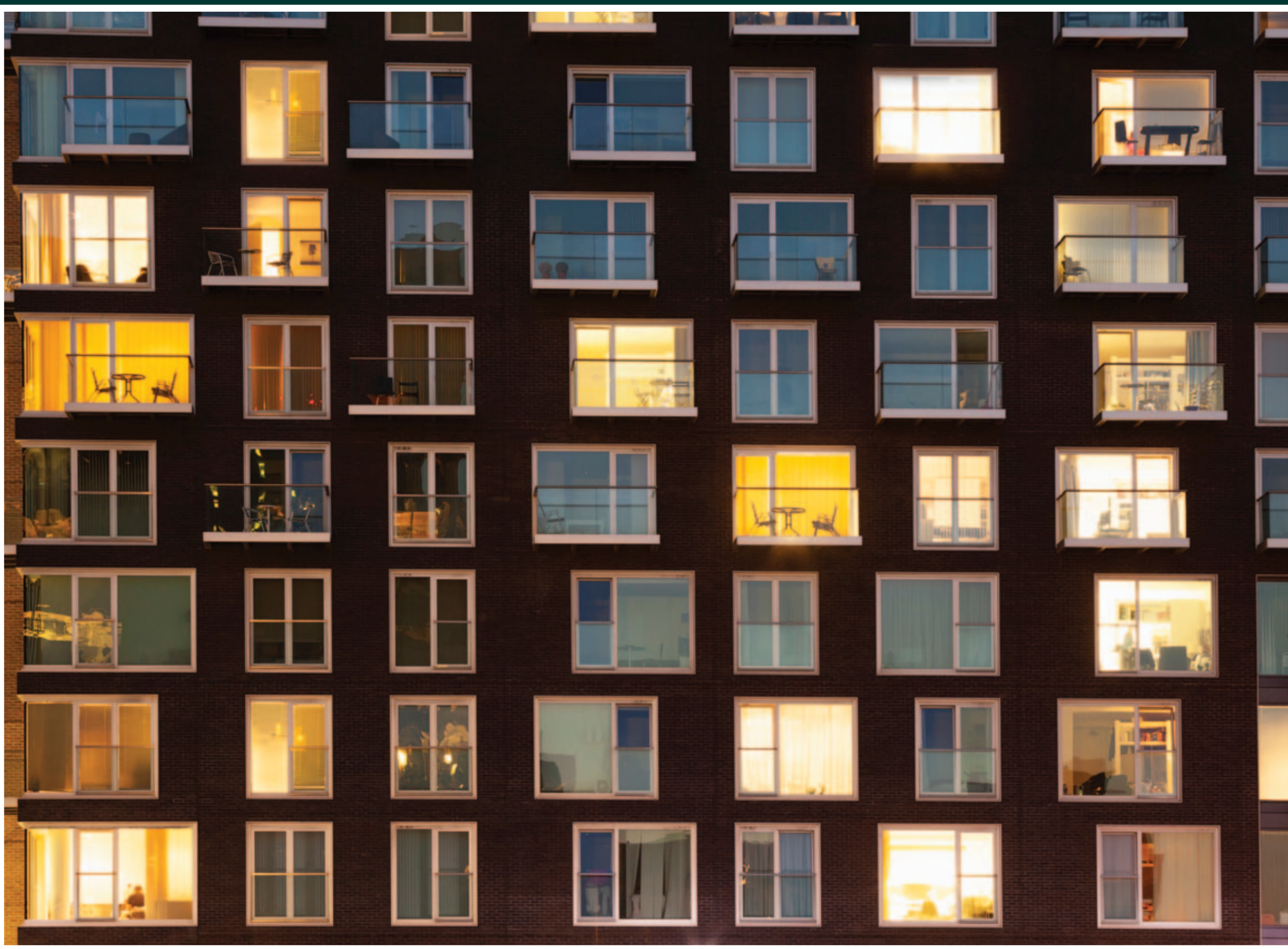
Social Housing Goals in State Housing Allocation Plans

A 50-State Survey

By Robert Lindsay, Janelle Taylor, and Philip Tegeler



About the Authors and Acknowledgments

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A. INTRODUCTION

Our federal housing policy continues to rely heavily on the private market and the immense capital at its disposal for the production of low income housing. But among government housing officials and across the broad network of non-profit housing professionals in the U.S., the belief in a "right to housing" is strong, along with a vision of housing that is community-owned and controlled, permanently affordable, and resident-centered. This social housing ideal is difficult to achieve at scale without direct public subsidy.

PRRAC's prior report on social housing goals in HUD programs[1] suggested ways that federal legislation and regulatory provisions might be adjusted to divert more public funding to support social housing development and social housing goals. This report, in contrast, examines the flexibility given to states in their allocation of three major federal programs – the Low Income Housing Tax Credit (LIHTC), the National Housing Trust Fund (NHTF or HTF), and the federal HOME program (HOME) – and finds a strong developing trend among state governments to steer these programs at least partly in the direction of the social housing ideal. The flexibility available to state governments in these plans highlights the value of organizing and advocacy, particularly at the state executive branch level, to expand tenant protections, establish permanent affordability, and promote community, nonprofit and resident ownership.

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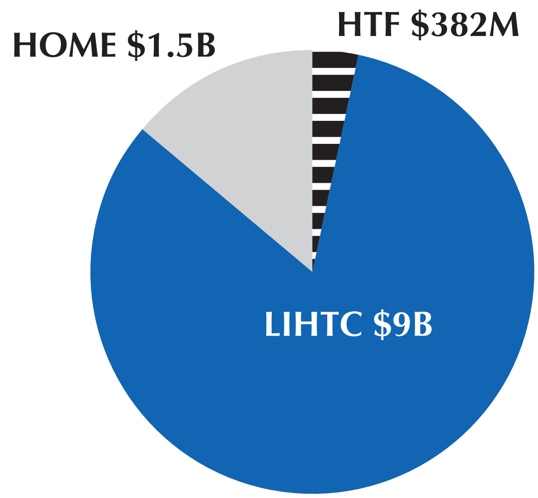
Consistent with the basic principles of social housing, as recently summarized by the Alliance for Housing Justice,[2] we looked for the following types of provisions in state allocation plans:

- Incentives or requirements for long-term affordability above the statutory minimum
- Non-profit ownership or management of housing above the statutory minimum
- Provisions promoting tenant or community acquisition of rental housing above the statutory minimum
- Tenant protections, including just-cause eviction policies above the statutory minimum, rent increase protections, and protection from displacement
- Democratic resident control over housing resources, partnership with community-based organizations, or other community oversight or tenant input in housing policy
- Tenant cooperative models / provisions promoting community living opportunities; limited equity coop or other tenant ownership
- Community land trusts or similar provisions
- Support for tenant organizing and/or engagement

1 *What Can HUD Do to Expand Public and Community Ownership of Rental Housing?* (PRRAC, April 2021).
2 See *What is Social Housing? Basic Principles for the U.S.*, https://www.allianceforhousingjustice.org/us-social-housing-principles.

