INCENTIVIZING AFFORDABLE HOUSING:

Is Disallowing the Qualified Contract Process Necessary for the Preservation of Affordable Housing in the United States?

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I. Introduction

The U.S. Department of Housing and Urban Development ("HUD") has identified the Low-Income Housing Tax Credit ("LIHTC") program as the essential resource for creating affordable housing in the United States.[1] The LIHTC program was created by the Tax Reform Act of 1986 ("Act")—arguably the most impactful tax reform legislation in United States history.[2] Since its enactment, the LIHTC program has remained politically popular, garnering decades-long support from both the Democratic and Republican Parties.[3]

The LIHTC program is available to housing developers in all 50 states, Washington DC, and Puerto Rico.[4] The LIHTC program provides federal income tax credits to fund the development of affordable rental housing.[5] The program has created over three million units of affordable housing since its creation in 1986.[6] According to the Internal Revenue Service ("IRS"), the primary policy consideration for creating the program is tied to Congress' recognition that a private sector developer may not receive enough rental income from a low-income housing project to cover the costs of development and still provide a return to investors sufficient to attract the needed equity investment.[7] In other words, without an incentive from the federal government, "the private market cannot be relied on to produce housing at rents low enough to be affordable for the lowest-income individuals and families."[8] Thus, the program was created in hopes that in exchange for equity, investors will receive tax credits and other tax benefits associated with ownership of the project to offset federal income taxes for a period of ten years.[9] If the program works as intended, a developer receives tax benefits plus the possibility of cash proceeds from the eventual sale of the project.[10]

The LIHTC program supports many forms of affordable housing including apartments, single-family housing, single-occupancy rooms, and transitional housing for people experiencing homelessness.[11] Under the LIHTC program, a developer of low-income housing agrees to provide 30 years of affordable housing.[12] The first 15 years are often referred to as the "compliance period," where the IRS can recapture tax credits if the IRS discovers that the property is non-LIHTC-compliant.[13] The second 15 years are referred to as the "extended use period," where property owners are not required to report to the IRS but are instead supervised to the extent that their respective state wishes to supervise these properties.[14] No credit is allowable unless an agreement to fulfill the extended use period between the taxpayer and their respective state agency is in effect.[15] The agreement must be recorded in the land records as a restrictive covenant and is enforceable under state law.[16]

Following the creation of the LIHTC program, "qualified contract process" provisions to the program were later added to the tax code. While the LIHTC program as a whole has garnered bipartisan support, the qualified contract process has not, and often causes debate among members of Congress.[17] At their core, the qualified contract process provisions assert that a property developer of a LIHTC-funded property may, after the first 15-year period of their service to the program, terminate the second 15-year extended use period by submitting a request to their respective state agency in which the agency will then seek to find a person to acquire the owner's interest in the low-income portion of the building. If the agency is unable to find a purchaser within a given time, the owner is relieved of their obligations under the LIHTC program.[18] Many national organizations have expressed the need for closing the "qualified contract loophole," arguing that the qualified contract loophole negatively impacts the production and preservation of affordable housing.[19]

This article will provide an overview of the LIHTC program. Second, this paper will explain the qualified contract process. It will consider arguments for and against disallowing the qualified contract process to increase the preservation of affordable housing. Finally, it will culminate in a recommendation addressing the issue of whether the qualified contract process must be disallowed if affordable housing is to be adequately preserved in the United States. The recommendation provided asserts that while the qualified contract process may prove problematic in instances of developers who may abuse the option, the disallowance of the qualified contract process in its entirety might be a step too far, as doing so would limit developers' option to exit the LIHTC program in times of financial hardship. Therefore, as opposed to entirely disallowing the qualified contract process, this article will provide reform recommendations for the LIHTC program that will assist in limiting its use to times of absolute financial necessity.

