

**POVERTY, DISCRIMINATION,
AND THE LOW-INCOME HOUSING
TAX CREDIT PROGRAM**

**Prepared for the
MEETING OF “LALSHAC”
(THE LOOSE ASSOCIATION OF LEGAL SERVICES HOUSING
ADVOCATES AND CLIENTS)**

**WASHINGTON, D.C.
NOVEMBER 19-20, 2000**

**In Memoriam: David Brady Bryson
1941-1999**

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I am grateful to Ken Zimmerman, Phil Tegeler, Henry Korman, Mark Schwartz, Erin Boggs, and John Schrider for their help with this outline; to Jarrett Tomás Barrios, Esquire, now a member of the Massachusetts legislature, whose excellent seminar paper laid a solid foundation for this work; and to Ms. Maureen F. McGovern, and Ms. Mary R. Deer, for their extraordinary secretarial skills and dedication. Any errors are of course my responsibility. Particularly because this is part of a larger project addressing tax credit issues, I would appreciate corrections, suggestions, and any other form of constructive criticism.

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 In August 2000, Treasury Secretary Lawrence H. Summers credited the program with creating "more than one million units of affordable housing for low-income Americans,"² although the actual figure may be closer to 750,000 units.³ The program has considerable political support,

¹GENERAL ACCOUNTING OFFICE, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW-INCOME HOUSING PROGRAM (March 1997) (hereinafter GAO Report) at § 2; accord, GENERAL ACCOUNTING OFFICE, CHARACTERISTICS OF TAX CREDIT PROPERTIES AND THEIR RESIDENTS (Jan. 10, 2000) (hereinafter GAO re RESIDENTS] at 1 ("The program is currently the largest source of federal funds for this purpose ["to develop or substantially rehabilitate rental housing for low-income households."])." 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.")

²"Steps to Increase Fair Housing Act Compliance Announced," HUD Press Release No. 00-222 (August 14, 2000), <http://www.hud.gov/pressrel/pr00-222.html>.

³See JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY/ NEIGHBORHOOD REINVESTMENT CORPORATION, EXPIRING AFFORDABILITY OF LOW-INCOME HOUSING TAX CREDIT PROPERTIES: THE NEXT ERA IN PRESERVATION (October 1999) (hereinafter JOINT CENTER STUDY) at 4 ("The LIHTC portfolio now stands at approximately 750,000 units, increasing by 62,500 a year. By 2002, the portfolio will include almost one million units. . . .").

See ABT REPORT, *supra* note 1, at 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 1992-1994). Compare GAO REPORT, *supra* note, at 32 (estimating that 172,151 units were placed in service from 1992 to 1994) with E & Y KENNETH LEVENTHAL REAL ESTATE GROUP, NATIONAL COUNCIL OF STATE HOUSING AGENCIES, THE LOW-INCOME HOUSING CREDIT: FIRST DECADE, 42 (1997) [hereinafter NCSHA REPORT] (stating that almost 900,000 units have been "created" or rehabilitated, which may not necessarily mean that they have been placed in service). It is not clear whether the GAO estimate of 172,151 is for precisely the same period as that for which ABT estimates 118,000.

ABT and GAO note the "lack of centralized data [] on the tax credit program. . . ."GAO

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 and civil rights advocates: development issues (how to foster the production of tax credit developments that would provide better and more affordable housing for clients and offer full choice of housing opportunities) and occupancy issues (how to get and keep clients in tax credit developments and assure non-discrimination and promote integration). This memorandum provides an overview of the LIHTC program (Part I), a discussion of advocacy tools (Part II), and an outline of development and occupancy issues (Parts III and IV, respectively).

I. AN OVERVIEW OF THE LOW INCOME HOUSING TAX CREDIT PROGRAM.⁴

The LIHTC program, created in the Tax Reform Act of 1986,⁵ allows owners of residential rental property to claim tax credits, generally for 10 years, for 30 to 70 percent of

REPORT, *supra* note 1, 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.

⁴This is an abbreviated and somewhat updated version of the description in Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and The Civil Rights Laws*, 52 *MIAMI L.REV.* 1011 (1998).

⁵Tax Reform Act of 1986, Pub.L. 99-514, § 252, 100 Stat. 2085, 2189 *et seq.* as amended, 26 U.S.C. § 42.

present value of new and substantially rehabilitated housing developments.⁶ In general, a project qualifies for the credit only if, for a period of 15 years, 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.⁷

The "primary source of equity financing for tax credit projects" is private investors, who usually are recruited by syndicators.⁸ 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 use to offset the taxes they owe on other income."⁹

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).¹⁰ The rent may in fact be more than 30% of the tenant's actual income.