We found that the most common "social housing" features of these state allocation plans included incentives for long-term or permanent affordability (above the statutory minimum), non-profit ownership (above the statutory minimum), provisions designed to protect the federally required nonprofit "right of first refusal" from predatory litigation by for-profit investors, tenant protections such as enhanced just cause eviction definitions, limits on excessive rent increases, limits on redevelopment-based displacement, and provisions encouraging tenant opportunity to purchase. Less common, but notable provisions, included requirements or incentives for tenant or community representation, support for tenant cooperative models and community land trusts, and support for tenant organizing. We explore each of these provisions in more detail below.[3]

Total Annual Allocation of Funds to States for 2023



Among the three major federal programs allocated by state governments, the Low Income Housing Tax Credit is by far the largest with $9 billion being allocated to LIHTC, $1.5 billion to HOME, and $382 million to HTF[6]

The annual allocation plans for the Low Income Housing Tax Credit[7] are called "Qualified Allocation Plans" (QAPs), and are generally updated annually, on a cycle that includes issuance of a draft plan, followed by a public comment period.[8] To maximize influence on their state's QAP advocates should engage with the Housing Finance Agency prior to the HFA's release of a draft plan, as well as commenting on the draft plan when it is released for public comment.[9]

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3 All data in this report are drawn from the most recent published LIHTC Qualified Allocation Plans and state HOME and HTF plans available during our research window in 2022-2023; these were usually year 2022 QAPs for LIHTC, or 2022 "annual action plans" (or most recent five-year HUD Consolidated Plan) for HOME and the HTF.

4 https://www.huduser.gov/portal/datasets/lihtc.html.

5 Home Investment Partnerships Program 2023 FAQs p. 3. https://www.ncsha.org/wp-content/uploads/2018/01/HOME-Investment-Partnerships-Program-FAQs-2023.pdf.

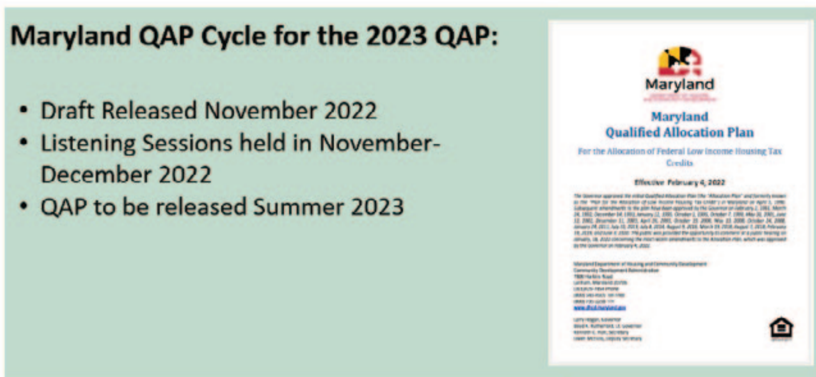
6 "HUD CPD Announces 2023 HTF State Allocations," https://nlihc.org/resource/hud-cpd-announces-2023-htf-state-allocations (May 2023).

7 Qualified Allocation Plans govern competitive applications for so-called "9% credits," which provide direct equity investment covering 70% of the development cost of a project, greatly reducing the need for other financing. These are the types of tax credits covered in this report, and most advocacy focused on the LIHTC program. These funds are distinguished from "4% credits," also allocated by housing finance agencies, which cover a much smaller portion of total project costs, and are generally not competitively awarded, though that may be changing. See, e.g., Yiwen Kuai, "A Missed Opportunity? The 4% Low-Income Housing Tax Credit Program," *Housing Policy Debate* (2023), https://doi.org/10.1080/10511482.2023.2180651.

8 It is important to note that the QAP cycle for each state is not always transparent and/or discernable. We recommend reaching out to each state's housing finance contact to learn more about the timing of their cycle.

9 LIHTC advocates should also be paying attention to their agency's LIHTC Compliance Manual, and the annual "Owner's Annual Certification of Continuing Program Compliance." See, for example, Oregon's Compliance Manual, generally and at page 10, https://www.oregon.gov/ohcs/compliance-monitoring/Documents/compliance/lihtc/LIHTC-Compliance-Manual-2016.pdf. With a few exceptions noted below, our report did not include a review of these LIHTC regulatory documents.

Examples of State QAP Cycles



Since tax credits and funding are highly sought after by both for-profit and non-profit developers, states "grade" applications and rank them competitively based on a variety of criteria to award funding or tax credits. These ranking schemes almost universally involve assigning points to applications that propose development aligning with the goals of state housing agencies. States therefore incentivize certain development characteristics by assigning more points to applications that reflect their housing priorities. The strongest incentives are what we refer to as "threshold requirements," which are features state housing agencies require to be included in development proposals in order for the application to even be considered.

Allocation plans for the Housing Trust Fund are required to be updated annually, but, like the HOME program plans, they are typically included in the 5-year HUD Consolidated Plan, and adjusted in the interim in annual Action Plans. The process of developing the Consolidated Plan includes extensive public consultation requirements, and the annual Action Plans also include opportunity for public review and comment.[10]

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10 For an introduction to the consolidated planning process, see Ed Gramlich, "Consolidated Planning Process," in the *National Low Income Housing Coalition's Advocates' Guide 2023: A Primer on Federal Affordable Housing & Community Development Programs & Policies*, available at NLIHC.org. Advocates should also insist that their state's QAP is aligned with the Con Plan and Annual Action Plans, and that the state's Consolidated Annual Performance and Evaluation Report (CAPER) includes information on the distribution of LIHTC projects and units by geography, demographics, and other data points covered in this report.