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II. Overview of the LIHTC Program

According to HUD, the LIHTC program is the primary production program for affordable housing under the federal government.[20] To support this, HUD has asserted that throughout most of the 2000s, the LIHTC program was producing well over 100,000 units of affordable housing every year, and even remained close to this figure after the financial crisis.[21] Additionally, the LIHTC program accounted for one-third of all affordable rental homes built in the United States within the first twenty years of the program's existence.[22] In addition to the number of affordable housing units that have been created through the LIHTC program, the program has also produced billions of dollars in private investments and generates around 60,000 new jobs per year.[23]

In 2018, the Urban Institute released a research report reflecting on the effectiveness of the LIHTC program and provided a detailed analysis of who the program serves.[24] The Institute's analysis culminated in a conclusion that supports HUD's conclusions by asserting that as the longest-running national affordable rental housing program in the country, the LIHTC program has consistently placed in over 100,000 units of affordable housing every year since the program's creation.[25] The Institute also asserted that the LIHTC program has become "the most critical method of preserving and expanding the stock of affordable rental housing."[26] Additional research has shown that the LIHTC program has proved to be effective in extending the affordability periods for Section 8 housing developments well beyond their average affordability periods.[27]

To qualify under the LIHTC program as a "qualified low-income housing project," a project must meet one of three tests: (1) a 20-50 test, (2) a 40-60 test, or (3) the average income test.[28] The 20-50 test is met if 20 percent or more of the residential units in such a project are both rent-restricted and occupied by individuals whose income is 50 percent or less of the area median gross income.[29] The 40-60 test is met if 40 percent or more of the residential units in such a project are both rent-restricted and occupied by individuals whose income is 60 percent or less of the area median gross income.[30] Finally, the average income test is met if 40 percent or more residential units in a project are both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer concerning the respective unit.[31]

There are two types of credits available under the LIHTC program—the 9% and 4% credits.[32] The former is applied to newly constructed low-income housing, and the latter is reserved for rehabilitation projects.[33] In creating these two categories, congress intended that the 9% and 4% credits would yield up to a 70% and 30% subsidy, respectively.[34] 70% of LIHTC projects use the 9% credit, thus making the program a significant tax break opportunity.[35] Although the 9% and 4% properties have different financing structures, both percentage avenues require that developers produce newly constructed, rehabbed, or refinanced rental properties that provide the same benefit to low-income individuals—affordable housing.[36] Additionally, both types of credits involve an extensive process under the LIHTC program before the affordable housing project is complete. Under both types of credits, many players are involved in the developer's ability to reap the benefits of the tax credit. At the federal level, the Internal Revenue Service and the US Department of Housing and Urban Development are involved in the LIHTC process by allocating the credit and publishing the requirements imposed onto the developer by the federal government.[37] At the state level, the developer's respective state housing finance agency monitors compliance with the program's requirements.[38] Local governments promise permits, land, and infrastructure for the development of the affordable housing unit(s).[39] In addition to government players, private actors are involved in the development of LIHTC properties. These private actors include developers, equity investors, attorneys, and syndicators.[40] The network required to develop affordable housing under the LIHTC program clarifies that the program is not one of simplicity. Instead, the program, like many components of the US Tax Code, is complex and requires layers of requirements from all levels of government as well as the private sector.[41]

Given the complexity of the LIHTC program, the program has become susceptible to critiques from invested parties. Given that the LIHTC program requires that participants commit to only 30 years of affordability for their affordable housing units, critics of the LIHTC program often view these 30 years of commitment as a threat to the preservation of affordable housing in the United States, suggesting that the federal or state governments should increase this commitment period.[42] Studies have shown that thousands of LIHTC units are exiting the program and converting to market-rate rents, which has the effect of displacing people in the communities where the given LIHTC properties are located.[43] In response, some have suggested that the commitment period be extended to a minimum of 55 years of affordability.[44]

Additionally, some have argued that federal and state governments have not done enough to monitor LIHTC properties to ensure compliance with the program and that this lack of monitoring has made the program susceptible to investor abuse.[45] The IRS has represented that the LIHTC program is "jointly administered" by the IRS and state-authorized tax credit allocating agencies.[46] Thus, both the federal and state governments are responsible for administering the program, and both bear responsibility for overseeing and monitoring LIHTC properties to ensure compliance with the program. However, critics of the program have consistently argued that federal and state governments have failed to oversee the program, thus resulting in abuse of the program and failed efforts to preserve affordable housing developed under the program.