Although the LIHTC has been justified and described as a program for housing low-income people,¹¹ the tax credit subsidy alone reduces rents only to a moderate level; unless

⁶26 U.S.C. §42(b); GAO REPORT, supra note 1, at 26.

⁷26 U.S.C. §42(g)(1)-(g)(8)(1994); GAO REPORT, supra note 1, at 25. The incomes are to be adjusted for family size. *Ibid.*

⁸GAO REPORT, supra note 1, at 27.

⁹*Id.* at 27-28.

¹⁰26 U.S.C. §42(g)(2); GAO REPORT, supra note 1, at 25.

¹¹See, 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"); see also Roisman, supra note 4, at 1016 n. 23 (providing more detail).

households have additional subsidies, they can afford tax credit units only if they have incomes between 40 and 60% of area median income.¹²

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 additional subsidy "such as rental assistance, other government loans, loan subsidies or grants,"¹³ and an earlier study had estimated that "more than three-fifths of LIHTC projects received an additional federal, state, or local subsidy."¹⁴ 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."¹⁵ 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.¹⁶

¹²Kathryn P. Nelson, *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"); see also Roisman, *supra* note 4, at 1016 n.23 (providing more detail).

¹³GAO REPORT, *supra* note 1, at 40, 6, 13.

¹⁴Nelson, *supra* note 12, 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 .

¹⁵GAO REPORT, *supra* note 1, at 7.

¹⁶*Id.* at 6.

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."¹⁷ GAO estimated that households without rental assistance had incomes of \$16,700; households with rental assistance, \$7,860.¹⁸ A more recent study reports that tax credit § 8 residents have incomes of about \$9,250.¹⁹

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...."²⁰ 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."²¹

¹⁷Id. at 37.

¹⁸GAO REPORT, supra note 1, at 6-7. These estimates are based on information provided to GAO by project managers of tax credit projects. GAO REPORT, supra note 1, at 38.

¹⁹NCSHA REPORT, supra note 3, at 67. This study also states that 31% of tax credit residents use § 8 "vouchers." Id. It is not clear 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.

²⁰26 U.S.C. § 42(m)(1)(A)(i). "In nearly all states, the state housing finance agency has been . . . given the responsibility for allocating the state's entire annual supply of low-income tax credit authority." 4 HDR Ref. File 81:0025. Some states, however, use additional or alternative agencies. Id. The City of Chicago Department of Housing shares authority with the Illinois Housing Development Authority; the New York City Department of Housing Preservation and Development shares authority with the New York State Division of Housing and Community Renewal. Id. at 81:0051-81:0053 (listing all LIHTC agencies).

²¹26 U.S.C. § 42(m)(1)(A)(ii).

As originally enacted, the LIHTC statute allowed the housing credit agencies vast discretion in the administration of the credit.²² Congress later amended the statute to set certain 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;²³ (2) each QAP's selection criteria must include some specified by Congress;²⁴ (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;²⁵ and (4) each QAP must provide a procedure for monitoring compliance with the other provisions and for notifying IRS of noncompliance.²⁶ Congress also added in 1989 the requirement of an "extended low-

²²Thomas R. Wechter & Daniel L. Kraus, *The Internal Revenue Code's Housing Program*, § 42, 44 TAX LAWYER 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.")

²³26 U.S.C. § 42(m)(1)(B)(i).

²⁴26 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.

²⁵26 U.S.C. § 42(m)(1)(B)(ii).

²⁶26 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).

income housing commitment" between the taxpayer (developer) and the allocating agency.²⁷ In 1993, Congress specified that this commitment must "prohibit [] the refusal to lease to a holder of a voucher or certificate . . . under section 8 . . . because of the status of the prospective tenant as such a holder."²⁸

In 1989, Congress amended the statute to encourage locating projects in certain areas.²⁹ Congress provided a thirty percent increase in eligible basis³⁰ for "any building located in a qualified census tract or difficult development area. . . ."³¹ 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.³² Difficult development areas ("DDAs") are those designated by HUD as areas with "high construction, land, and utility costs relative to area median gross income."³³

²⁷Pub.L. 101-239, § 7108(c)(1).