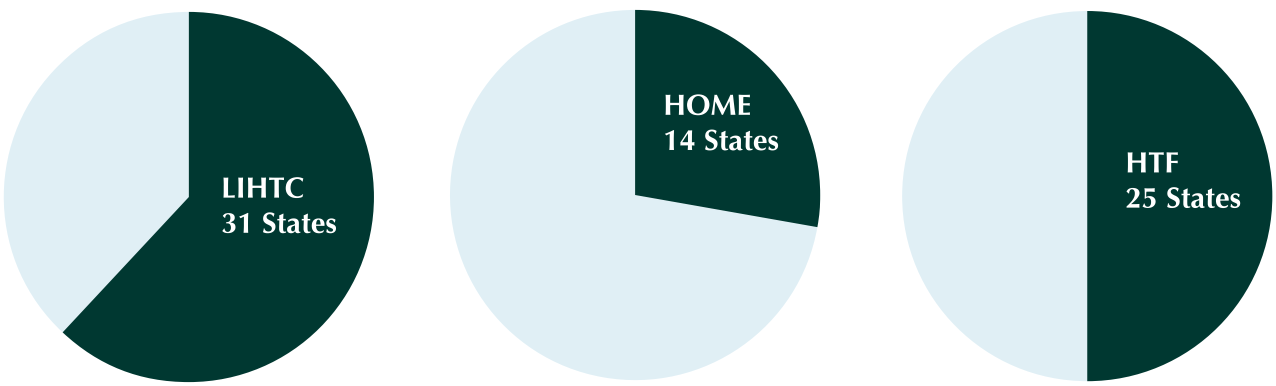
B. SOCIAL HOUSING PROVISIONS IN STATE ALLOCATION PLANS

1. Long term affordability in state allocation plans

All three programs that we looked at have minimum periods of required affordability – for example, the LIHTC program's "extended use period" requires units to remain rent restricted for low income families for a period of 30 years, after which the property is released from restriction.[11] The Housing Trust Fund has a similar minimum 30-year affordability requirement,[12] while the HOME program minimum affordability requirement is 20 years for new construction and shorter periods for homeownership housing and housing rehabilitation.[13]

Beyond the basic requirements of the LIHTC program, many states have required or incentivized longer periods of affordability, consistent with the LIHTC statute which requires state QAPs to give preference to projects and developments that have the longest affordability periods.[14] In the LIHTC program, at least 31 states have sought to increase the minimum statutory period of affordability, with some states requiring affordability periods so long that for-profit developers are likely to be excluded as a practical matter. For example, the California QAP requires that LIHTC developments remain affordable for a full 55 years, and Vermont requires permanent affordability.

States with requirements or incentives to increase statutory period of affordability



11 26 USC § 42(h)(6); Under the IRC § 42 Program, the taxpayer agrees to provide low-income housing for at least 30 years:
- In exchange for the investment in low-income housing, the taxpayer will receive tax credits for each of ten years, which is known as the "credit period."
- To keep the credit, the taxpayer must provide low-income housing for fifteen years, which is known as the "compliance period." Failure to maintain the housing in compliance with IRC § 42 requirements for the entire compliance period can result in the recapture of a portion of the credit allowable in prior years.
- After IRS jurisdiction ends, the state agency has sole jurisdiction and the taxpayer must continue to provide low-income housing for at least another fifteen years. The "extended use period" is at least 30 years, beginning with the first year of the credit period. p. 10. https://www.irs.gov/pub/irs-utl/IRC_42.pdf.

12 24 CFR § 93.302(d).

13 24 CFR § 92.254(a)(4).

14 26 USC § 42(m)(1)(B)(ii)(II).

The strongest provisions are threshold requirements for extended affordability periods:

- In Vermont, almost all LIHTC, HOME, and NHTF projects are required to be affordable in perpetuity.
- In California, LIHTC, HOME, and NHTF projects are all subject to a minimum low-income use period of 55 years.
- In Oregon, most LIHTC projects must remain affordable for 60 years (except for projects paired with other OHCS resources).
- In Massachusetts, Montana, and Utah, all LIHTC projects must have an extended use period of 50 years.
- In Washington State, HOME and NHTF projects must maintain their affordability for a total of 50 years in King County and 40 years elsewhere in the state.
- In Maine, Housing Trust Fund developments must remain affordable for a 45-year term.

Other LIHTC examples

A number of other states offer point incentives in the LIHTC Qualified Allocation Plan for longer periods of affordability. For example, Virginia gives 40 points for a 10-year commitment beyond the 30-year extended use period or 50 points for a 20-year commitment, while Massachusetts awards 3 points to applications whose sponsors commit to a term of affordability of 50 years or more. Finally, the increasing use of LIHTC funds for public housing redevelopment through the Rental Assistance Demonstration (RAD) guarantees permanent affordability by definition for those developments.

In practice, these incentives and requirements have led to an increased percentage of developments subject to extended use restrictions. According to NCSHA, in 2021 38% of all LIHTC awards had affordability restrictions between 31-50 years, and 13% of awards had affordability restrictions of over 50 years.[15]

> The increasing use of LIHTC funds for public housing redevelopment through the Rental Assistance Demonstration (RAD) guarantees permanent affordability by definition for those developments.

Other HOME and the Housing Trust Fund examples

Some states incentivize affordability in the HOME and HTF plans by providing five additional points for projects that extend affordability beyond the initial, required 30-year period. A few states provide greater point incentives. For example, Illinois awards up to 25 points to projects that provide project-based rental or operating assistance based on the number of units assisted and the length of the committed assistance.[16] In New Jersey, applications will receive a maximum of 15 out of 100 points for providing extended affordability controls beyond the initial 30 years.[17] In South Dakota, LIHTC and HOME projects that commit to increasing the extended use period an additional 10 years will receive 30 points.[18]

15 State HFA Factbook 2021 (National Council of State Housing Finance Agencies), Table 14.

16 25 points are awarded to projects that commit to 10+ years of extended affordability for 75.1% or more of units, 20 points are awarded to projects that commit to 10+ years of extended affordability for 50.1-75% of units: 20 points, 15 points are awarded to projects that commit to 10+ years of extended affordability for 10.1-50% of units; and 10 points are awarded to projects that commit to 10+ years of extended affordability for 1-10% of units, https://nlihc.org/sites/default/files/IL-HUD-approved-2016-HTF-Allocation-Plan.pdf p. 4.

17 New Jersey National Housing Trust Fund Program Guidelines and Procedures, p. 3, https://www.nj.gov/dca/divisions/dhcr/rfp/pdf/nhtfguideline.pdf.

18 South Dakota Housing 2022-2023 QAP, p. 27,

2. Nonprofit Ownership/ Management

Federal statutes establish minimum setasides for non-profit ownership for two of the programs we surveyed. The LIHTC program effectively requires that states allocate at least 10% of credits to non-profit developers/owners[19] – these non-profits are the managing partners, as distinguished from the for-profit limited partner investors who make up the lion's share of actual ownership in a development (and provide the capital to build the development, in exchange for the tax credits).[20] These non-profits are also eligible to purchase the property from the investors at below market rates at the end of the 15 year compliance period (see section 3, below).

> The actual proportion of non-profit participation in the LIHTC program is significantly higher than 10% in almost every state, suggesting that other elements in the QAP process (such as extended affordability periods) may also favor non-profit applicants.

The HOME program requires a setaside of at least 15% of funds to Community Housing Development Organizations (CHDOs),[21] which are classic exemplars of the "social housing" model. This setaside includes a requirement of a minimum one-third community representation on the non-profit CHDO board and a system in place for tenant input into management decisions. The National Housing Trust Fund has no general non-profit setaside or incentive.