An additional argument in the critique of the LIHTC program is that the program is an economically inefficient model for yielding affordable housing in the United States given the program's time-consuming and complex features.[47] For example, LIHTC projects have been shown to frequently take twice as long to develop compared to traditional market-rate property.[48] This time extension in production often yields higher transaction costs, thus arguably making the program economically inefficient.[49] Another feature of the program that is criticized for its economic inefficiency is how the program incentivizes raising development costs to increase the tax credit issued by the federal government.[50]

Although critiques of the LIHTC program citing development times and increased development costs are attractive, these critiques are common among many large federal programs, especially tax credit programs. There is an argument to be made that such critiques are not significant enough to warrant a call to end the LIHTC program because these critiques aren't pointed at the purpose of the program—to create affordable housing. So long as the program is effectively producing affordable housing, arguments critiquing the time of development of these affordable housing units might appear disconnected from the program's intended impact.

The program's complexity presents challenges in offering critiques of the program as it is often difficult to draw conclusions and pinpoint precisely where the program is flawed.[51] Thus, this paper will not serve as a critique of the LIHTC program in its entirety, but rather one component of the program—the qualified contract process. Understanding the qualified contract process—a small component of the broader LIHTC program—will aid in understanding the entire program.

III. Discussion of the Qualified Contract Process

From the date of the passing of the Act to 1989, the federal government required that LIHTC properties maintain affordability for only 15 years.[52] Under this rule, the penalty for noncompliance with the 15-year affordability requirement was the recapturing of prior credits received under the LIHTC program.[53]

However, this 15-year affordability requirement was extended in 1990 when federal law was adjusted to require developers to maintain affordability for 30 years.[54] The 30-year affordability requirement was split into two 15-year time frames, with the first 15 years referred to as the "initial compliance period." The second 15 years are referred to as the "extended use period."[55] While the initial compliance period is generally accepted, the extended use period is often at the center of controversy in discussions surrounding the fairness, efficiency, and preservation of

affordable housing in the United States. The point of controversy regarding the extended use period is the period's feature allowing owners to leave the LIHTC program through a relief process known as the "qualified contract process." The qualified contract process allows LIHTC owners to convert their LIHTC property from affordable housing to market-rate units after only 15 years of service to the LIHTC program, thus relieving themselves of the second 15-year commitment to affordability.[56] In other words, once the qualified contract option is pursued, the low-income project converts from an affordable housing unit to a market-rate project.[57] A developer's decision to use the qualified contract process option usually occurs when the two following conditions are met: (1) the affordable housing unit's fair market value is worth more than the rent and occupancy restrictions imposed by the LIHTC program, and (2) the project's value with restricted rents is less than the qualified contract price.[58]

The qualified contract process is typically used by developers who hold LIHTC properties in areas that have "high land prices or that are experiencing gentrification pressures, where market-rate rents can be far above the restricted rental rates required by the LIHTC program."[59] In neighborhoods where the market-rate rent exceeds far beyond the restricted affordable housing rental rates required by the LIHTC program, developers of LIHTC properties are strongly incentivized to use the qualified contract process as a means of escaping the LIHTC program, converting the LIHTC property to market-rate housing, and reaping the benefits of collecting market-rate rent while having also taken advantage of the tax credits offered by the LIHTC program for the 15+ years that the property was restricted to affordable housing rates under the program.[60]

The qualified contract process has resulted in the removal of 50,000 affordable housing units from the LIHTC program since 2002.[61] In the year 2017 alone, 18,000 affordable housing units were removed from the LIHTC program as a result of the qualified contract process.[62] While some states have taken action to limit the use of the qualified contract process, the process remains an option available to developers, as stated in Section 42 of the Tax Code, thus often sparking controversy in discussions surrounding the development of affordable housing in the United States.[63]

IV. Debates Surrounding the Qualified Contract Process

The qualified contract process is controversial among both the government and private sectors. Members of Congress have attempted to resolve this issue by introducing legislation related to the qualified contract process. Most notably, in 2019, Senate Finance Committee Ranking Member Ron Wyden (D-OR) and Senator Todd Young (R-IN) introduced the "Save Affordable Housing Act of 2019," which proposed closing the loophole—that is, the qualified contract process—to disallow developers to exit their contracts under LIHTC.[64] In support of this bill, the members of congress introducing the bill cited that nearly 50,000 affordable housing units have been lost to qualified contracts from 2002 to 2019.[65] The members also argued that the qualified contract process is used by developers who are seeking to sell their properties to private developers at market rates.[66] Although the bill was introduced on June 25, 2019, the bill did not receive a vote and was not enacted, thus leaving the qualified contract process available to developers as a tool to convert their LIHTC property to market rate after only 15 years of affordability.[67]