²⁸Pub.L. 103-66, § 13142(b)(4), 26 U.S.C. § 42(h)(6)(B)(iv). See Memorandum from Jeff Lubell (Center on Budget and Policy Priorities) to Jack Malgeri (IRS) (Feb. 17, 2000) (urging application of prohibition to all developments awarded credits from and after 1990).

²⁹Wechter & Kraus, *supra* note 22, at 392.

³⁰26 U.S.C. § 42(d)(5)(C)(i)(I). "Since the LIHTC is a function of basis, virtually all the important issues devolve into questions of 'eligible basis.'" Edwin B. Schuck, *The Low-Income Housing Tax Credit for New Construction: Eligible Basis and Planning Possibilities*, 48 TAX LAWYER 321, 322 (1995).

³¹26 U.S.C. § 42(d)(5)(C)(i)(I).

³²26 U.S.C. § 42(d)(5)(C)(ii)(I); see "Statutorily Mandated Designation of Difficult Development Areas, and Supplemental Designation of Qualified Census Tracts, for Section 42 of the Internal Revenue Code of 1986, Part III," 64 FED.REG. 50,234 (Sept. 15, 1999).

³³26 U.S.C. § 42(d)(5)(C)(iii). See "Statutorily Mandated Designation of Difficult Development Areas for Section 42 of the Internal Revenue Code of 1986, Part III," 65 FED. REG. 57,526 (September 20, 2000).

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.

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%.³⁴ 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.³⁵ 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.³⁶

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.³⁷ Thirty-four percent of all tax credit units are in areas with more than 50%

³⁴ABT REPORT, supra note 1, 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. ABT REPORT, supra note 1, at 4-7; Connie H. Casey, *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." GAO REPORT, supra note 1, at 44.

³⁵ABT REPORT, supra note 1, at 4-7. By comparison, 33% of FHA-assisted units are in the suburbs. Casey, supra note 32, at 14.

³⁶ABT REPORT, supra note 1, at 4-7, Casey, supra note 32, 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. . . ." GAO REPORT, supra note 1, 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.

³⁷ABT REPORT, supra note 1, at 4-16.

minority population.³⁸ In almost 25% of the properties in metropolitan areas, the development has a substantially higher percentage of minority residents than does the census tract.³⁹ 22% of the LIHTC central-city units are in census tracts with more than 20% female-headed households, although only 5% of all U.S. census tracts have this characteristic.⁴⁰ Abt estimated that about 37% of the units placed in service between 1992 and 1994 are located in DDAs and QCTs.⁴¹

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,⁴² although only "about 29 percent of all U.S. Census tracts contained over 50 percent low-income households in 1990."⁴³ 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.⁴⁴ Only 20% of the suburban tax credit units are located in neighborhoods with more than 50% minority population.⁴⁵

³⁸Id. at 4-15. Only 18% of all U.S. tracts have this characteristic. Ibid.

³⁹See GAO re RESIDENTS, supra note 1, at 3. For 10% of the metro area properties, the percent of minority residents is 26-50 points higher than for the census tract; for 14% of the metro area properties, the percent of minority residents is 51 or more points higher than for the census tract.

⁴⁰ABT REPORT, supra note 1, at 4-15 to 4-17.

⁴¹Id. at 4-10.

⁴²Id. at 4-16.

⁴³Id. at 4-15.

⁴⁴Id. at 4-16.

⁴⁵Id. at 4-16.

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 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.⁴⁶

Lampert says that "most of the projects of the nonprofits . . . are developed in neighborhoods where social problems may depress market values."⁴⁷

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

*most of the households served were small: 67% included one or two people; the average household had 2.2 persons;⁴⁸

⁴⁶Peter 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.

⁴⁷Id. at 348.

⁴⁸GAO Report, *supra* note 1, at 42.

*82% of the LIHTC units had 2 bedrooms or fewer;⁴⁹

*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;⁵⁰

*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."⁵¹

GAO later provided, at HUD's request, more detail about the characteristics of residents of the LIHTC properties.⁵² This January 2000 report indicated that properties outside metropolitan areas were likely to have relatively few minority residents, while properties in metropolitan areas were likely to be predominantly white or predominantly minority.⁵³

To secure information about the LIHTC developments in your own jurisdiction, you may access a database provided by HUD.⁵⁴ Your own state agency also probably maintains a web site

⁴⁹Id. at 45.

⁵⁰Id. at 43.

⁵¹Id. at 43.