A number of states have gone above and beyond these minimum requirements, to further promote non-profit ownership:

LIHTC: In the LIHTC program, ten states provide additional competitive points for non-profit (or public housing authority) applicants, and six states set a specific minimum setaside higher than the federal minimum (notably, Rhode Island at 34% and Pennsylvania at 25%). Beyond these specific incentives and setasides, the actual proportion of non-profit participation in the LIHTC program is significantly higher than 10% in almost every state, suggesting that other elements in the QAP process (such as extended affordability periods) may also favor non-profit applicants. In 2021, an average of 29.2% of all LIHTC funds were allocated to projects with non-profits in the lead, with a range between 11% to 100% (Hawaii).[22]

HOME: Eleven states (Idaho, Indiana, Iowa, Maryland, Missouri, New Jersey, New Mexico, Ohio, Rhode Island, Tennessee, and Washington) incentivize nonprofit ownership/management by awarding additional points in selection to qualified nonprofits and CHDOs. Louisiana and Oklahoma go above the HOME 15% CHDO set-aside by setting aside 25% of total HOME allocation for CHDOs.[23]

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https://static1.squarespace.com/static/62043c6fe162bf3ffdc5f475/t/63c1b7d42f750a2c45077041/1673639893066/QAP+Plan+-+Final.pdf p. 27; South Dakota Housing 2022-2023 HOME Allocation Plan, p. 25, https://static1.squarespace.com/static/62043c6fe162bf3ffdc5f475/t/63b857f35cce5157150990fb/1673025523716/HOME+Plan+-+Final.pdf.

19 Technically, the 10% nonprofit setaside is not a setaside; rather, the statute limits the percentage of for profit ownership/management to 90% of all LIHTC developments in a state's annual allocation.

20 For a helpful visual representation of LIHTC ownership structures, see "Anatomy of a LIHTC Deal," published by the North Carolina HFA, https://www.nchfa.com/sites/default/files/page_attachments/AnatomyLIHTCdeal.pdf.

21 24 CFR § 92.200.

22 State HFA Factbook 2021 (National Council of State Housing Finance Agencies), Table 12.

23 "Under the CHDO Annual Awards Program (CHAAP), Louisiana Housing Corporation reserves 25% of its HOME allocation for use in funding CHDO eligible projects on an annual basis."

Housing Trust Fund: Nonprofit status or partnership with nonprofit entities was required for eligibility for NHTF funds in the Massachusetts 2023 NOFA. New York gives "priority" to Supportive Housing Projects developed by nonprofits and CHDOs. Pennsylvania and Rhode Island also give unspecified "priority" consideration to applicants seeking HOME funds that meet the 15% CHDO Set-Aside requirement on behalf of a non-profit.

3. Non-profit or tenant opportunity to purchase after 15 years

LIHTC: The Low Income Housing Tax Credit's "Right of First Refusal" provision, in 26 USC section 42(i)(7), is one of the most powerful social housing provisions in federal law, but it has been undercut by recent litigation. Under the statute, a resident management corporation of a building, a qualified nonprofit organization[24] (usually the property's non-profit general partner) or government agency may hold an option to purchase a LIHTC building at a below-market rate after the close of the building's 15-year compliance period.[25] But recent challenges by for-profit investors to the statutory right of first refusal have created statutory ambiguity, threatening long-term affordability and nonprofit control of LIHTC-funded properties.[26]

In the absence of clarifying federal legislation,[27] or regulatory language,[28] a number of states have stepped in to reinforce the program's original intent and secure the right of first refusal for non-profits. According to the National Housing Trust, which has developed recommended language and tracked efforts to protect the ROFR, 32 states now include protective language in their Qualified Allocation Plans.[29] For example, the state of New Hampshire has adopted model provisions to preserve non-profit ownership and long term affordability, including agreements by the investors as to the interpretation of the statutory ROFR, and setting out the maximum profits expected and the maximum purchase price at the end of 15 years (see box on page 10).

Vermont has a simpler approach to the problem, stating flatly that "[t]he Right of First Refusal must allow the holder of the right to make the offer on the property that triggers the Right of First Refusal."[30]

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24 as defined in IRC § 42(h) (5) (C).

25 IRC § 42(i)(7), https://www.irs.gov/pub/irs-utl/IRC_42.pdf

26 Specifically, it has become unclear if the Right of First Refusal (ROFR) in the LIHTC program refers to a "common law" ROFR which is triggered by an enforceable bona fide offer from an unrelated third party or if it is a statutory provision that does not require a third party offer to be triggered. The ambiguity of the ROFR provision has led to outside for-profit entities disputing transfers to nonprofits, undermining this crucial social housing provision of the LIHTC program. See Brandon M. Weiss, "Clarifying Nonprofit Purchase Rights in Affordable Housing," 48 Fordham Urb. L.J. 1159 (2021), https://ir.lawnet.fordham.edu/ulj/vol48/iss5/4; "Nonprofit Transfer Disputes in the Low Income Housing Tax Credit Program: An Emerging Threat to Affordable Housing," Report from the Washington State Housing Finance Commission (September 2019); Brandon Duong, Losing Nonprofit Control of Tax Credit Housing?, Shelterforce (Oct. 16, 2020) https://shelterforce.org/2020/10/16/refusing-the-right-to-refuse/?fbclid=IwAR0TVk1Q829D5T51fxVA4wyoRIh_glGbRPR-3OshWanvS8IZkzSPJkClxCI.

27 For example, Affordable Housing Credit Improvement Act (AHCIA) of 2019 included language that would have amended Section 42(i)(7) to strike the term "a right of first refusal" and instead insert "an option."

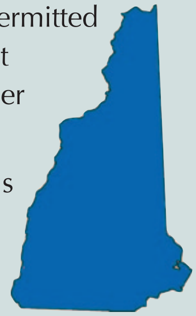
28 Earlier this year, NLIHC and other housing advocates submitted a public comment letter to the Internal Revenue Service (IRS) with recommendations on ways to improve "right of first refusal" regulations for nonprofit partners of Low Income Housing Tax Credit (LIHTC) financed properties. https://nlihc.org/sites/default/files/2022-06/Letter-from-National-Nonprofit-Organizations-to-IRS-Regarding-Priority-Guidance-Plan.pdf.

29 See https://nationalhousingtrust.org/news/nht-offers-toolkit-help-housing-agencies-strengthen-right-first-refusal-provisions-promoting.

30 VT QAP, p.6, https://www.vhfa.org//sites/default/files/2022%20Qualified%20Allocation%20Plan%20February%201%202021%20Signed.pdf.