The U.S. Department of Housing and Urban Development has repeatedly affirmed that the benefits of the LIHTC program—the affordable properties—remain in service and remain affordable to low-income families.[68] HUD released a study in 2012 in which the Department argued that disallowing the qualified contract process is not necessary because most LIHTC properties remain affordable despite having passed the 15 years of affordability compliance with IRS use restrictions, with limited exceptions.[69] In the study, HUD stated that losing affordable housing units through the qualified contract process is the "least common outcome" for LIHTC properties. HUD further asserted that even in instances where affordable housing units are lost through the qualified contract process, the properties are not lost as a result of developers seeking to abuse the LIHTC program but rather that the properties are lost as a result of developers removing their affordable properties from the LIHTC program because the properties have to be repositioned due to economic reasons.[70] Additionally, HUD explained that properties that exit the program typically remain affordable, citing one statistic stating that nearly one-half of properties that exited the program remained with rents below the LIHTC maximum, and another 9 percent of exited properties had rents only slightly above LIHTC rents.[71]

In an interview with a senior economist from HUD's Office of Policy Development and Research, the senior economist responded to concerns regarding the qualified contract process.[72] The economist insinuated that developers opting out of the LIHTC program after 15 years of service is uncommon.[73] The economist reaffirmed HUD's position that the qualified contract process is not an issue because LIHTC properties typically remain

in the program for the entire 30 years and sometimes longer.[74] Additionally, the economist expressed that developers only decide to opt-out of the LIHTC program once they find themselves in the position of no longer having the money to maintain the property or not being able to avoid vacancies in the property.[75]

At a minimum, HUD's response to concerns surrounding the qualified contract process leaves questions unanswered. For one, even if most LIHTC properties remain affordable, what is being done about those that do not remain affordable? Secondly, if the LIHTC program's purpose is to produce and preserve affordable housing, does the qualified contract process, which allows affordable housing projects to escape the program, warrant reform of the LIHTC program to close this loophole?

Some have directly addressed and critiqued HUD's study,[76] arguing that HUD's conclusions regarding the qualified contract process no longer apply in today's robust housing market.[77] Those who have criticized the qualified contract process do so for many reasons. Many critics of the qualified contract process often oppose allowing developers to enter into a qualified contract because the critics view these contracts as one of the most significant barriers to the preservation of LIHTC properties in the United States.[78]

An additional major critique of the qualified contract process is that federal law does not require state agencies to search for qualified buyers affirmatively.[79] Rather, the IRS only requires agencies to make the request available to the "general public, based on reasonable efforts."[80] This creates preservation barriers to LIHTC properties because states, as some do, do not make an effort to ensure that the property is being purchased by a purchaser who will preserve the property for its residents.[81]

Further, the qualified contract process is also criticized because, to many, the process is the main barrier to the preservation of affordable housing in the United States.[82] Reasons provided for the assertion that the qualified contract process is the main barrier to the preservation of affordable housing include how the qualified contract price is formulated once a developer decides to use the qualified contract process.[83] Under the qualified contract price, the fair market value of the non-low-income portion of the building and the price of the low-income portion of the building are combined. Within this calculation, the non-low-income portion of the building may also account for the market value of the land beneath the entire building, thus increasing the calculation.[84] This formula often leads to a sales price that is significantly higher than the fair market value, thus making it extremely difficult to yield a successful preservation purchase by a purchaser who intends to maintain the affordability of the property.[85] Therefore, because the qualified contract price is often higher than the fair market value of the property, the state is unable to find a buyer who will maintain the affordability of the property. The original developer who entered the LIHTC program can sell the property without restriction, thus usually resulting in a sale with a purchaser who is not interested in maintaining an affordable housing unit. In sum, how the purchase price is calculated on properties from developers who are seeking the qualified contract process route usually results in an inability to find a buyer who will maintain the affordability of the property for the remainder of the commitment period agreed to when the original developer entered into the LIHTC program.[86] As a result, the original developer can exit the program by way of the qualified contract process after providing only 15 years of affordability, thus further resulting in the property's loss of affordability.[87]

The University of Texas at Austin School of Law ("UT Law") published an article favoring closing the qualified contract process by providing reasons for preserving affordable properties within the LIHTC program as opposed to selling the properties and constructing new affordable housing.[88] The reasons, as provided by the UT Law article and others, include (1) preservation is less expensive than constructing new affordable housing, typically one-half to two-thirds the cost of new construction, (2) preservation allows vulnerable residents to stay in their homes and maintain access to their communities, and (3) preservation reduces student mobility and disruptions in academic performance.