⁵²See GAO re RESIDENTS, supra note 1, at 3.

⁵³Id. The estimates were that 60% of the properties outside metropolitan areas had 20% or fewer minority residents, and that within metropolitan areas, approximately 1/3 of the properties had 20% or fewer minority residents and approximately 1/3 of the properties had more than 80% minority residents. All of the estimates are based on data collected for a sample of about 400 out of 4100 LIHTC properties and therefore are subject to sampling error. Id. at 1.

⁵⁴Go to the web site <http://www.huduser.org/datasets/lihtc.html#data>.

* Choose "download data or report" from the list of options.

* Scroll down to the listing of files of areas of the country. These files will end with the extension "exe."

* Click on the desired file.

* Your computer will give you the option of deciding where to save it. Note the location. (At this

with some information; to secure more detailed information, you may well need to make requests of your state agency, probably using your state freedom-of-information act.

II. ADVOCACY TOOLS.

The central authority for each state's allocation of tax credits is its Qualified Allocation Plan, or QAP. Congress has set some standards for each QAP: (1) each QAP must identify selection criteria, "appropriate to local conditions," by which to choose among projects;⁵⁵ (2) each QAP's selection criteria must include some that have been specified by Congress;⁵⁶ (3) each QAP must give preference to projects serving the lowest income tenants for the longest periods

point you may also change the name to something that makes sense to you.)

- * Close out of or minimize your web browser. Minimize all other programs.
- * From your initial screen go to the "my computer" icon (usually in the top left-hand corner).
- * Within "my computer" go to the place you saved the "exe" file.
- * Double click the file. A black screen with white lettering will appear (this process "unzips" the data).
- * Close out of the black screen and "my computer."
- * Open Excel or some other spreadsheet program.
- * Go to the file and open it.

You should now have a spreadsheet listing developments in the left-hand column and various demographic information across the rows. We are grateful to Erin Boggs, Esq., of the Connecticut Civil Liberties Union, for providing these instructions.

⁵⁵26 U.S.C. § 42(m)(1)(B)(i)(1994).

⁵⁶26 U.S.C. § 42(m)(1)(c)(1994). These selection criteria are: "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." Id.

of time;⁵⁷ and (4) each QAP must specify a procedure for monitoring compliance with these provisions and for notifying the Internal Revenue Service (IRS) of noncompliance.⁵⁸

The statute also specifies a procedure for development of each state's QAP. Section 42(m)(1)(A)(i) directs that "the housing credit dollar amount . . . shall be zero unless such amount was allocated pursuant to a qualified allocation plan . . . which is approved by the governmental unit (in accordance with rules similar to the rules of section 147(f)(2) (other than subparagraph (B)(ii) thereof)...."⁵⁹ Section 147(f)(2) establishes the public approval requirement for private activity bonds, and specifies that "an issue shall be treated as having been approved by any governmental unit if such issue is approved -- (i) by the applicable elected representative of such governmental unit after a public hearing following reasonable public notice...." Thus, each QAP is required to be approved "after a public hearing following reasonable public notice...." In addition, each QAP probably is subject to state administrative procedure acts.⁶⁰ States generally seem to produce a new draft QAP annually, make the draft QAP available for public comment (including public hearing), and then produce a final QAP for the year.

⁵⁷26 U.S.C. § 42(m)(1)(B)(ii)(1994).

⁵⁸26 U.S.C. § 42(m)(1)(B)(iii)(1994).

⁵⁹I am indebted to Mark Schwartz for calling this section to my attention.

⁶⁰So far as I can discern from a computer-assisted search, Texas is the only state with specific statutory directions for the process of adopting a QAP. See Texas Gov't Code §§ 2306.0661 (2000) (requiring public hearing and opportunity "for persons to transmit on the Internet written testimony or comments . . . in accordance with rules adopted by the Board"); 2306.671 (submission of QAP to Governor). These provisions probably are related to "a stinging rebuke of its low-income housing tax credit program by a state legislative commission and a governing board member's criminal indictment . . ." 28 HDR Current Developments 204 (Aug. 7, 2000). See also § 2306.672 (2000), requiring publication in the QAP of "any discretionary factor that the department will consider in scoring an application."

The draft and final QAPs often are available on the internet.⁶¹ The application of fundamental principles of administrative law to the process of adopting and applying a QAP might lead to the requirement of dramatic procedural changes.

