POOR PEOPLES’ HOUSING PROBLEMS

AND THE LOW-INCOME HOUSING

TAX CREDIT PROGRAM

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by

Florence Wagman Roisman
Associate Professor of Law

Widener University School of Law
4601 Concord Pike
Wilmington, Delaware 19803
(until July 24, 1997)

Indiana University School of Law
735 West New York Street
Indianapolis, Indiana 46202-5194
(from and after July 27, 1997)

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The Low Income Housing Tax Credit ("LIHTC") program is "currently the largest federal program to fund the development and rehabilitation of housing for low-income households."1 From the initiation of the program in 1987 through 1994, almost 500,000 units were placed in service.2 The program has considerable political support, and seems likely to continue to be the primary source of new and rehabilitated subsidized housing. It therefore warrants the attention of legal services lawyers and other advocates for poor people.

Two kinds of issues with respect to LIHTC units are likely to be of most interest to legal services advocates: admission issues (how to get a client into a tax credit development) and

1GENERAL ACCOUNTING OFFICE, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW-INCOME HOUSING PROGRAM (March 1997) (hereinafter GAO REPORT) at § 2; accord, HUD, Final Rule, 60 Fed.Reg. 61846, 61917 (December 1, 1995)(for funding new or rehabilitated subsidized housing units, the LIHTC program is "the only major Federal assistance program...that is currently active") and ABT ASSOCIATES INC., DEVELOPMENT AND ANALYSIS OF THE NATIONAL LOW-INCOME HOUSING TAX CREDIT DATABASE: FINAL REPORT (July 1, 1996)(hereinafter ABT REPORT) at 1-2: ("The LIHTC has become the principal mechanism for supporting the production of new and rehabilitated rental housing for low-income households.")

2See ABT REPORT, pp. 1-3 and 1-4, Exhibit 1-1 (estimating that in the six initial years of the program, 1987-1992, approximately 314,625 low-income units were placed in service, and an additional 118,000 units were added in 1992-4). Compare GAO REPORT at 32 (estimating that 172,151 units were placed in service from 1992 to 1994).

Abt and GAO note the "lack of centralized data [] on the tax credit program...."GAO REPORT at 31.

Abt reports that "information on the number of units actually developed is difficult to assemble. Given the decentralized nature of the program, there is no single federal source of information on tax credit production." While "states are required to report on tax credit projects to the IRS, ... these data are not available for analysis due to the confidentiality of tax-related submissions." ABT REPORT at 1-2, text and note 6.

GAO REPORT at 32. It's not clear whether the GAO 172,000 is for the same period that Abt says 118,000.
development issues (how to foster the production of tax credit developments that would provide better and more affordable housing for clients). This outline will address both sets of issues. It precedes that discussion with an overview of the LIHTC program.

I. **The Low Income Housing Tax Credit Program**

The LIHTC program, created in the Tax Reform Act of 1986, allows owners of residential rental property to claim tax credits, generally for 10 years, for 30 to 70 percent of present value of new and substantially rehabilitated housing developments. In general, a project qualifies for the credit only if at least 20% of the units are rented to households with incomes at or below 50% of area median gross income ("AMGI"), or at least 40% of the units are rented to households with incomes at or below 60% of AMGI.

The "primary source of equity financing for tax credit projects" is private investors, usually recruited by syndicators. The investors' incentive is the expectation that, for ten years, they will "receive tax credits and other tax benefits, such as business loss deductions, that they can

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4 26 U.S.C. §42(b); GAO REPORT at 26.
5 26 U.S.C. §42(g)(1); GAO REPORT at 25. The incomes are to be adjusted for family size. Ibid.
6 GAO REPORT at 27.
use to offset the taxes they owe on other income."

LIHTC units are rent-restricted. If the credit is to be maintained, gross rent, including an allowance for utilities, cannot exceed 30 percent of the tenant's imputed income limitation (i.e., 50% or 60% of AMGI).²

Although the LIHTC has been justified and described as a program for housing low-income people³, the tax credit subsidy alone reduces rents only to a moderate level; unless households have additional subsidies, they could afford tax credit units only if they had incomes between 40 and 60% of area median income.⁴

It appears, however, that most tax credit projects do have other subsidies: GAO estimates that 71% of the households in units placed in service between 1992 and 1994 benefit from some

³GAO REPORT at 27-28.

