

# REFORMING THE LOW-INCOME HOUSING TAX CREDIT

## A GREATER FOCUS ON HOUSEHOLDS WITH THE LOWEST INCOMES

The Low-Income Housing Tax Credit (LIHTC) is the largest source of financing for the construction and preservation of affordable rental housing. While it is an important resource, LIHTC, on its own, rarely builds or preserves homes affordable to households with the lowest incomes, those with the greatest and clearest needs. Moreover, LIHTC tenants have fewer protections than residents of other federally assisted housing, putting them at risk of housing insecurity.

**Congress should reform LIHTC to strengthen tenants' rights, ensure long-term affordability, and better serve people experiencing or at risk of homelessness or housing insecurity.** National Low Income Housing Coalition (NLIHC), National Housing Law Project (NHLPP), and National Alliance to End Homelessness (NAEH) support the following reforms:

### 1. Strengthen Tenant and Applicant Rights

- Support Tenants' Right to Organize
- Define "Good Cause" Eviction Standards
- Provide Protections for Tenants of Expiring Properties
- Provide Opportunities for Tenant/Collective Ownership
- Improve Accessibility Standards in LIHTC Properties
- Require Fair Lease Provisions

### 2. Enact reforms in the Bipartisan Affordable Housing Credit Improvement Act

- Create a Basis Boost for Properties Serving More Extremely Low-Income Households
- Enact Reforms to Create More Affordable Homes in Tribal Nations
- Enact Reforms to Create More Affordable Homes in Rural Communities

### 3. Preserve the Long-Term Affordability of LIHTC properties

- Eliminate the Qualified Contract Loophole
- Strengthen Nonprofits' Right of First Refusal
- Increase the Federal Minimum Nonprofit Set-Aside
- Extend the Minimum Affordability Period
- Ensure Data Transparency and Improve HUD's LIHTC Database

## REFORMS TO STRENGTHEN TENANT AND APPLICANT RIGHTS

### 1. SUPPORT TENANTS' RIGHT TO ORGANIZE

Tenant organizing is often necessary to secure improved conditions and rights when landlords, owners, or responsible agencies fail to comply with their obligations. Tenants—particularly tenants of color—often face harassment or retaliation for organizing.

Most states do not protect tenants from retaliation for organizing. Although LIHTC is the largest source of federal funding for affordable housing, tenants living in LIHTC properties do not have the protected right to organize. Currently, tenants in several types of federally subsidized housing have the right to organize; LIHTC tenants should also have this right.

### 2. DEFINE "GOOD CAUSE" EVICTION STANDARDS

Evictions have a devastating impact on households, destabilizing employment and education and ultimately putting people at risk of homelessness. The effects are even more pronounced for marginalized communities, with Black women, survivors of gender-based violence, and people with disabilities facing eviction at markedly higher rates than other groups.

Good cause (aka "just cause") protections are necessary to limit evictions and their consequences by establishing standards that work to root out retaliatory, arbitrary and otherwise unfair eviction actions. Although LIHTC tenants cannot be evicted absent "good cause," the term is not specifically defined by the Treasury Department, which oversees LIHTC.<sup>1</sup> Without this specificity, this protection does not work as intended. Congress must enact comprehensive and specific "good cause" requirements for evictions, lease non-renewals, and "no fault"

terminations in LIHTC properties. Congress does not need to reinvent the wheel. Existing federal housing programs that are often paired with LIHTC have strong definitions of good cause that Congress can use as a model, e.g., good cause as defined in the USDA's Section 515 program. Eighteen states and several local jurisdictions have also adopted good cause requirements that Congress can use in developing its own definition.

### 3. PROVIDE PROTECTIONS FOR TENANTS OF EXPIRING PROPERTIES

LIHTC affordability restrictions are set to expire at thousands of properties across the country in the next 10 years. When these restrictions expire, properties can be converted to market rate housing (subject to state and local rent increase requirements) without any protections for tenants, leaving them vulnerable to unaffordable rents and displacement.