The QAPs address all of the issues likely to be of concern to legal services and civil rights attorneys. The annual development of the QAP is a crucially important advocacy opportunity .

In addition to the QAP, HUD's consolidated plan requirement offers a good advocacy opportunity. Under the consolidated planning regulations, a state's strategic plan must describe the manner in which the state will coordinate tax credit activities with efforts to develop affordable housing.⁶² A state's consolidated plan also must certify that the state is taking steps affirmatively to further fair housing.⁶³ These requirements offer an opportunity to link the allocating agency's QAP with the state's obligation to further fair housing.

Other advocacy tools include: federal and state constitutions' anti-discrimination provisions; Title VIII of the 1968 Civil Rights Act;⁶⁴ Title VI of the 1964 Civil Rights Act;⁶⁵ 42 U.S.C. Sections 1981 and 1982; the Americans with Disabilities Act;⁶⁶ Section 504 of the 1973 Rehabilitation Act;⁶⁷ the LIHTC statute, 26 U.S.C. § 42, and the Treasury regulations, especially

⁶¹See, e.g., [http://www.dhcr.state.ny.us/ocd/pubs/lihcqap\).htm](http://www.dhcr.state.ny.us/ocd/pubs/lihcqap).htm) (visited 10/12/2000) (New York State QAP); <http://www.state.nj.us/dca/hmfa/txcredit/index.html> (New Jersey QAP).

⁶²24 C.F.R. § 91.315(k).

⁶³24 C.F.R. § 91.325(a)(1).

⁶⁴42 U.S.C. § 3601 et seq. (1994).

⁶⁵42 U.S.C. 2000d (1994).

⁶⁶42 U.S.C. §12132 (1994).

⁶⁷29 U.S.C. § 704(a) (1994).

26 C.F.R. § 1.42-9(a), which requires that an eligible unit be "for use by the general public" and mandates compliance with HUD fair housing directives; state statutes prohibiting discrimination on various bases; the provisions of the housing statutes governing the Community Development Block Grant (CDBG),⁶⁸ Home Investment Partnership (HOME),⁶⁹ Rural Housing Service (RHS)⁷⁰ and other programs that may be used in combination with the LIHTC program.⁷¹

Another advocacy opportunity is presented by the eagerness of the industry and the agencies to have Congress increase funding for the LIHTC. The House of Representatives has passed legislation that would increase that amount, but the Senate may well not act until the 2001 session.⁷² Depending upon its make-up, the next Congress may have some interest in addressing civil rights and poverty concerns with the LIHTC as well as the industry's agenda.

⁶⁸Pub. L. No. 93-383 (1974) as amended, 42 U.S.C. § 5301 et seq.

⁶⁹Pub. L. No. 101-625 (1990) as amended, 42 U.S.C. § 12701.

⁷⁰Pub. L. No. 81-171, 63 Stat. 432 (1949) as amended, 42 U.S.C. § 1471.

⁷¹For further discussion of these "advocacy handles," see the memorandum prepared by Henry Korman for this tristate meeting ("Tax Credits and Civil Rights: Advocacy Handles") (from which this section is shamelessly cribbed) and the Outline of Principles, Authorities, and Resources Regarding Housing Discrimination and Segregation prepared for this meeting.

⁷²See 28 HDR Current Developments 321, 327 (Oct. 2, 2000).

III. DEVELOPMENT ISSUES.

Legal services and civil rights advocates should be concerned with rent levels, unit sizes, accessibility, 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. Serving Very Poor People.

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.⁷³ The allocating agencies have exercised considerable ingenuity in purporting to comply with these requirements. As the GAO report indicates, 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.⁷⁴ Many allocation plans treated these preferences as selection criteria that could be outweighed by other standards.⁷⁵ 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.⁷⁶

⁷³26 U.S.C. § 42(m)(1)(b)(ii).

⁷⁴GAO reported, 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, supra note 1, at 61; emphasis added. Texas targeted its tax credits at households with incomes between 31 and 50% of AMI. Ibid.

⁷⁵GAO REPORT, supra note 1, at 63.

⁷⁶See GAO REPORT, supra note 1, at 63.

Sponsors should be required to take every available step to get the rent levels as low as possible.⁷⁷

Additional subsidies almost always will be required to produce rent levels that can accommodate very low-income people. State tax credit programs are an important tool to accomplish this result.⁷⁸ QAPs should favor developments that use multiple subsidies to serve people with incomes between 0 and 30% of AMI.