⁴See, e.g. STAFF OF THE JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 (H.R. 3838, 99th Cong., Pub. L. 99-514), Comm. Print (May 4, 1987) (100th Cong., 1st Sess.) [hereinafter GENERAL EXPLANATION] at 152 (past tax preferences "failed to guarantee that affordable housing would be provided to the most needy-low-income individuals").

⁵Kathryn P. Neison, Whose Shortage of Affordable Housing?, 5 HOUSING POL’Y DEBATE 401, 402 (1994) ("Unless they have additional subsidies, LIHTC occupants must have incomes between 40 and 60 percent of the median to avoid severe rent burdens, and research shows that families who occupy such units do have incomes in that range").
additional subsidy "such as rental assistance, other government loans, loan subsidies or grants,"\textsuperscript{11} and an earlier study had estimated that "more than three-fifths of LIHTC projects received an additional federal, state, or local subsidy."\textsuperscript{12} GAO estimates that, taking into account project-based additional subsidies, the average monthly rent for a unit placed in service from 1992 to 1994 was "about $435."\textsuperscript{13} At 30\% of income, this would be affordable to a household with an income of $17,400/year, approximately 50\% of median. GAO also estimates that for the units placed in service from 1992 through 1994, about 75\% of the resident households had incomes at or below 50\% of area median income.\textsuperscript{14}

GAO reported that the households that "received rental assistance generally had much lower incomes than those who did not" and that "without this rental assistance, these households might not have been able to have afforded to live in their units."\textsuperscript{15} GAO estimated that households without rental assistance had incomes of $16,700; households with rental assistance,

\textsuperscript{11}GAO REPORT at 40, 6, 13.

\textsuperscript{12}Nelson, supra note 9, at 411. State subsidies to LIHTC developments include taxable bond financing, bridge financing, subordinate financing, mortgage interest subsidies, operating subsidies, rental subsidies, equity financing, and individual state low-income housing credits. Jarrett Tomás Barrios, Government Fair Housing Obligations Administering the Low-Income Housing Tax Credit (GEO. U. L. CTR. seminar paper, May 15, 1994) 13-14 and notes.

\textsuperscript{13}GAO REPORT at 7.

\textsuperscript{14}GAO REPORT at 6.

\textsuperscript{15}GAO REPORT at 37.
$7,860.\textsuperscript{16} A more recent study reports that tax credit § 8 residents have incomes of about $9,250.\textsuperscript{17}

State or local government action is required to secure the tax credit. The credit must have been "allocated pursuant to a qualified allocation plan ["QAP"] of the housing credit agency which is approved by the governmental unit ... of which such agency is a part...."\textsuperscript{18} In addition, the "chief executive officer...of the local jurisdiction within which the building is located" must have been offered "a reasonable opportunity to comment on the project."\textsuperscript{19}

As originally enacted, the LIHTC statute allowed the housing credit agencies vast discretion in the administration of the credit.\textsuperscript{20} Congress later amended the statute to set certain

\textsuperscript{16}GAO REPORT at 6-7. These estimates are based on information provided to GAO by project managers of tax credit projects. GAO REPORT at 38.

\textsuperscript{17}25 HOUSING & DEVELOPMENT REPORTER 107 (June 20, 1997), reporting on a study conducted for the National Council of State Housing Finance Agencies by E&Y Kenneth Leventhal. HDR reports that this study shows that "nearly a third" of tax credit residents use § 8 "vouchers." 25 HDR at 107. It is not clear from the HDR story why this figure is so much lower than GAO’s estimate for all rental assistance, whether "vouchers" is meant to include § 8 certificates, or why the $9,250 figure is so much higher than GAO’s estimate of $7,860 for tax credit residents with rental assistance. Note that the GAO Report generally addresses only units placed in service in 1992-1994.

\textsuperscript{18}26 U.S.C. § 42(m)(1)(A)(i).

\textsuperscript{19}26 U.S.C. § 42(m)(1)(A)(ii).

\textsuperscript{20}Thomas R. Wechter & Daniel L. Kraus, The Internal Revenue Code’s Housing Program, § 42, 44 TAX LAWER 375,385 (1991) ("As originally enacted, the low-income housing tax credit provisions provided no guidance to the housing credit agencies with respect to the administration of the credit.")
priorities for the use of the LIHTC. Congress added the requirement that the state or local allocating agency develop a QAP and, with respect to each QAP, Congress set four requirements: (1) each QAP must identify selection criteria by which to choose among projects\(^{21}\); (2) each QAP's selection criteria must include some specified by Congress\(^{22}\); (3) each QAP must give preference to certain kinds of projects favored by Congress: those serving the lowest income tenants and those obligated to serve qualified tenants for the longest periods;\(^{23}\) and (4) each QAP must provide a procedure for monitoring compliance with the other provisions and for notifying IRS of noncompliance.\(^{24}\)


\(^{22}\)26 U.S.C. § 42(m)(1)(C). "The selection criteria...must include" project location, housing needs characteristics, project characteristics, sponsor characteristics, participation of local tax-exempt organizations, tenant populations with special housing needs, and public housing waiting lists.