Excerpts from New Hampshire 2022 QAP

All partnership agreements must contain the following provisions:



- ★ An acknowledgement and agreement from the investor that the right of first refusal permitted by the Internal Revenue Code § 42(i)(7) is different from the common law right of first refusal and is not conditioned upon the consent of the investor or receipt by the owner of a bona fide offer from any party, including any third parties;
- ★ An acknowledgement and agreement from the investor that its return on investment is primarily in the form of the tax benefits conferred by the Internal Revenue Code and will not, upon the exercise of the nonprofit's right of first refusal, include any cash proceeds attributable to the project's appreciation in value;
- ★ A right of first refusal term of at least 24 months from the end of the compliance period;
- ★ A maximum purchase price of the sum of the principal amount of outstanding indebtedness secured by the building and all Federal, State, and local taxes attributable to such a sale;
- ★ A provision that in the event IRC Section § 42(i)(7) is amended by Congress to permit a nonprofit to hold a purchase option after year 15, the terms of the Right of First Refusal agreement will be converted to a purchase option permitting a transfer through acquisition of partnership interests and including all partnership assets for an amount equal to the statutory minimum purchase price; and,
- ★ A provision requiring the limited partner to obtain the consent of the general partner before there is any transfer of the limited partnership interest."[31]

Some states have also taken steps to effectively bar applicants who have been involved in past efforts to undermine the Right of First Refusal. See the QAPs in Maine,[32] Oregon,[33] Massachusetts,[34] Pennsylvania,[35] and New Hampshire,[36] New Hampshire's QAP, for example, raises a high bar for entities that have engaged in predatory litigation – including barring investors that have previously been involved in a "lawsuit against a general partner and/or a non-profit sponsor challenging the exercise of the LIHTC right of first refusal/right of first option," or in "any 'aggregator' activity in New Hampshire."[37]

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31 New Hampshire Qualified Allocation Plan 2022, pp 9-10, https://www.nhhfa.org/wp-content/uploads/2022/03/2023-2024-Qualified-Allocation-Plan_Final.pdf.

32 Maine Qualified Allocation Plan 2022, p. 4, https://www.mainehousing.org/docs/default-source/qap/2023-2024-qap.pdf?sfvrsn=71818415_2; [See also Appendix E in Maine QAP (p. 54 of pdf document): https://www.mainehousing.org/docs/default-source/qap/2023-2024-qap.pdf?sfvrsn=71818415_2].

33 OR QAP, p. 26, https://www.oregon.gov/ohcs/development/Documents/2022%20Updated%20Final%20QAP.pdf.

34 Massachusetts requires that sponsors/owners include in applications letters of interest from syndicators or investors who are "not involved, and are not affiliated with parties who are involved, in activities challenging or attempting to subvert the exercise of existing rights of refusal or purchase options by LIHTC developers. Such activities have been determined by DHCD to be detrimental to the goals of long-term affordability and nonprofit participation in the LIHTC program." (MA QAP, p. 39, https://www.mass.gov/service-details/qualified-allocation-plan.

35 PA QAP, p. 17, https://www.phfa.org/forms/multifamily_news/news/2022/2022-lihtc-allocation-plan.pdf.

36 New Hampshire Qualified Allocation Plan 2022, pp 9-10, https://www.nhhfa.org/wp-content/uploads/2022/03/2023-2024-Qualified-Allocation-Plan_Final.pdf.

37 New Hampshire Qualified Allocation Plan 2022, pp 9-10.

Other states have prioritized conversion to non-profit or tenant ownership in their QAPs, though it is unclear if these priorities protect these developments from aggressive corporate litigation to evade the Right of First Refusal.

Tenants may also individually hold a right of first refusal to purchase their units in fourteen states.[38] Additionally, Kansas awards 15 points if the application includes a comprehensive plan for converting the units to tenant ownership after 15 years; Arizona and Delaware award 10 points; and Arkansas provides 6 points for eventual tenant ownership, with the applicant required to submit the proposed right of first refusal contract for eventual tenant ownership. Seven states have smaller point awards (>2 points) for projects that offer homeownership after the 15 year compliance period.[39]

Finally, we found at least one state that appears to *support* for-profit retention/acquisition of LIHTC properties, in spite of Congressional intent to protect the right of non-profits to acquire these developments at below market rates. Thus, the Georgia 2022 QAP states that "[t]he ROFR process is only triggered when a third party makes an offer on the property or for an ownership interest in the partnership."[40]

HOME and the Housing Trust Fund: There do not appear to be equivalent tenant-right-to-purchase provisions in HOME and HTF state plans, except in the state of Missouri, which has an omnibus allocation plan for HOME, HTF, and LIHTC, and which awards points for developments intended for eventual tenant ownership. It should be noted, however, that both HOME and HTF funds can be used for homeownership more generally.[41] For example New Mexico's HTF awards extra points to single family, duplex, four-plex or townhome style projects, in which all units are intended for eventual tenant ownership. South Dakota provides a lease-purchase housing option for HOME funds designed to bring homeownership within reach of very-low-income and low-income homebuyers.

4. Tenant Protections

Rent increase protections

Protection against unfair rent increases is an increasingly common provision in state housing allocation plans. In the LIHTC program, rents are based on a percentage of the "Area Median Income" (AMI) for each group of units, and thus rents can fluctuate with increases in AMI, regardless of tenant income. The National Housing Law Project has recently urged the IRS to issue regulations limiting rent increases,[42] but in the absence of federal action, at least fifteen states have sought to protect tenants by limiting rent increases (usually limiting increases to 5% per year). At least one state (South Carolina) goes further by requiring approval from the state's Compliance Monitoring Department for any proposed rent increase (up to a maximum of 5%).

HOME and the Housing Trust Fund: Some state plans simply repeat the HUD statutory requirements on rent caps, and we did not find any plans that went further. HUD calculates maximum rent

38 States that convey an individual purchase right to tenants include Arkansas, Delaware, Idaho, Hawaii, Michigan, Minnesota, Nevada, New Hampshire, and Virginia. Louisiana, Mississippi, Missouri, New Jersey, Tennessee include the ROFR for individual tenants in townhouse, duplex, or single unit projects, and single family properties.

39 Alaska, California, Georgia, Hawaii, Idaho, Indiana, and Kentucky.

40 GA QAP, Ex. A of Appx. II, p. 118 of pdf, https://www.dca.ga.gov/sites/default/files/2022qualifiedallocationplan_boardapproved.pdf.

41 24 CFR § 93.200(a)(1); 24 CFR § 92.205(a)(1). In addition, up to 10% of a state's allocated HTF funds may be used for homeownership activities for first-time homebuyers.