The QAPs also can set the rules regarding non-discrimination against § 8 recipients and affirmatively requiring developers to solicit and accept residents from public housing and § 8 waiting lists. The QAPs also should set the rules regarding minimum income, leases, security deposits, and other provisions likely to be problems for very low-income applicants.

The QAP should require the collection and reporting of data, and good cause for eviction. The QAP should require LIHTC developments to meet FMR standards.

B. Unit Sizes and Accessibility.

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."⁷⁹ "The populations most frequently identified as needing

⁷⁷See GAO REPORT, supra note 1, at 63-72.

⁷⁸See Cal. Rev. & Tax Code §§ 12206 (2000) (creating state LIHTC); Mass. Ann. Laws ch. 62, §§ 6H, 6I (2000) (same); N.Y. CLS Pub. Hous. § 22 (same).

⁷⁹GAO REPORT, supra note 1, at 55-56.

housing were the elderly (70 percent); large families (67 percent); and persons with special needs"⁸⁰ 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 for local conditions."⁸¹ 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.⁸² Advocates also should seek to have the QAP specify accessibility requirements.

C. Achieving Non-Discrimination, Desegregation, and Integration.

Agencies should use the QAP to assure that new developments will serve the goals of racial non-discrimination, desegregation, and integration. The agencies should require and enforce siting and tenanting policies that will achieve these results.

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

⁸⁰GAO REPORT, supra note 1, at 56.

⁸¹26 U.S.C. § 42(m)(1)(B)(i).

⁸²See *Debolt v. Espy*, 47 F.3d 777 (6th Cir. 1995) (challenge to predominance of small FmHA-assisted units rejected on standing and mootness grounds).

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,"⁸³ and many allocating agencies have identified "deteriorated neighborhoods" and "excessive concentrations of very low-income housing" as problems to be solved.⁸⁴ 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.⁸⁵

Third, federal constitutional requirements may impose stringent requirements on state and local allocation agencies as well as on the Department of the Treasury.⁸⁶ In housing as in education, "state agencies or officials whose actions have contributed to . . . [unlawful] segregation have a duty 'to take the necessary steps 'to eliminate . . . all vestiges of state-imposed

⁸³26 U.S.C. § 42(m)(1)(B)(i).

⁸⁴GAO REPORT, supra note 1, at 56. Allocating agencies identified "excessive concentrations of very low-income housing" as a housing need 30% of the time. Id.

⁸⁵With respect to state constitutional arguments, consider the important and creative work of Helen Hershkoff's "project about state courts and state constitutions." See Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 HARV. L.REV. 1132, 1137 (1999).

⁸⁶See Roisman, supra note 4, at 1023.

segregation.'" . . . 'Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment.'"⁸⁷

Fourth, federal law imposes on the Department of Treasury and allocating agencies an obligation to promote racial and ethnic desegregation.⁸⁸ Both Treasury and many state and local 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.

States have a similar duty under the CDBG statute⁸⁹

⁸⁷*United States v. City of Yonkers*, 96 F.3d 600, 622 (2d Cir. 1996), cert. denied, 521 U.S. 1104 (1997); *United States v. Yonkers Bd. of Ed.*, 30 F.Supp.2d 650, 652-3 (SDNY 1998) (imposing these standards on the New York State Urban Development Corporation).

⁸⁸At 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.

⁸⁹42 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

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.⁹⁰

It is generally agreed that the "purposes" and "policies" of Title VIII are dual: to eschew discrimination and to promote integration.⁹¹ As interpreted by several courts of appeals, the "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."⁹² 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

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).

⁹⁰Section 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.

⁹¹*Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); see also *United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir. 1988), cert. denied, 488 U.S. 946 (1988). See generally SCHWEMM § 7.2(2).

⁹²*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. See also *ADAPT v. HUD*, 170 F.3d 381 (3d Cir. 1999) (rejecting 3608(e)(5) claim).

course of action that would increase that supply."⁹³ 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."⁹⁴ 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.⁹⁵ Under these holdings, the 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

⁹³*NAACP, Boston Chapter v. HUD*, 817 F.2d at 156.

⁹⁴*NAACP, Boston Chapter v. HUD*, 817 F.2d at 157.

⁹⁵*Shannon v., 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 displacees); 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 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.")

population,⁹⁶ 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.⁹⁷ 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.

IV. OCCUPANCY ISSUES

Tax credit units are more likely than 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 those subsidies 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.⁹⁸)

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

⁹⁶ABT REPORT, *supra* note 1, at 4-15; 4-16.