\(^{24}\)26 U.S.C. § 42(m)(1)(B)(iii). In addition to the requirement of a monitoring procedure, Congress imposed reporting requirements on both the allocating agencies and the development sponsors. Each housing credit agency is required to submit to the Secretary an annual report specifying the amount of housing credit allocated, identifying the recipient buildings and taxpayers, and providing "such other information as the Secretary may require." 26 U.S.C. § 42(1)(3). Furthermore, after the close of each building's first taxable year, each taxpayer must submit to the Secretary a certification setting forth certain specified information and "such other information as the Secretary may require." 26 U.S.C. § 42(1)(1). Congress also authorized the Secretary to require taxpayers to submit annual reports of such information as the Secretary may require. 26 U.S.C. § 42(1)(2).
In 1989, Congress amended the statute to encourage locating projects in certain areas.\textsuperscript{25} Congress provided a thirty percent increase in eligible basis\textsuperscript{26} for "any building located in a qualified census tract or difficult development area."\textsuperscript{27} A "qualified census tract" ("QCT") is one designated by the Secretary of HUD in which 50% or more of the households have incomes less than 60% of AMGI.\textsuperscript{28} Difficult development areas ("DDAs") are those designated by HUD as areas with "high construction, land, and utility costs relative to area median gross income."\textsuperscript{29}

It was not until July 1996 -- 10 years after the creation of the LIHTC program -- that any reliable information about the locations of the LIHTC projects was provided. That information comes from the July 1996 Abt Report commissioned by HUD.

\textsuperscript{25}Wechter & Kraus, \textit{supra} note 7, at 392.


\textsuperscript{27}IRC § 42(d)(5)(C)(i).

\textsuperscript{28}26 U.S.C. § 42(d)(5)(C)(ii)(I). Qualified Census Tracts were designated by HUD at 60 \textit{FED. REG.} 21246 (May 1, 1995). HUD has reported that "Qualified Census Tracts will not be redesignated until year 2000 census data become available." \textit{Id.}

\textsuperscript{29}26 U.S.C. § 42(d)(5)(C)(iii). As with Qualified Census Tracts, "all designated Difficult Development Areas in MSAs/PMSAs may not contain more than 20 percent of the aggregate population of all MSAs/PMSAs, and all designated areas not in metropolitan areas may not contain more than 20 percent of the aggregate population of all non-metropolitan counties." HUD, 60 \textit{FED. REG.} 48340,48341; 26 U.S.C. § 42(d)(5)(C)(ii)(II). HUD has designated the Difficult Development Areas in "Statutorily Mandated Designation of Difficult Development Areas for Section 42 of the Internal Revenue Code of 1986, Part IV," 60 \textit{FED. REG.} 48340 (September 18, 1995).
The Abt Report shows that "LIHTC units are more likely than other types of rental housing to be located in central cities . . .": the percentage of tax credit units in central cities is approximately 54%.\textsuperscript{30} A relatively smaller percentage of LIHTC units is in the suburbs: only 26% of the tax credit units for 1992-94 are in the suburbs.\textsuperscript{31} And non-metro (rural) areas have a higher percentage of tax credit units than of FHA-assisted units--19.5% of the tax credit units are in non-metro areas, while only 13% of the FHA units are in non-metro areas.\textsuperscript{32}

Most of these central city LIHTC units -- 73.9% -- are in census tracts with more than 50% low-income households; 48% of these central city units are in tracts with more than 50% minority population. \textsuperscript{33} 34% of all tax credit units are in areas with more than 50% minority population.\textsuperscript{34} 22% of the LIHTC central-city units are in census tracts with more than 20 percent

\textsuperscript{30}\textit{Abt Report} at 4-6. This is almost the same as the percentage of FHA-assisted units in the cities--54.4% tax credit, 55% FHA-assisted. \textit{Abt Report} at 4-7; Connie H. Casey, \textit{Characteristics of HUD-Assisted Renters and Their Units in 1989} (HUD OPDR March 1992) at 14. The Abt findings are consistent with GAO's estimate for the units placed in service from 1992 through 1994: based on reports from tax credit project managers, GAO estimated that 48% of the units were in "urban areas." \textit{GAO Report} at 44.