42 National Housing Law Project, June 9, 2023 letter to the Internal Revenue Service re "Recommendations for 2023-2024 Priority Guidance Plan." https://s3.amazonaws.com/pdfs.taxnotes.com/2023/2023-19496_TNTIRSDocs_National_Housing_Law_Project_on_PGP.pdf.

limits for participating jurisdictions based on fair market rents or 30% of AMI. Participating Jurisdictions are required under the 2013 HOME Final Rule to review and approve rents for all HOME financed units annually throughout the affordability period.[43] The HTF Interim rule requires Grantees to review and approve rents annually for multi-family HTF assisted properties during their affordability period.[44]

Just cause eviction protections

LIHTC: The LIHTC statute includes a just cause or good cause eviction provision.[45] However, since good cause is not defined by federal law, the IRS has deferred to state law for definition, which has created ambiguity and some litigation.[46] States have the option of resolving this ambiguity by defining good cause in their QAP or other regulatory documents, but most states simply repeat the good cause legal requirement without definition. A handful of states provide more explicit protection to tenants by defining good cause. For example, the California LIHTC Compliance Manual defines good cause as: "serious or repeated violations of a material term of the lease, as that definition is applied with respect to federal public housing."[47]

States have the option of resolving this ambiguity by defining good cause in their QAP or other regulatory documents, but most states simply repeat the good cause legal requirement without definition.

Eviction prevention is a related protection, exemplified by the Indiana QAP, which awards a small number of points if the applicant commits to implementing strategies that reduce the impact of eviction on low-income households, including creating an Eviction Prevention Plan addressing how the property will implement management practices that utilize eviction only as a last resort and must describe strategies that will be taken with tenants on an individualized basis to attempt to prevent evictions when issues arise.[48]

HOME and National Housing Trust Fund: Good cause eviction protection is a federal requirement of the HOME Investment Partnerships program.[49] Eviction protections are more stringent for HOME developments owned by CHDOs.[50] Good cause is also required for housing developed through the NHTF.[51]

Similar to its LIHTC protections, Indiana's HTF program awards a small number of points if the applicant commits to implementing strategies that reduce the impact of eviction on low income households.

Protections against displacement relating to redevelopment

A majority of states have incorporated protections against displacement related to housing redevelopment. Although some basic protections are provided by the Uniform Relocation Act and parallel HUD rules, we observed more aggressive protections in several states:

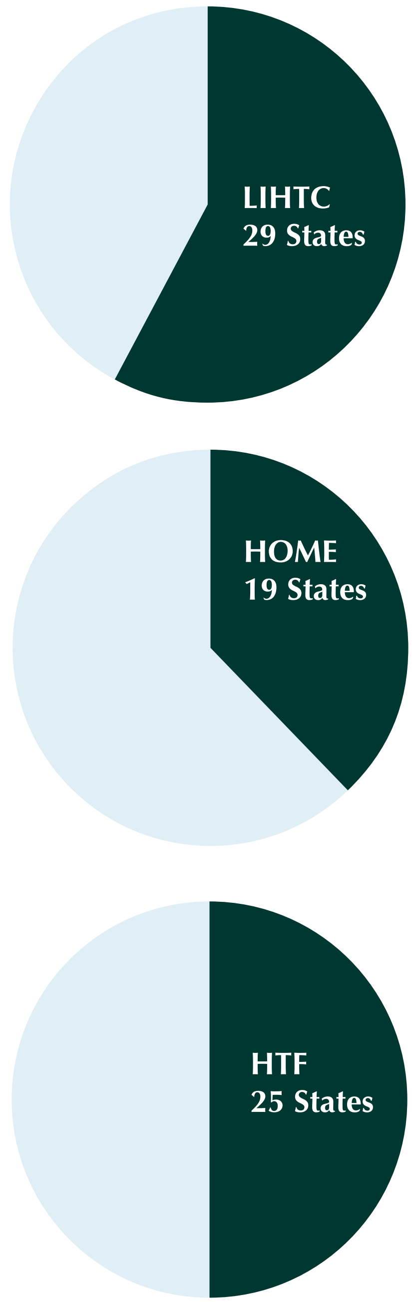
43 24 CFR § 92.252(f)(2).
44 24 CFR § 93.302(c)(2).
45 26 U.S.C. § 42(h)(6)(E)(ii)(I), IRS Rev. Rul. 2004-82, Q&A#5.
46 See "An Advocate's Guide to Tenants' Rights in the Low Income Housing Tax Credit Program" (National Housing Law Project, August 2021), https://www.nhlp.org/wp-content/uploads/LIHTC-2021.pdf.
47 California Tax Credit Allocation Committee, Compliance Online Reference Manual, at p. 12, https://www.treasurer.ca.gov/ctcac/compliance/manual/manual.pdf.
48 Indiana 2023-2024 QAP at 85-6, https://www.in.gov/ihcda/files/2023-2024-QAP-Final.pdf.
49 42 USC § 127774(a); 24 CFR § 92.253(c).
50 42 USC § 12755(b).
51 24 CFR § 93.303(c).

In Connecticut, proposed developments in LIHTC program are required to be affordable to current residents (if any) so that no permanent displacement is required for reasons of affordability; similarly, in Delaware no development will be eligible to compete for an allocation of LIHTC credits if existing residents would need to be permanently relocated due to income ineligibility. In Minnesota, the state agency will not accept applications where Section 8 tenants would be displaced because rents would be above the Section 8 payment standard limit

The state of Indiana awards extra points for eviction protection measures in all three of its federally funded housing programs:

- **LIHTC:** Up to three points if the Applicant commits to implementing strategies that reduce the impact of eviction on low-income households, including creating an Eviction Prevention Plan (2 points) and implementing low-barrier tenant screening to minimize the impact of previous evictions on a household's ability to secure future housing (1 point) (p. 85-6)
- **HOME:** Two points will be awarded if the Applicant commits to creating an Eviction Prevention Plan for the property. The plan must address how the property will implement management practices that utilize eviction only as a last resort and must describe strategies that will be taken with tenants on an individualized basis to attempt to prevent evictions when issues arise (p. 44)
- **HTF:** Applicants that commit to implementing strategies that reduce the impact of eviction on low-income households will receive 3 points

State protections against displacement



Support for tenant organizing and/or engagement

Residents of new or preserved/rehabilitated LIHTC, HOME, and/or HTF develops are best suited to understand their needs and the needs of low-income housing communities. Unfortunately, only three states—Connecticut (LIHTC), Indiana (HOME), and Rhode Island (LIHTC)—have explicit provisions that reference a tenant's right to organize or engage with the proposed development. However, none of those states make the right to organize and/or engage mandatory. Whereas Indiana and Rhode Island provide a small number of points for developments that support resident services such as resident associations or resident meetings,[52] Connecticut provides at least a small incentive for protecting the residents' right to organize and explaining the extent of this right:

> "1 point is awarded to proposed developments that include a signed Resident Participation Agreement.[53] Resident Participation Plan must include a notification to all residents explaining residents' right to organize and to participate in tenant organization without interference for or advance action by the authority."[54]

The general lack of express support for tenant organizing in most LIHTC, HOME, and HTF allocation plans is stark—especially considering the broad discretion that state housing agencies have over their plans. Including protections for tenant organizing, encouraging resident engagement in housing developments, and providing an avenue for advocacy should be incentivized in all projects dependent on federal funding.