Replacement subsidies should be issued to tenants of expiring properties sufficient to cover the difference between tenant rent at expiration and any subsequent rent increase. This will bring LIHTC in line with other federal housing programs, all of which offer replacement subsidies at expiration.

Because the subsidy program may take time to develop, and even once developed, subsidies may be delayed in reaching tenants, Congress should also create a period of protection that applies post-expiration to keep good cause protections and rent restrictions in place. Such a grace period already exists for properties exiting the program through the Qualified Contract process and foreclosure.

As a minimum measure of protection, tenants should have the right to at least one-year advanced notice of expiring LIHTC affordability restrictions.

1. IRS guidance attempts to provide clarity but merely suggests state and local law as a further guide.

#### 4. PROVIDE OPPORTUNITIES FOR TENANT/ COLLECTIVE OWNERSHIP

Tenants should have the opportunity to purchase a LIHTC property once affordability restrictions expire. Additionally, the federal government should provide technical assistance and funding for tenant associations and nonprofit organizations that have a demonstrated record of achieving desired results, such as charging rents below LIHTC maximum rent levels, maintaining property affordability longer than required by law, leasing a significant number of units to extremely low-income tenants, and successful supportive services.

#### 5. IMPROVE ACCESSIBILITY STANDARDS IN LIHTC PROPERTIES

Fewer than 6% of all housing units are designed to be accessible for people with disabilities, and older Americans are becoming homeless at a rate faster than any other demographic. NLIHC, NHLP, and NAEH join disability justice advocates in urging Congress to ensure that a greater share of apartments built with LIHTC is accessible to people with disabilities. NLIHC, NHLP, and NAEH support the VITAL Act, which would require at least 40% of LIHTC-financed apartments to be accessible/adaptable.

At a minimum, LIHTC properties should be required to meet the accessibility standards of Section 504 of the Rehabilitation Act.

#### 6. REQUIRE FAIR LEASE PROVISIONS

Housing stability is a lynchpin of affordable housing, and integral to housing stability is fair and transparent lease terms. That is why every federal affordable housing program requires program participants to use leases that contain fair lease provisions. LIHTC is the only exception.

Congress should require the use of a standard lease or require that all leases contain certain provisions that promote fairness and certainty in LIHTC tenancies, such as automatic one-

year lease renewals absent good cause; an express mention of key protections like good cause and Violence Against Women Act survivor housing rights; limits on late fees for past due rent; and an explanation of how rent and utility allowances are calculated.

## REFORMS IN THE BIPARTISAN AFFORDABLE HOUSING CREDIT IMPROVEMENT ACT

*The following reforms are included in the Affordable Housing Credit Improvement Act (AHCIA), introduced by Senator Cantwell (D-WA), Senator Young (R-IN), Representative LaHood (R-IL) and Representative DelBene (D-WA).*

#### 1. PROVIDE A 50% BASIS BOOST FOR DEVELOPMENTS THAT SET ASIDE AT LEAST 20% OF UNITS FOR HOUSEHOLDS WITH EXTREMELY LOW INCOMES

The shortage of affordable and available rental housing is most acute for extremely low-income (ELI) renters, who earn no more than 30% of the Area Median Income (AMI) or the federal poverty limit. Nationally, there is a shortage of 7.3 million homes affordable and available to ELI households; put another way, there are only four affordable, available homes for every 10 of these households. No state has an adequate supply of affordable and available homes for these renters. In fact, ELI households are the only income group in America facing an absolute shortage of affordable homes.

Despite the clear need, apartments built with LIHTC are often too expensive for ELI households, including those experiencing homelessness. In LIHTC-financed properties, the majority (59%) of ELI renters who do not have additional rental assistance pay more than half of their income on rent, despite living in "affordable" housing.