\textsuperscript{31}\textit{Abt Report} at 4-7. By comparison, 33% of FHA-assisted units are in the suburbs. Casey, \textit{supra} note , at 14.

\textsuperscript{32}\textit{Abt Report} X at 4-7, Casey, \textit{supra} note 30, at 14. GAO's report suggests that there may be an even a higher percentage of non-metro units, reporting that "almost one-third of the tax credit properties placed in service between 1992 and 1994 were financed by RHS [Rural Housing Service] mortgages . . . ." \textit{GAO Report} at 41. Since this is "properties," not units, a generally smaller size of RHS developments would explain why 1/3 of the properties but only 1/5 of the units are in non-metro areas.

\textsuperscript{33}\textit{Abt Report} at 4-16.

\textsuperscript{34}\textit{Abt Report} at 4-15. Only 18% of all U.S. tracts have this characteristic. \textit{Ibid}.
female-headed households, although only 5% of all U.S. census tracts have this characteristic.\textsuperscript{35} Abt estimated that about 37% of the units placed in service between 1992 and 1994 are located in DDAs and QCTs.\textsuperscript{36}

Even in the non-central city but metro areas -- i.e., the suburbs -- 48% of the LIHTC units were in tracts with over 50% low-income households,\textsuperscript{37} although only "about 29 percent of all U.S. Census tracts contained over 50 percent low-income households in 1990."\textsuperscript{38} But, in comparison to the central city units, the "metro" (suburban) units are in census tracts that have fewer poor households, fewer minorities, fewer female-headed households, and more homeowners.\textsuperscript{39} Only 20% of the suburban tax credit units are located in neighborhoods with more than 50% minority population.\textsuperscript{40}

The LIHTC market may be segmented on another dimension, with profit-oriented developers outside the cities (in predominantly white areas) and non-profit developers in the cities (in predominantly minority areas). This was presented as a given in a discussion of corporate motivation for investing in tax credit funds and projects. Peter Lampert, the Senior Tax Counsel

\textsuperscript{35}Abt Report at 4-15 to 4-17.

\textsuperscript{36}Abt Report at 4-10.

\textsuperscript{37}Abt Report at 4-16.

\textsuperscript{38}Abt Report at 4-15.

\textsuperscript{39}Abt Report at 4-16.

\textsuperscript{40}Abt Report at 4-16.
for the Federal Home Loan Mortgage Corporation, observed:

If the corporation desires to maximize return, it will likely invest in for-
profit syndicators with affordable housing projects located in the suburbs. 
Alternatively, if it desires to assist in targeting affordable housing where the 
need is greatest, it will invest with nonprofit syndicators in blighted inner-
city areas.41

Lampert says that "most of the projects of the nonprofits...are developed in neighborhoods where 
social problems may depress market values."42

The locations of the LIHTC units tell only part of the story: a separate question is the 
characteristics of the residents.

In general, neither the allocating agencies nor the project sponsors consider that they are 
required to collect or report any information about residents other than income and family size. 
For the GAO study, tax credit project managers were asked to provide information about the 
residents. On the basis of the information so provided, GAO estimated that

41Peter M. Lampert, Corporate Investment in the Low-Income Housing Tax Credit, 79 J. 
TAXATION 344, 344 (1993). The views expressed in the article do not of course necessarily 
represent any official position of Freddie Mac.

42Lampert, 79 J. TAX. at 348.
*most of the households served were small: 67% included one or two people; the average household had 2.2 persons;*43

*82% of the LIHTC units had 2 bedrooms or fewer;*44

*26% of the units were intended primarily to serve the elderly, and about 5% were for persons "with special needs," including people with disabilities and previously homeless people;*45

*64% of the households were headed by women; and

*53% of the heads of households were white, 33% black, 11% Hispanic, and 3.5 "of other races."*46

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43GAO REPORT AT 42.

44GAO REPORT AT 45.

45GAO REPORT at 43.

