An Advocate's Guide to Tenants' Rights in the Low-Income Housing Tax Credit Program

August 2021

Table of Contents

INTRODUCTION 3
LOW-INCOME HOUSING TAX CREDIT PROGRAM OVERVIEW 4
- **Financing Structure** 4
- **Program Implementation: Qualified Allocation Plans** 4
- **LIHTC Program Advocacy** 5

EVICTIONS IN THE LOW-INCOME HOUSING TAX CREDIT PROGRAM 7
LOW-INCOME HOUSING TAX CREDIT RENT CALCULATIONS 8
- **LIHTC Rent Maximums** 8
- **Other Factors Affecting LIHTC Rent** 10
  - **States Can Impose Lower Maximum Rents** 10
  - **Rent Increases** 10
  - **Effect of Rental Assistance** 10

TENANT ELIGIBILITY FOR LIHTC HOUSING 13
- **Tenant Income Eligibility Determined by Area Median Gross Income (AMI)** 13
- **Citizenship Status** 14
- **Student LIHTC Rules** 14
- **Other Factors Affecting Admission** 15
- **Effects of Other Subsidies** 15
- **Other Protections** 16

OVER-INCOME TENANT SITUATIONS – THE NEXT AVAILABLE UNIT RULE 17

INTRODUCTION

This short guide provides legal advocates with an overview of key tenants' rights issues in the Low-Income Housing Tax Credit (LIHTC) program, including: rent calculations; income eligibility; evictions; and the rules that apply when an existing tenant's income exceeds the project maximum. We have also included a brief explanation of how analysis of these issues may be affected where a LIHTC property or unit is also subject to other subsidy program rules. This guide is intended as an introduction and is not a comprehensive manual covering all aspects of the LIHTC program. The information below should be supplemented by NHLP's Green Book and other resources, and advocates should reach out to NHLP for assistance with LIHTC issues that are beyond the scope of this guide.

LOW-INCOME HOUSING TAX CREDIT PROGRAM OVERVIEW

Financing Structure

The Low Income Housing Tax Credit (LIHTC) program is a federal affordable housing program established under 26 U.S.C. §42. Unlike traditional affordable housing programs, the LIHTC program itself does not include rental assistance or any other type of direct government expenditure.[1] Instead, private investors fund a portion of project costs in exchange for a tax credit that is claimed over the course of 10 years. In return, units must be occupied by qualifying tenants paying no more than specified restricted rent levels for at least 30 years.

There are two types of tax credits: 4% and 9% credits.[2] In addition to financing original construction, 9% credits can also be used finance the acquisition and/or rehabilitation of a building not currently assisted by any federal program. The 4% credits can be used to rehabilitate federally assisted buildings, so they have been the primary source of funding for the rehabilitation of existing federally assisted affordable housing.

Program Implementation: Qualified Allocation Plans

The LIHTC program is regulated at the federal level by the U.S. Department of the Treasury. 26 U.S.C. §42(n). However, the tax credits are allocated by state tax credit agencies.[3] These state tax credit agencies must allocate their states' tax credits in accordance with a qualified allocation plan (QAP), and each state agency is responsible for preparing and formally adopting its own QAP.[4]

Every QAP must set forth selection criteria that reflect the state agency's housing priorities based on local conditions.[5] The QAP must also give preference in allocating tax credits to:

- Projects that serve the lowest income tenants;
- Projects obligated to serve qualified tenants for the longest periods; and
- Projects located in qualified census tracts where the projects contribute to a concerted community revitalization plan.[6]

---

[1] As discussed in more detail below, many LIHTC properties do receive additional project-based subsidies through other federal housing programs, and LIHTC units are often leased to tenant-based voucher holders.

[2] These percentages refer to the "applicable percentage," a rate established by the Treasury Department that is applied to a project's "qualified basis" to determine the amount of tax credits available for a specific project, typically yielding enough capital to cover about 70% of project costs for 9% credit projects and about 30% of project costs for 4% credit projects. 26 U.S.C. §42(b). See 26 U.S.C. §42(a)-(d) for definitions of highlighted terms and additional rules on the valuation of tax credits.

[3] 26 U.S.C. §42(h)(3)(A)-(C).

[4] *Id*. at §42(m)(1)(A)(ii).

[5] *Id*. at §42(m)(1)(B)(i).

[6] *Id*. at §42(m)(1)(B)(ii).

These preferences reflect Congress' intent that the LIHTC program serve the lowest-income population possible, maintain affordability restrictions for as long as possible, and support economic development in underserved communities.[7] The QAP must also set out the procedures that the state tax credit agency will follow in monitoring program compliance.[8]

State tax credit agencies have broad interpretative discretion with respect to provisions dealing with the allocation process. As one court put it, "Section 42 of the Code does little more than require states to distribute credits pursuant to a qualified allocation plan. Although certain selection criteria must be included in that plan, no specific directives mandate *how* the [state tax credit agency] must weigh or consider those criteria."[9] As a result, allocation policies and practices can vary from state to state.[10]

LIHTC Program Advocacy

Since state tax credit agencies have broad discretion over their QAPs, advocates have an opportunity to directly engage them to pursue policy objectives that the federal mandates do not address. For example, advocates can push for credits to be allocated in a way that prioritizes rural projects, projects located in high opportunity neighborhoods as a way to affirmatively further fair housing, or projects that set rent maximums below federal levels in order to target the poorest individuals in a particular area.