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5. Other social housing related provisions

Community control

The social housing ideal of tenant or community control of housing does not seem to be a priority in state allocation plans, with the exception of the required setaside in the HOME program for Community Housing Development Organizations (CHDOs). This will be an important area for advocacy going forward.

LIHTC: One of the few examples of community oversight we observed in the LIHTC program was in Georgia, where the state prioritizes a "Community Quarterback Board," consisting of:

> "[A] coalition of public/private entities serving the Defined Neighborhood that: (1) Drives the revitalization initiative to make sure all related components are successful and sustainable; (2) Ensures the people in the Defined Neighborhood are engaged, included, and served; and (3) Serves as a single point of accountability for partners and funders….. 1/3 of CQB must be residents of the Defined Neighborhood."[55]

In Delaware, up to 14 points will be awarded to developments that can demonstrate overall community compatibility (community connectivity, residential appropriateness, community design) – though this is obviously not the same as resident/community oversight or control. But note that this type of "community compatibility" standard can also be misused to bar multifamily and affordable housing from predominantly single family neighborhoods and areas of opportunity.[56]

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52 Indiana 2023-2024 QAP p. 83, https://www.in.gov/ihcda/files/2023-2024-QAP-Final.pdf; Indiana 2020 Draft Policy p. 36, https://www.in.gov/ihcda/files/FY-2022-HOME-Rental-Program-DRAFT-POLICY.pdf; and Rhode Island 2022 QAP p. 41, https://www.rihousing.com/wp-content/uploads/2022-Final-QAP-ATT-B.pdf.

53 Connecticut 2023-2024 QAP, page 23, https://www.chfa.org/assets/1/6/FINAL_2022-23_QAP_(July_2021).pdf.

54 CT Gen. Stat. § 8-64(c)(1).

55 Georgia 2022 QAP Appendix II—Scoring Criteria, p. 13, 15, https://www.dca.ga.gov/sites/default/files/2022qualifiedallocationplan_boardapproved.pdf.

56 See *Building Opportunity III: Affirmatively furthering fair housing in the Low Income Housing Tax Credit program* (PRRAC, 2023), http://www.prrac.org/pdf/BuildingOpportunityIII.pdf.

HOME: As noted above, the federal statutory requirement of a 15% setaside of funds for CHDOs guarantees (on paper) a basic minimum standard of community and resident accountability for those developments, including "maintaining at least one third of its governing board's membership for residents of low-income neighborhoods, other low-income community residents, or elected representatives of low-income neighborhood organizations."[57] and "providing a formal process for low-income program beneficiaries to advise the organization in its decisions regarding the design, siting, development and management of affordable housing."[58] Several state QAPs exceed the 15% requirement, or otherwise privilege and incent funding of CHDOs. For example, in Louisiana, under the CHDO Annual Awards Program (CHAAP), the Louisiana Housing Corporation reserves 25% of its HOME allocation for use in funding CHDO eligible projects on an annual basis. Oklahoma also sets aside 25% of its annual allocation to CHDOs.

At least two states emphasize the importance of tenant involvement and oversight in CHDO management – in Oregon, OHCS requires that CHDO applicants must adhere to a fair lease and grievance procedure approved by OHCS. They must also submit a plan and follow a program of tenant participation in management decisions.

Income targeting and income mixing

The LIHTC statute requires states to prioritize projects that target the lowest income families,[59] so this priority is often reflected, to varying degrees, in the competitive point systems of state QAPs. But the minimum required affordability levels in the program, driven in part by assumptions about financial viability, reflect an income mixing approach that is closer to the European model of social housing than the U.S. public housing model.

The average income test is valuable for both deeper income targeting and income mixing.

Projects may meet the income requirements of the LIHTC statute by satisfying one of three tests. The "20-50 test" requires 20% or more of the residential units to be occupied by individuals whose income is 50% or less of area median gross income (AMI). Likewise, the "40-60 test" requires 40% or more of the units to be occupied by tenants whose income is 60% or less of AMI. The "Average Income test," established in the 2018 Appropriations bill, requires that 40% or more of the units be low-income units, with the average income of the tenants occupying those units being 60% or less of AMI.[60]

The average income test is valuable for both deeper income targeting and income mixing. Because the income requirement is an average of the low-income units, families who do not qualify under the other two tests (for example, have incomes from 60-80% of AMI) can permit the lowest income families (for example, 30% of AMI) to rent by bearing a larger share of the rental burden. These families also benefit from living in a more mixed income community. LIHTC can also achieve income mixing by its use to finance the acquisition of scattered site rental units in higher income areas on continuous or non-contiguous sites, as the Maryland QAP does.[61]

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57 or urban areas, community may be a neighborhood or neighborhoods, city, county, or metropolitan area.; for rural areas it may be a neighborhood or neighborhoods, town, village, county, or multi-county area (but not the entire state).
58 24 CFR § 92.2.
59 26 USC § 42(m)(1)(B)(ii)(I).
60 26 USC § 42(g)(1)(A)-(C).
61 LIHTC has been used in the Baltimore region as part of the financing for acquisition of scattered single family homes to serve as replacement for demolished public housing. In jurisdictions with Inclusionary Housing laws,

Yesler Terrace, Seattle. Photo credit: Seattle Housing Authority

Another way that the LIHTC program is able to reach the lowest income families is through the layering of multiple subsidy programs in the same project, including funds from the HOME program, the Housing Trust Fund, and Project Based Vouchers. The most powerful example of this approach is in public housing redevelopment – for example, redevelopment using HUD's Choice Neighborhoods Initiative[62] or HUD's Rental Assistance Demonstration, where public housing authorities (or their nonprofit designee) can function as the general partner in a LIHTC deal that is linked to monthly Section 8 subsidies.[63] These developments are by definition permanently affordable, with strong tenant protections, and deeply income targeted – though generally without any significant income mixing, unless that is prioritized by the PHA in its redevelopment plans.[64]

HOME and the Housing Trust Fund: Both of these programs are restricted to low income tenants (families with incomes below 80% of the "Area Median Income"). The Housing Trust Fund is targeted to Extremely Low Income (<30% AMI) and Very Low Income (<50% AMI) tenants,[65] and the HOME program requires at least 90% of rental units to be targeted to families below 60% of AMI (and HOME homeownership funds are restricted to low income households).[66]

LIHTC also has potential to contribute to the financing of affordable units in an otherwise market rate building. and/or by financing scattered site units in higher income areas.

62 https://www.hud.gov/cn.

63 https://www.hud.gov/RAD.

64 See, for example, Seattle Housing Authority's Yesler Terrace Choice Neighborhoods development, https://cssp.org/wp-content/uploads/2019/03/MISA-Yesler-Terrace-Seattle.pdf.