46GAO REPORT at 43.
II. ADMISSIONS ISSUES

Tax credit units are more likely then unsubsidized housing to offer opportunities for decent accommodation. Some clients may want to live in tax credit units even though the rents will cost more than 30% of income; other clients, who have Section 8 or other subsidies, might well prefer to use them in tax credit units rather than in other private housing. Clients might prefer the tax credit units because the units are newer or rehabilitated, because the rents are within § 8 Fair Market Rents levels, or because the units are located in better-served areas. (Recall that the tax credit units in the suburbs are in census tracts that have fewer poor households, fewer minorities, fewer female-headed households, and more homeowners than do HUD-assisted units.47)

It appears clear that the lowest-income households are not enjoying tax credit units, even when those households have § 8 subsidies. The reported average income of these additionally assisted households, $7,860 or $9,250, is well above the income levels for public assistance recipients and public housing residents.48 This suggests that there may be a role for legal services lawyers to play in assuring very low income client households

47 ABT REPORT at 4-16.

48 HDR reports that the National Council of State Housing Finance Agencies' study shows that most § 8 tax credit residents have incomes of about $9,250, "indicating a wage earning family." 25 HDR at 107. John Schrider points out that a full-time job at the current minimum wage would pay more than $9,250/year. These figures may be several years old; it may be that these are mostly elderly households, a thesis supported by the predominance of small households. In 1993, the median AFDC benefit for a 4-person family was $435/month, $5,220/year. HOUSE COMM. ON WAYS AND MEANS, 103d Cong., 2d Sess., OVERVIEW OF ENTITLEMENT PROGRAMS ["1994 GREEN BOOK"] 369 (COMM. PRINT 1994). The median income of public housing residents in 1989 was approximately $6,571. Casey, supra note 30, at 10-11.
equality of opportunity to live in tax-credit units.

If tax credit developments are not accepting Section 8 certificate holders at all, they can be challenged under the tax credit statute itself, which provides that no credit shall be allowed absent an agreement between the taxpayer and the housing credit agency which prohibits a refusal to lease “because of the status of the prospective tenant as” a holder of a Section 8 certificate or voucher. If a tax credit development has no or few § 8 certificate or voucher holders, it might be fruitful to discuss with a local fair housing group testing to establish the nature of the treatment accorded applicants who are § 8 certificate or voucher holders. If the development does discriminate against § 8 beneficiaries, the housing credit agency and IRS might be asked to withdraw the tax credit. This is a powerful penalty, the threat of which is likely to secure the attention of the LIHTC project sponsor.

It may be that a sponsor accepts some § 8 certificate or voucher holders, but limits that acceptance to elderly households. Such situations may well violate the Fair Housing Act’s prohibition of familial status discrimination. Landlords are allowed to prefer elderly persons only in three situations, one of which is for projects specifically intended to serve the elderly under federal or state programs. Only about 26% of the tax credit units meet this standard. The other exemptions are housing (1) intended for, and solely occupied by,

\[49\text{U.S.C. § 42(h)(6)(B)(IV).}
\[50\text{GAO REPORT at 43.}
persons 62 or older, or (2) intended for, and at least 80% occupied by, households
including 1 person 55 or older, with some additional restrictions. It is likely that tax
developments that do not meet these standards nonetheless prefer elderly tenants,
with or without § 8, thus violating the Fair Housing Act.

If tax credit sponsors accept some § 8 holders, but limit the acceptance to working
households, challenges will require more creativity. State or local law may prohibit
discrimination on the basis of amount or source of income. If AFCD/TANF recipients
are being rejected, the sponsor is vulnerable to a sex-discrimination claim. There also is
room to argue that excluding federal or state public assistance recipients from federally
and state aided housing is inconsistent with and would frustrate the purposes of the federal
and state programs.

It is likely that tax credit sponsors discriminate on the basis of race or national
origin and that tax credit developments are segregated by race and ethnicity. Since these

51 42 U.S.C. § 3607(b)(2).

52 Robert G. Schwemm, Housing Discrimination: Law and Litigation (1996) at 30-3;
James A. Kushner, Fair Housing: Discrimination in Real Estate, Community
Development, and Revitalization (2 ed. 1995) at 70-72.

53 The Aid to Families with Dependent Children Program was replaced by Temporary Assistance
for Needy Families by the Personal Responsibility and Work Opportunity Reconciliation Act of

54 See HUD v. Ross, HUDALJ 01-96-0466-8 (1994), Prentice Hall Fair Hsg.-Fair Lend'g
Rptr. ¶25,075 and Gilligan v. Jameco Dev. Corp., 108 F.3d 246 (9th Cir. 1997).
characterize most housing, it is probable that they also characterize tax credit housing. It is most likely that this kind of discrimination will be found in the non-metro and suburban developments. Recall that while the suburban units often are in low-income neighborhoods (Abt reports that 48% of these units are in tracts with over 50% low-income households), only 20% of the suburban tax credit units are located in neighborhoods with more than 50% minority population. Most suburban tax credit developments are in majority-white neighborhoods, and it is likely that they have predominantly white occupants. Lawyers representing minority applicants have powerful weapons to secure admission to such projects by minorities.