Properties with deeper affordability are often more costly to develop and operate because they provide residents with

supportive services and take in less rental income. Providing a 50% basis boost would make these properties more financially sustainable. This reform would also facilitate the development of affordable, accessible housing for people with accessibility or supportive needs, such as people with disabilities or people who have experienced homelessness.

## 2. ENACT REFORMS TO CREATE MORE AFFORDABLE HOMES IN TRIBAL NATIONS

Indigenous people living in tribal nations have some of the most urgent housing needs in the United States. High poverty rates and low incomes, overcrowding, lack of plumbing and heat, and unique development issues make financing properties in tribal areas particularly challenging. Despite the growing need for safe, decent homes, however, federal investments in affordable housing on tribal lands have lagged for decades. This is particularly true in more rural and remote areas, which can lack basic infrastructure.

To address the significant housing needs in tribal nations and for Indigenous people, **Congress should:**

- **Designate tribal communities as “Difficult to Develop Areas (DDAs).”** Most tribal areas do not qualify under current DDA standards. This reform would make housing developments in tribal communities automatically eligible for a 30% basis boost, making it more financially feasible for developers to build affordable homes in tribal areas.
- **Require states to consider the needs of Native Americans when determining which housing developments will receive LIHTC allocations each year.** This reform would help address the housing needs of Indigenous people, who are disproportionately impacted by the housing crisis and more likely to experience homelessness.

## 2. ENACT REFORMS TO CREATE MORE AFFORDABLE HOMES IN RURAL COMMUNITIES

Rural communities face unique barriers to developing affordable rental homes, including lower incomes, higher poverty rates, and lack of access to private capital. As a result, far too many rural families live in rental homes that are unaffordable or in substandard condition.

To address housing needs in rural America, **Congress should designate rural communities as “Difficult to Develop Areas (DDAs),”** making housing developments in rural communities automatically eligible for a 30% basis boost.

## REFORMS TO PRESERVE THE LONG-TERM AFFORDABILITY OF LIHTC PROPERTIES

### 1. ELIMINATE THE QUALIFIED CONTRACT LOOPHOLE

*Included in Senators Wyden’s (D-OR) “Decent, Affordable, Safe Housing for all (DASH) Act” and Representative Neguse’s (D-CO) “Save Affordable Housing Act of 2023.”*

The Qualified Contract (QC) loophole allows LIHTC owners to exit the program at Year 15, well before their 30-year minimum commitment expires. When LIHTC investors abuse the QC loophole, they undermine Congress’s intent to ensure long-term affordability of LIHTC properties and waste scarce taxpayer resources.

In short, the QC process allows an owner to offer their property for sale, through their housing finance agency, at a statutorily mandated minimum price. If a bona fide offer is not received within a year, the property exits the program, subject to a three-year grace period during which good cause eviction and rent protections still apply.

Unfortunately, the minimum statutory price results in an above-market price in almost every case, preventing housing finance agencies from identifying a bona fide buyer. Some LIHTC owners have exploited this loophole, not with a genuine intent to sell, but rather as a surefire strategy to exit the program early and convert their property to market rate housing. This has led to a substantial loss of LIHTC units and dramatic rent increases for tenants.

To address this issue, Congress must repeal the QC process for all existing and future properties.

As an alternative approach to mitigate the risk of QC exits at existing properties, Congress can clarify that a failure to expressly reserve the QC process as an exception to the extended use period in the subject regulatory agreement is a “more stringent requirement” for LIHTC program purposes, making the QC process unavailable.<sup>2</sup>

The statutory pricing methodology should be changed so that it is based on the fair market value of the property as affordable housing.