65 24 CFR § 93.302.

66 24 CFR § 92.216 (rental); 24 CFR § 92.217 (homeownership).

Community Land Trusts and Limited Equity Coops

Community Land Trusts (CLTs) and limited equity cooperatives are forms of shared equity homeownership that exemplify the social housing model.[67] Community land trusts purchase land within a community to preserve it for long-term affordable housing, and are often able to obtain funding from federal sources as well as local government funds – as one report noted, "[m]any CLTs leverage HOME, CDBG, and even LIHTC programs in their work to provide lasting affordability."[68]

LIHTC: We only observed one QAP, from Montana, that explicitly mentions CLTs, noting that a requirement of projects wishing to convert to homeownership is placing the land into a community land trust (including resident-owned cooperatives) and placing limitation on equity upon subsequent sales.[69] The North Dakota Housing Finance Agency also has an ongoing, Community Land Trust pilot associated with their housing project financing that provides local Community Land Trusts with a low-cost line of credit to create more single-family housing for low-to moderate-income households.[70]

While we did not find other examples of explicit preferences or incentives for community land trusts or limited equity coops in other states, a number of states have, in practice, allocated LIHTC funds to these types of social housing projects. For example:

- In Denver, Urban Land Conservancy, a non-profit with a CLT approach to real estate development and preservation, has partnered on numerous LIHTC developments, including Walnut Street Lofts and Sheridan Station Apartments to create over a thousand permanently affordable apartments.[71]
- The Champlain Housing Trust of Vermont, a CLT, owns a variety of real estate, including LIHTC properties and over 50% of their LIHTC properties serve people with less than 30% AMI.[72]
- Mountainlands Community Housing Trust in Utah in has partnered with the Utah Housing Corporation to leverage funds to create and preserve over 300 homes and almost 350 affordable rental projects[73] while converting some older LIHTC-financed projects to market rate housing.[74]

HOME: The HOME program is also an important potential source of funding for CLTs. HOME requires participants to reserve at least 15% of its HOME allocation to CHDOs, and may allocate an additional 5% to the operating costs of CHDOs.[75]

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67 Community Land Trusts (Local Housing Solutions): https://localhousingsolutions.org/housing-policy-library/community-land-trusts/.
68 Community Land Trusts: A Guide for Local Governments, page 21 (National League of Cities & Grounded Solutions Network 2021), https://www.nlc.org/wp-content/uploads/2021/08/Community-Land-Trusts_A-Guide-for-Local-Governments_Report-1.pdf p. 21; See also John Emmeus Davis, "Starting a Community Land Trust: Organizational and Operational Resources" (Burlington Associates in Community Development LLC 2007), https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/tool-7-funding.pdf.
69 Montana 2024 Qualified Allocation Plan, pp. 21-22: https://housing.mt.gov/_shared/Multifamily/docs/2024QAP.pdf.
70 North Dakota Housing Finance Agency, Project Financing: https://www.ndhfa.org/index.php/development/.
71 The Benefits of Using Community Land Trusts with Low Income Housing Tax Credits (Urban Land Conservancy December 2020): https://www.urbanlandc.org/wp-content/uploads/2020/12/LIHTC-CLT-Report-Draft-4.pdf. p. 3
72 https://nhc.org/wp-content/uploads/2021/06/Champlain-Housing-Trust.pdf.
73 Our Projects, Mountainlands Housing Trust Fund: https://housinghelp.org/projects/.
74 How Have Community Land Trusts Used the Low-Income Housing Tax Credit? Case Studies from Athens, GA and Park City, UT (Michael S. LoStocco 2013) p. 24. https://scholarworks.uno.edu/cgi/viewcontent.cgi?article=2701&context=td.
75 Summary of HUD Regulations Affecting Community Land Trusts: https://www.burlingtonassociates.com/files/2113/4463/2951/11-Summary_of_HUD_Regulations_Affecting_CLTs.pdf.

Most CLTS qualify under HUD's definition of CHDOs and thus qualify for this specifically-allocated HOME funding. For instance, the Athens Land Trust in Georgia is funded through HOME and the Community Development Block Grant program.[76]

Based on this review, it is clear that Community Land Trusts are very well suited to LIHTC and HOME funding, but virtually no states currently provide incentives for CLTs. Investment in these valuable social housing ownership structures could be substantially expanded if more states prioritized CLTs with either setasides or additional competitive points.

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Bright Street Housing Co-op in Burlington, Vermont was built using LIHTC and HOME funds and is home to 40 households. It was completed in 2015. Photo credit: Champlain Housing Trust

76 Affordable Housing, Athens Land Trust: https://athenslandtrust.org/our-work/affordable-housing/

C. CONCLUSION

The most powerful finding in this survey is the enormous discretion that state housing agencies have to adapt their state-administered federal funding programs to serve social housing policy objectives. It is incumbent on housing advocates to work with their state agencies to expand the social housing policies reviewed in this report. There is no compelling reason for a state to prioritize for-profit developers, or to allow non-profits to be blocked from acquiring properties after fifteen years, or to limit the period of affordability to only 30 or 40 years. These are all policy ***choices***. Tenants and communities should play a more direct role in overseeing the housing that serves them, government housing funds should carry with them ironclad tenant protections, and community land trusts and other alternative ownership models should be openly supported and encouraged by states. We hope that this report will inspire advocacy around these existing federal programs: more funding for social housing is certainly needed, but in the meantime the federal government has already put a lot of money on the table, and much more of this funding can and should be used to support social housing goals.

APPENDICES

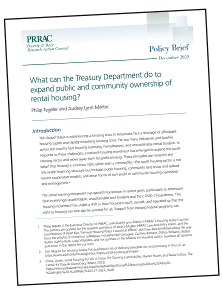
Appendix A:
Summary of tenant protections and social housing provisions in state housing allocation plans

see prrac.org/wp-content/uploads/2023/12/social-housing-appendix-a.pdf

Appendix B:
State-by-state summaries

see prrac.org/wp-content/uploads/2024/03/social-housing-appendix-b.pdf

Related resources from
Poverty & Race Research Action Council (PRRAC):



What can the Treasury Department do to expand public and community ownership of rental housing?

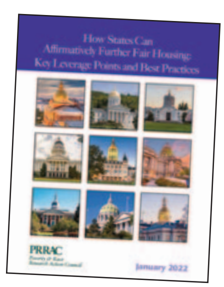
Philip Tegeler and Audrey Lynn Martin, December 2023

What can HUD do to expand public and community ownership of rental housing?

Philip Tegeler, April 2021

Building Opportunity III: Affirmatively furthering fair housing in the Low Income Housing Tax Credit program

Janelle Taylor, Robert Lindsay, and Philip Tegeler, October 2023



How States Can Affirmatively Further Fair Housing: Key Leverage Points and Best Practices

January 2022

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