⁹⁷See *supra* at 16.

⁹⁸ABT REPORT, *supra* note 1, at 4-16.

recipients and public housing residents.⁹⁹ There is a role for legal services and civil rights lawyers to play in assuring very low income client households 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.¹⁰⁰ 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

⁹⁹The 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." See supra note 19 and accompanying text. John Schrider points out that a full-time job at the current minimum wage would pay more than \$9,250/year. The NCSHA 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, \$5,020/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 32, at 10-11.

¹⁰⁰26 U.S.C. § 42(h)(6)(B)(IV). The prohibition against discrimination on the basis of § 8 status was added in 1993.

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.¹⁰¹ The other exemptions are housing (1) intended for, and solely occupied by, persons 62 or older, or (2) intended for, and at least 80% occupied by, households including one person 55 or older, with some additional restrictions.¹⁰² It is likely that tax credit 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.¹⁰³ If AFCD/TANF¹⁰⁴ recipients are being rejected, the sponsor is vulnerable to a sex-discrimination claim.¹⁰⁵ There also is room to

¹⁰¹GAO REPORT, *supra* note 1, at 43.

¹⁰²42 U.S.C. § 3607(b)(2).

¹⁰³ROBERT 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; *Franklin Tower One v. N.M.*, 725 A.2d 1104 (N.J. 1999); *Commission on Human Rights and Opportunities v. Sullivan Assoc.*, 739 A.2d 238 (Conn. 1999).

¹⁰⁴The 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 1996, Pub.L. 104-193, 110 Stat. 2105 (1996), 42 U.S.C. § 654 (1996).

¹⁰⁵See *HUD v. Ross*, HUDALJ 01-96-0466-8 (1994), PRENTICE HALL FAIR HSG.-FAIR LEND'G RPTR. ¶ 25,075 and *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246 (9th Cir. 1997).

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.

Minimum income and other screening requirements can be challenged on several bases, including disparate impact on § 8 certificate and voucher holders and on people who are elderly or disabled.

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 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),¹⁰⁶ only 20% of the suburban tax credit units are located in neighborhoods with more than 50% minority population.¹⁰⁷ Most suburban tax credit developments are in majority-white neighborhoods, and it is likely that they have predominantly white occupants.¹⁰⁸ Lawyers representing minority applicants have powerful weapons to secure admission to such projects by minorities.

¹⁰⁶ABT REPORT, supra note 1, at 4-16.

¹⁰⁷ABT REPORT, supra note 1, at 4-15.

¹⁰⁸An 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.

First, of course, are the traditional Title VIII principles, including attacks on advertising and marketing practices.¹⁰⁹ 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

¹⁰⁹See the Outline of Principles, Authorities, and Resources regarding Housing Discrimination and Segregation distributed with these materials.

federal or state programs involved in the project (such as CDBG funding, RHS assistance or state programs).¹¹⁰

¹¹⁰For 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.¹¹¹ And some of the HUD "rules or regulations" to which 26 CFR § 1.42-9(a) refers require affirmative marketing.

¹¹¹See, e.g., New Jersey Admin Code tit. 5, § 9245.2 (1992). The New Jersey Supreme Court has related this state requirement to the HUD requirement in 24 CFR § 200.600. *In re Township of Warren*, 247 N.J. Super 146, 166, 588 A.2d 1227, 1237 (1991). See Florence Wagman Roisman, *The Role of the State, The Necessity of Race-Conscious Remedies, and Other Lessons From The Mount Laurel Study*, 27 SETON HALL L.REV. 1386 (1997).

The Low-Income Housing Tax Credit (LIHTC) subsidizes the acquisition, construction, and rehabilitation of affordable rental housing for low- and moderate-income tenants. The LIHTC was enacted...Â Key Elements of the U.S. Tax System. Tax Incentives for Economic Development. What is the Low-Income Housing Tax Credit and how does it work? Chapters. Introduction. In summary, the Low Income Housing Tax Credit in Massachusetts has helped support the production or preservation of over 67,000 affordable multifamily rental units since the program became operational in 1987. The program is highly flexible and has been used to advance numerous policy goals: sustainable development; neighborhood revitalization; housing for extremely low-income households; housing for the homeless; housing for persons with disabilities; housing in areas of opportunity; new construction as well as adaptive re-use and preservation. At the national level, the LIHTC program has sup