First, of course, are the traditional Title VIII principles, including attacks on advertising and marketing practices. An all-white tax credit development that rejects minority applicants is very vulnerable to a Title VIII challenge. (Here, too, testing by a local fair housing group could be helpful). In addition, advocates may draw on the special obligations imposed because of other federal or state programs involved in the project

53ABT REPORT at 4-16.

56ABT REPORT at 4-15.

57An experienced observer of the program writes that “left to their own devices, most projects tend to be occupied by one ethnic or racial group.” JOSEPH GUGGENHEIM, TAX CREDITS FOR LOW-INCOME HOUSING: OPPORTUNITIES FOR DEVELOPERS, NON-PROFITS, AND COMMUNITIES UNDER PERMANENT TAX ACT PROVISIONS (9th ed. 1996) at 137.

58See The Outline of Principles, Authorities, and Resources for Fair Housing Litigation included in these materials.
For example, if CDBG funding is involved, the development is subject to 42 U.S.C. § 5309(a), which provides that: "No person in the United States shall on the ground of race, color, national origin, religion, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this chapter. Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 or with respect to an otherwise qualified handicapped individual as provided in section 794 of Title 29 shall also apply to any such program or activity." 42 U.S.C. § 5304(b)(2) requires that grantees certify that grants "will be conducted and administered in conformity with the Civil Rights Act of 1964 and the Fair Housing Act and the grantee will affirmatively further fair housing."

State and local CDBG-recipient certifications of "affirmatively furthering fair housing" mean that each jurisdiction

will conduct an analysis to identify impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard.

24 CFR § 91.225(a)(1)

In addition to these general requirements, for any LIHTC project that employs Community Development Block Grant funds, each recipient is required to establish and maintain records containing, among other things, "data on the extent to which each racial and ethnic group and single-headed households (by gender of household head) have applied for, participated in, or benefitted from, any program or activity funded in whole or part with CDBG funds." 24 CFR § 570.506(g)(2), which also specifies that "such information shall be used only as a basis for further investigation as to compliance with nondiscrimination requirements. No recipient is required to attain or maintain any particular statistical measure by race, ethnicity, or gender in covered programs."

The LIHTC developments with Rural Housing Service mortgages also are subject to the specific requirements of the rural housing legislation, regulations and handbooks. Waiting lists are required to "show the racial identify of the prospective tenant." Multiple Housing Management Handbook, Exhibit B to Subpart C of 7 CFR § 1930, HDR Ref. 40:0625. Borrowers are forbidden to discriminate "because of" statuses protected by Title VIII. 7 CFR § 1944.215(j). A complaint procedure is established in 7 CFR § 1944.239. Title VIII is explicitly made applicable, as is "the respective affirmative Fair Housing Marketing Plan." 7 CFR § 1944.239(c).
Second, what may be the most effective weapon against this kind of discrimination would be a challenge based on Treasury regulation 26 CFR § 1.42-9(a), which provides that eligibility for the low-income housing tax credit requires that "the unit is rented in a matter consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of" HUD. Fear of losing the tax credit may be a much more powerful concern for tax credit sponsors than fear of remedies under Title VIII. And § 1.42-9(a), of course, would apply to all forms of discrimination prohibited by HUD "rules or regulations" -- and Title VIII: discrimination based on race, national origin, gender, color, religion, familial status, and handicap.

Third, admission challenges also may be based on requirements imposed by state QAPs; and violation of these requirements, like violation of the Treasury regulation, would carry the extra force of possible loss of the tax credit. State QAPs may require, for example, that tax credit developments have affirmative fair marketing plans. And some of the HUD "rules or regulations" to which 26 CFR § 1.42-9(a) refers require affirmative marketing policies.

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III. DEVELOPMENT ISSUES

Another way in which legal services lawyers may be concerned with the tax credit program is with respect to rent levels, unit sizes, and locations of tax credit developments. Addressing each of these issues requires attention to what is in the QAP and how the QAP provisions are administered.