## **2. CLARIFY AND STRENGTHEN NONPROFITS’ RIGHT OF FIRST REFUSAL**

*Included in Senators Wyden’s (D-OR) “Decent, Affordable, Safe Housing for all (DASH) Act.”*

Congress should clarify and strengthen the “right of first refusal (ROFR)” for nonprofit owners of LIHTC properties. Some LIHTC properties are initially owned by a partnership consisting of an investor partner and a nonprofit general partner. The LIHTC rules allow investor and nonprofit partners to agree to give the nonprofit partner a ROFR that can be exercised at a below-market price once the private partner has claimed all tax credits. The purpose is clear: to create an affordable, easy process to transfer complete ownership of the property to a nonprofit entity that will manage the property in a mission-driven way for the long term.

For most of the program’s history, nonprofits have exercised the ROFR without issue. In recent years, however, some private investors have challenged the ROFR in hopes of preventing the sale to the nonprofit general partner, or extracting additional payments from the nonprofit general partner, especially in hot housing markets. They do this by attempting to impose onerous state common law rules as a condition to a nonprofit exercising their ROFR. In doing so, investors undermine the goals of the LIHTC program by putting the long-term financial health and condition of the properties at risk and draining public resources.

To ensure the ROFR process operates as intended, Congress should change the nonprofit ROFR to an option for future properties. For existing properties, Congress should make a ROFR exercisable without partner consent and clarify that a ROFR may be triggered by a related-party offer. Congress should also clarify that ROFRs (both existing and future) should not be interpreted in accordance with state law, unless the subject partnership agreement expressly provides otherwise.<sup>3</sup>

## **3. INCREASE THE FEDERAL MINIMUM NONPROFIT SET-ASIDE**

Nonprofit-managed LIHTC properties tend to offer resident services that support tenants’ well-being. The current federal minimum nonprofit set-aside is 10 percent, and some states incentivize greater nonprofit participation. Increasing the federal nonprofit set-aside would result in more properties with supportive services and longer-term affordability.

To be eligible for this set-aside, nonprofits should be committed to positive outcomes for residents with the greatest need, for example, serving households experiencing homelessness, individuals with disabilities, and other extremely low-income renters.

2. This is line with recent cases that have considered the issue. See *Tuttle v Front St. Aff. Hsg. Partners*, 478 F.Supp.3d 1030 (D.Haw. 2020); *Creekside Ltd. v. Alaska Hous. Fin. Corp.*, 482 P.3d 377 (Alaska 2021).  
3. This is consistent with recent case law. (*SunAmerica Housing Fund 1050 v. Pathway of Pontiac, Inc.*, 33 F.4th 872, 881 (6th Cir. 2022); *Homeowner’s Rehab, Inc. v. Related Corporation V SLP, L.P.*, 479 Mass. 741, 753 (2018).

Additionally, capacity building and other technical assistance support must be provided to nonprofit developers to help them preserve LIHTC properties.

#### 4. EXTEND THE MINIMUM AFFORDABILITY PERIOD

LIHTC properties are currently subject to a 30-year affordability period under federal law. When affordability restrictions expire, households with the lowest incomes and no rental assistance are likely to see the greatest potential rent increases, putting them at acute risk for housing instability. While some states incentivize or require longer affordability periods, Congress should require a longer minimum period of affordability for LIHTC properties across the United States.

#### 5. ENSURE DATA TRANSPARENCY AND IMPROVE HUD'S LIHTC DATABASE

Congress should provide HUD access to Internal Revenue Service (IRS) data on LIHTC properties. HUD's National Database of LIHTC Properties, the primary data source about LIHTC properties, includes critical information needed to protect residents and preserve federal investments. However, the database is incomplete and some datapoints can be unreliable.

While housing finance agencies report critical property-level data to IRS, federal law does not allow IRS to share this data with HUD. Without access to IRS data, HUD can ask housing finance agencies for missing information, but these agencies tend to have limited capacity to respond to such requests, and HUD has few tools to enforce compliance with data reporting requirements.

Without more accurate and complete data, long-term tracking of LIHTC properties and the ability to preserve these homes is more difficult. Improving tenant-level data would also help assess fair housing implementation and racial equity in the LIHTC program.



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