Preservation as the focal point of discussions surrounding affordable housing is necessary for many reasons. For one, as the UT Law report emphasizes, existing affordable housing in the United States is the direct product of billions of taxpayer dollars at work.[89] Preserving this investment of taxpayer dollars is the logical route as opposed to selling these properties and constructing new affordable housing. In addition to the dollars required for the physical production of new affordable housing, increased regulation costs are also associated with new construction as opposed to the regulation of already-existing housing.[90] Constructing new properties, as opposed to preserving existing properties, is the more efficient means of using taxpayer dollars.[91]

The UT Law article proposes that, to preserve affordable housing in Texas, the state should take steps to close down the qualified contract loophole in the LIHTC program.

Secondly, the rising risk of displacement of tenants of affordable housing units is an additional reason to invest in preserving these properties. Suppose LIHTC properties are sold and not preserved and restored. In that case, the tenants of these properties are often forced to relocate to isolated areas of low-income housing, thus resulting in the displacement of these tenants, who often face a significant disadvantage in access to education and jobs. Additionally, preserving affordable housing in gentrifying neighborhoods can promote economic diversity and create mixed-income neighborhoods instead of isolating affordable housing from all other housing.[92] Mixed-income neighborhoods are beneficial to low-income communities because of increased access to better-performing schools, jobs, and transit.[93] Relatedly, the preservation of affordable housing increases the stability of students living in the affordable housing units by reducing mobility, which has been shown to destabilize community ties and reduce the disruption of academic performance.[94]

Although UT Law's study explicitly addresses the Texas housing market, the information provided throughout the article on the broader issue of closing the qualified contract process remains helpful in addressing the issue. In support of its concerns regarding the preservation of affordable housing in the state of Texas, the UT Law article reported that at the time of the article's publishing, the qualified contract process had caused a loss

of about 4,000 units of affordable housing in Texas alone with an additional 1,200 affordable units in the process of exiting the LIHTC program.[95] Additionally, UT Law's article revealed that there are nearly 1,000 properties that are nearing eligibility to exit the LIHTC program through the qualified contract process, thus creating a substantial risk of loss of affordable housing in the state of Texas alone.[96]

The UT Law article proposes that, to preserve affordable housing in Texas, the state should take steps to close down the qualified contract loophole in the LIHTC program. More specifically, the article lists three actionable steps for the state to take to preserve affordable housing. These steps include (1) requiring LIHTC property owners to waive their right to a qualified contract in exchange for obtaining TDHCA's approval of specific administrative actions, (2) amending the Texas Government Code to permanently disallow the qualified contract process for all LIHTC properties moving forward, and (3) requiring qualified contract applicants to meet with TDHCA's director or underwriters to discuss options for keeping the property affordable.[97]

In contrast to advocates calling for the disallowance of the qualified contract process, the qualified contract process has its defenders. One point of defense in favor of preserving the qualified contract process is that the qualified contract process allows nonprofits to engage in the LIHTC program more than they would be able to without the qualified contract process.[98] This argument is made on the basis that nonprofits often seek to purchase projects from developers whose projects are subject to the qualified contract process because doing so allows the nonprofit to enter into an agreement with their respective allocating state agency which will assign the right to purchase the project to the nonprofit.[99]

Defenders of the qualified contract process also advocate for preserving the process by attempting to debunk the accusation that property owners are abusing the qualified contract process. Those seeking to debunk the accusation defend the qualified contract process by stating that the process is necessary for property owners who find themselves in a position where they are no longer able to maintain the cash flow needed for maintenance and other types of expenses related to the affordable housing property.[100] Defenders of the qualified contract process also argue that the process is necessary as a form of intervention when market conditions prevent the owner from being able to rent out the property.[101]