A. Rent Levels.

Congress has required that each state’s QAP give preference to projects serving the lowest-income tenants and to projects obligated to serve qualified tenants for the longest periods of time. The state allocating agencies have exercised considerable ingenuity in purporting to comply with these requirements. As the GAO report indicates, state agencies have used a variety of definitions and ranking techniques and then considerable discretion in selecting among applicants, so that the projects that are funded are not necessarily those that serve the lowest-income people for the longest periods of time. Definitions of “low-income” vary. Many allocation plans treated these preferences


63GAO reports, for example, that “North Carolina targeted its allocation to renters with incomes between 51 and 60 percent of their area’s median income. North Carolina’s consolidated plan specified that renters with incomes between 0 and 50 percent of their area’s median income would not be served through the tax credit program.” GAO REPORT at 61; emphasis added. Texas targeted its tax credits at households with incomes between 31 and 50% of AMI. Ibid.
as selection criteria that could be outweighed by other standards.\textsuperscript{64} Advocates should reform the QAPs, working to assure that "lowest income" is defined at zero, that the preferences are made requirements, and that political decisions do not allow deviations from the standards.\textsuperscript{65} Sponsors should be required to take every available step to get the rent levels as low as possible.\textsuperscript{66}

B. \textbf{Unit Sizes.}

GAO reports that 82\% of the tax credit units added from 1992 to 1994 were 2 bedroom or smaller units. This is not consistent with the housing needs that states have identified. HUD requires the states to develop consolidated plans for certain programs, and each consolidated plan must "develop a strategy for coordinating their housing resources -- including their tax credits -- to meet their identified housing needs."\textsuperscript{67} "The populations most frequently identified as needing housing were the elderly (70 percent); large families (67 percent), and persons with special needs..."\textsuperscript{68} When 82\% of the units are 2 bedrooms or smaller, the 67\% need of large families is not being equitably addressed. The IRC requires that QAPs set forth selection criteria "which are appropriate

\textsuperscript{64}GAO REPORT at 63.

\textsuperscript{65}GAO REPORT at 63.

\textsuperscript{66}GAO REPORT at 63-72.

\textsuperscript{67}GAO REPORT at 55-56.

\textsuperscript{68}GAO REPORT at 56.
for local conditions.\textsuperscript{69} Advocates should seek to have the QAP require an appropriate percentage of units with specified larger numbers of bedrooms. To encourage such action, advocates can point out the viability of a challenge to selection criteria (1) as not “appropriate to local conditions” when the criteria allow small units to predominate in areas that need large family units and (2) as familial status discrimination.\textsuperscript{70}

C. Location.

Different people in different places will have different ideas about where tax credit developments ought to be located, but since the developments tend to be located in central city, minority, low-income neighborhoods, advocacy is most likely to be needed to foster LIHTC developments in suburban, middle-income, predominantly white areas. Advocates should seek to have QAP’s establish racial, ethnic, and economic integration and deconcentration as standards for tax credit developments. Several tools are available to support such arguments.

First, the IRC does require that each QAP’s selection criteria be “appropriate to local conditions,”\textsuperscript{71} and many allocating agencies have identified “deteriorated

\begin{footnotesize}
\textsuperscript{69}26 U.S.C. § 42(m)(1)(B)(i).

\textsuperscript{70}See Debolt v. Espy, 47 F.3d 777 (6th Cir. 1995) (challenge to predominance of small FmHA-assisted units rejected on standing and mootness grounds).

\textsuperscript{71}26 U.S.C. § 42(m)(1)(B)(i).
\end{footnotesize}
neighborhoods” and “excessive concentrations of very low-income housing” as problems to be solved. Such assessments of local conditions would support an argument that selection criteria that encourage more LIHTC developments in low-income neighborhoods are not “appropriate to local conditions.”

Second, state constitutional and statutory provisions may require integrative and desegregative action by the state agencies.

Third, federal law imposes on the Treasury Department and allocating agencies an obligation to promote racial and ethnic desegregation. Both Treasury and many state agencies are required “affirmatively to further” fair housing. Treasury’s duty is imposed by 42 U.S.C. 3608(d), which directs that

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

72 GAO REPORT at 56. Allocating agencies identified “excessive concentrations of very low-income housing” as a housing need 30% of the time. Id.

73 At the federal level, this has been interpreted also as an obligation to promote deconcentration of poor people. That duty would not necessarily extend to state agencies under the “affirmatively to further” fair housing mandate, although it could extend to state agencies in conjunction with other statutes, such as state or local prohibitions against economic discrimination.
States have a similar duty under the CDBG statute.  

The most developed source of law about the duty "affirmatively to further" fair housing is § 808(e)(5) of the Fair Housing Act, which directs the Secretary of HUD to administer housing programs so as "affirmatively to further the policies" of Title VIII.  

It is generally agreed that the "purposes" and "policies" of Title VIII are dual: to eschew discrimination and to promote integration. As interpreted by several courts of appeals, the 

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42 U.S.C. § 5304(b)(2) (requiring that the state certify that it will affirmatively further fair housing). HUD thus defines the state’s duty to certify that it will affirmatively further fair housing:

The certification that the State will affirmatively further fair housing shall specifically require the State to assume the responsibility of fair housing planning by: (1) Conducting an analysis to identify impediments to fair housing choice within the State; (2) Taking appropriate actions to overcome the effects of any impediments identified through that analysis; (3) Maintaining records reflecting the analysis and actions in this regard; and (4) Assuring that units of local government funded by the State comply with their certifications to affirmatively further fair housing. [24 CFR § 570.487(b).]

This can be of course a significant difference between the duty to do something and the duty to certify that one will do something. Compare Suter v. Artist M., 503 U.S. 347 (1992) and Western Addition Community Org. v. Romney, 320 F.Supp. 308 (N.D. CA 1969).

Section 808(e)(5), 42 U.S.C. § 3608(e)(5). No one has suggested any distinction between the "purposes" language of 3608(d) and the "policies" language of 3608(e). The cases uniformly treat the obligations as identical.

"affirmatively to further" duty requires an agency not only to refrain from contravening these "purposes" or "policies" but also to "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." 77 An agency is obligated "to 'consider [the] effect [of a grant] on the racial and socio-economic composition of the surrounding area' and the need for such consideration itself implies, at a minimum, an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply." 78 The requirement "affirmatively to further" fair housing has been the basis for holding a federal agency liable for "failure, over time, to take seriously its minimal Title VIII obligation to evaluate alternative courses of action in light of their effect upon open housing." 79 Several courts of appeals have said that the "affirmatively to further" duty prohibits an agency that is disbursing assistance for housing developments from allowing developments that will exacerbate racial concentration. 80 Under these holdings, the

77 NAACP, Boston Chapter v. HUD, 817 F.2d 149, 155 (1st Cir. 1987) (Breyer, J.). This case interpreted HUD's duties under § 3608(e)(5), but courts have recognized that the same duties are imposed on other agencies by the "affirmatively further" language of analogous statutes. See SCHWEMM § 21.1 at 21.2 ("It is worth remembering that all federal departments and agencies are subject to the commands of § 3608"). SCHWEMM § 21.1 at p. 21-2; emphasis in original.

78 NAACP, Boston Chapter v. HUD, 817 F.2d at 156.

79 NAACP, Boston Chapter v. HUD, 817 F.2d at 157.

80 Shannon, HUD, 436 F.2d 809, 814 (3rd Cir. 1970) (relying also on 42 U.S.C. § 1441); Alschuler v. Dept., 686 F.2d 472, 482 (7th Cir. 1982); Otero v. New York City Housing Authority, 484 F.2d 1122, 1133-34 (2d Cir. 1973) (applying § 3608(e)(5) to the NYCHA and may justify disregarding commitment to priority rehousing for displaced); and Anderson v. City of Alpharetta, Ga., 737 F.2d 1530, 1535 (11th Cir. 1984) (3608(d)) was enacted "because federal housing administrators had traditionally given little consideration to the impact of their decisions on the racial or socio-economic composition of a given neighborhood. The bill's sponsors sought
Treasury Department, and state allocating agencies that are subject to a duty "affirmatively to further" fair housing, would be required to assess applications for tax credits by rejecting those that would exacerbate racial concentration and favoring those that would increase the supply of "genuinely open housing."

The information we have about the location of tax credit developments illuminates probable violations of the obligation "affirmatively to further" fair housing. Since one-third of all LIHTC units, and 48% of those in central cities, are in tracts with more than 50% minority population, the existing method of site selection probably is not promoting racial integration, unless the LIHTC residents in the minority tracts are not minorities and the LIHTC residents in the predominantly white suburbs are people of color, which is not likely. There are, therefore, strong bases for requiring state agencies to act affirmatively to promote racial and ethnic integration in site selection for tax credit developments.

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to remedy this bureaucratic myopia by requiring federal housing administrators to take account of the effect of their funding decisions upon the racial and socio-economic composition of affected areas."

81 Abt Report at 4-15; 4-16.

82 See supra at 16.