However, arguments in defense of the qualified contract process citing financial distress as a valid cause for ending a developer's commitment to affordability are also attacked by those who favor disallowing the qualified contract process. In response to concern regarding the financial distress of developers when their affordable housing projects fail to bring forth the anticipated revenue due to market conditions or other factors, those in favor of disallowing the qualified contract process argue that developers have options other than attempting to escape their LIHTC commitments by way of the qualified contract process.[102] These alternative options include restructuring debt, making new loans, re-syndicating the property, and amending the use agreement to modify the affordability restrictions on a small portion of the units.[103] Those favoring disallowing the qualified contract process offer these alternative paths as a means of reaffirming their belief that developers should never have the opportunity to fully release themselves from the affordability restrictions committed to when the developer entered the LIHTC program.[104]

V. Should the Qualified Contract Process End?

It is undisputed that the need for affordable housing remains a constant in the United States, as evidenced by the statistic that only 21 affordable housing units are available for every 100 extremely low-income households in the United States.[105] It is also undisputed that the LIHTC program remains the essential resource for creating affordable housing in the United States. Thus, although the program has shortcomings, entirely doing away with the LIHTC program would devastate communities relying on it to increase the development of low-income housing in the United States.

However, although doing away with the program in its entirety would be devastating for affordable housing development, doing away with parts of the program, particularly the qualified contract process, might be more worthwhile for those interested in efficient and fair development. Invested parties, as previously discussed in this paper, have made compelling arguments for the disallowance of the qualified contract process. On the other hand, other invested parties have also made compelling arguments for the necessity of the qualified contract process as an option for developers who find themselves in a financially difficult position regarding their LIHTC property. Thus, instead of suggesting that the qualified contract process should be entirely disallowed, this paper will suggest milder reform options that might improve the efficiency of the LIHTC program while still providing developers the option to exit the program when necessary.

An avenue of reform to pursue as an alternative to entirely disallowing the qualified contract process is to amend the LIHTC program to require properties to remain affordable beyond the 30-year mark. HUD has acknowledged that after year 30, a pattern found among former LIHTC properties is that developers reposition these properties, and the properties are no longer affordable.[106] HUD asserted that maintaining affordability within a former LIHTC property often requires a mission-driver owner who is invested in providing affordable housing to those of low-income communities.[107] On the other hand, after the 30-year affordability requirement, developers who aren't mission-driven are likely to make a *financial* calculation about what is to be done with their former-LIHTC property, essentially basing this calculation on the conditions of the housing market at the time of this calculation.[108] HUD has found that for these non-mission-driven developers, the key consideration in whether the former-LIHTC will remain an affordable property is whether the location can support market rents substantially higher than LIHTC rents.[109] Thus, for former LIHTC properties with non-mission-driven developers, the homes of low-income residents rests in the result of this solely financial calculation that pays little, if any, consideration to the potential displacement of these low-income communities. A federal program intended to provide affordable housing to low-income communities, somehow resulting in a solely financial calculation that often results in the displacements of those the federal program promised to support, begs the question of whether the federal program effectively meets its goals. Is a federal program intended to provide affordable housing to low-income communities that eventually rely on the hope that for-profit owners in favorable market locations will be mission-driven enough to continue providing affordable housing to their tenants a reliable program to rely on for such a grave need?[110] Although provid-

ing indefinite affordable housing with zero risk of displacement might be unrealistically aspirational, the problems resulting from the 30-year requirement warrant, at the very least, an assessment of whether this limited-time requirement should be revisited if the LIHTC program is to successfully meet its objective of providing affordable housing to low-income communities.

An alternative avenue is incentivizing developers to waive their right to a qualified contract at the state level.[111] The option of incentivizing developers to waive their right to a qualified contract is appealing because, in exchange for waiving this right, developers will receive a benefit that can potentially place them in a better position in the LIHTC program and further incentivize developers to maintain affordability and preserve their properties which will, in turn, benefit the low-income tenants residing within these properties.

Placing barriers to seeking a qualified contract or disincentivizing developers from entering a qualified contract is also an option in seeking to limit the number of qualified contracts sought out by developers.[112] Placing such barriers to disincentivize developers from seeking a qualified contract is supported by many organizations, including the National Council of State Housing Agencies.[113] An example of a simple means of placing barriers to seeking a qualified contract is to attach a fee to the request for a qualified contract.[114] The fee-based approach was adopted by the Idaho Housing and Finance Association which attached a $20,000 administrative fee to a developer's request to seek a qualified contract.[115] Attaching such a fee to the request of a qualified contract can effectively deter developers from seeking a qualified contract because such a hefty fee can affect the cost-benefit analysis enough so that the cost of seeking a qualified contract outweighs the benefits and thus prevents developers from requesting the qualified contract.

An additional appealing barrier that has been suggested is to require qualified contract applicants to meet with their respective state agencies to discuss options for keeping the property affordable and require that developers explore these options before following through with their request for a qualified contract.[116] The State of Michigan has adopted this approach by requiring owners of LIHTC property to meet with the Michigan State Housing Development Authority to discuss options for keeping the property affordable before the owner is permitted to request a qualified contract.[117] Minnesota has also adopted a similar policy by assigning an agency underwriter to each applicant of a qualified contract to discuss alternatives to seeking a qualified contract.[118] Finally, an additional potential barrier that could prove effective in deterring developers from entering qualified contracts, and has been recommended by the National Council of State Housing Agencies, is to award negative points to the developer's future applications if the developer attempts to seek a qualified contract.[119]

An additional means of disincentivizing developers from entering a qualified contract is barring LIHTC developers who request qualified contracts from future LIHTC allocations or limiting the tax credits received from other LIHTC properties when a developer decides to enter into a qualified contract.[120] To illustrate, North Carolina has implemented a policy of this sort which has the effect of disqualifying developers who have requested a qualified contract for LIHTC property from receiving tax credits for the developer's other properties.[121] North Carolina implemented this policy in hopes that such a penalty would disincentivize developers from entering into a qualified contract given the effect doing so could have on the developer's other properties.[122]

VI. Conclusion

While the qualified contract process has negatively impacted the success of the LIHTC program, the issues arising from the qualified contract process do not warrant a pressing need for the disallowance of the process. The qualified contract process is not being used at a rate that should raise significant concerns.[123] In 2010, it was found that only five percent of LIHTC properties were no longer affordable at the 15-years-of-affordability mark.[124] Although the five percent statistic warrants investigation, it does not pose an immediate threat to affordable housing in the United States and thus likely does not warrant entirely disallowing the qualified contract process. Additionally, the five percent of LIHTC programs that are no longer affordable after the 15-year-of-affordability mark might be a result of a larger issue—lack of monitoring.

The LIHTC program has been heavily criticized for failing to place measures for monitoring LIHTC properties to ensure that the program is benefitting low-income communities. For example, the LIHTC program does not have measures in place to ensure that LIHTC developers are compliant with the Fair Housing Act.[125] The lack of monitoring of LIHTC properties can have the effect of pushing low-income tenants further into poverty and increasing the existence of racially concentrated areas.

While the qualified contract process has negatively impacted the success of the LIHTC program, the issues arising from the qualified contract process do not warrant a pressing need for the disallowance of the process.

Increased regulation and oversight of LIHTC properties might prove effective in resolving many of the issues arising from the qualified contract process, as lack of oversight has been cited as potentially being the primary flaw of the LIHTC program, as the program does not require any form of mandate to report on the performance of a given LIHTC property periodically.[126] As opposed to entirely doing away with the qualified contract process, an oversight-centered solution to the issues caused by the qualified contract process might be a viable option. Reforming the qualified contract process instead of disallowing the option in its entirety can improve the efficiency of the LIHTC program more generally while also providing developers with the option to exit the program during severe financial distress. Providing a reform-based solution to the problems posed by the qualified contract process as opposed to disallowing the process is the more appropriate route because entirely disallowing the qualified contract process might have the effect of deterring developers from the LIHTC program, which would significantly affect the development of low-income housing in the United States. Thus, reform, as opposed to disallowance, is the appropriate route.

As previously discussed, potential options for reforming the LIHTC program to assist in mitigating the abuse of the qualified contract process include mandating increased oversight of LIHTC properties to ensure compliance with the LIHTC program and laws regulating fair housing, placing additional barriers to the qualified contract process, and placing additional incentives for developers to maintain affordability in LIHTC properties past the 15-year mark. Implementing these reforms instead of disallowing the qualified contract process will increase the preservation of affordable housing in the United States while maintaining the option for developers to exit the LIHTC program in times of financial distress, thus providing a middle ground that serves the primary parties involved in any given LIHTC project—the developers and tenants.

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