For an example of this type of policy focus, see California's QAP, which, among other things, sets aside 20% of its annual tax credits for projects located in rural areas.[11] NHLP also has examples of letters advocating for the promulgation of policies at the state tax credit agency level.[12]

Advocates who cannot directly engage in policy advocacy because of LSC restrictions can still contribute to LIHTC policy advocacy efforts. Because of the direct legal services these advocates typically provide, advocates working for LSC-funded programs usually have a more up-to-date and comprehensive understating of the issues affecting current and prospective LIHTC tenants. These insights are essential to the success of any policy advocacy effort because they illustrate

---

[7] These federal policy goals could serve as the foundation for the state level advocacy suggested below.

[8] 26 U.S.C. §42(m)(1)(B)(iii).

[9] *DeHarder Inv. Corp. v. Indiana Housing Finance Authority*, 909 F.Supp. 606, 613 (S.D. Ind. 1995) (internal quotation marks omitted).

[10] See e.g., *Tuttle v. Front Street Affordable Housing Partners*, ___ F.Supp.3d ___, 2020 WL 4679411 (D. Hawaii 2020).

[11] See Cal. Code of Reg., tit. 4, §10315(e). California's QAP is available at https://www.treasurer.ca.gov/ctcac/programreg/2020/20201221/regulations.pdf.

[12] See NHLP's 2019 comment letter on proposed regulations (https://www.nhlp.org/wp-content/uploads/2019.09.16-QAP-Tenant-Advocate-Comments.pdf) and NHLP 2021 letter seeking a LIHTC tenants' bill of rights (https://www.nhlp.org/wp-content/uploads/TCAC-Letter-Re-LIHTC-Tenant-Bill-of-Right-06.09.2021.pdf).

the harm and/or benefit of a particular policy. Advocates should document these issues and bring them to the attention of organizations that engage in policy work on behalf of low-income tenants.

EVICTIONS IN THE LOW-INCOME HOUSING TAX CREDIT PROGRAM

Good cause is required to evict a person from a LIHTC unit.[13] Unfortunately, federal law does not define what constitutes good cause to evict.

The Internal Revenue Service (IRS) has issued guidance explaining that good cause is determined by applicable state and local law, and may include nonpayment of rent; violations of the lease or rental agreement; destruction or damage to the property; interference with other tenants or creating a nuisance; or using the property for an unlawful purpose.[14] Confusingly, this same guidance explains that an eviction based on the expiration of the lease alone does not per se constitute an eviction without good cause, suggesting that such no-cause evictions may be allowed under the LIHTC rules.

Because federal rules offer no detail and because the IRS guidance on good cause is not binding or sufficiently clear, advocates will have to look beyond the applicable federal rules to give meaning to the LIHTC program's good cause requirement. State tax credit agency regulations may further define good cause for all LIHTC projects in a given state.[15] The subject lease and/or any required addenda may also clarify the meaning of good cause for a particular tenancy.

If statutory or regulatory authority is unhelpful and the lease is silent on the issue, other authority might help fill the gap. For example, unpublished state appellate court opinions in at least two states held that good cause is required to evict a tenant from a LIHTC property before the requirement was acknowledged by the Internal Revenue Service.[16] Thus, it may be worthwhile to look into whether federal or state courts in other jurisdictions have further defined good cause for purposes of the LIHTC program and/or considered the same good cause-related issue you are facing.

Advocates should also consider basing their arguments on the good cause requirements in other project-based affordable housing programs.[17] Since these other project-based affordable housing programs are structured similarly and have the same basic purpose as the LIHTC program, it stands to reason that good cause under the LIHTC rules should be similarly defined and applied.

---

[13] 26 U.S.C. §42(h)(6)(E)(ii)(I); Rev. Rul. 2004-82, Q&A#5.

[14] I.R.S. Guide to Completing Form 8823 at 26-3-26-4 available at https://www.irs.gov/pub/irs-utl/lihc-form8823guide.pdf.

[15] If your state tax credit agency has not defined good cause, that is an area ripe for administrative policy advocacy.

[16] *Cimarron Village Townhomes, Ltd. v. Washington*, No. C3-99-118, 1999 WL 538110 (Minn. Ct. App.1999); *Bowling Green Manor Ltd. Partnership v. Kirk*, No. WD-94-125, 1995 WL 386476 (Ohio Ct. App. 1995).

[17] See, e.g., 7 C.F.R. §3560.159(a)(2) (defining good cause for purposes of the Rural Development Section 515 multi-family housing program); 24 C.F.R §880.607(b) (discussing good cause in the context of the Section 8 Project-Based Rental Assistance program).

LOW-INCOME HOUSING TAX CREDIT RENT CALCULATIONS

LIHTC Rent Maximums

For a building to qualify under the LIHTC program, the owner of a LIHTC property must agree to rent a minimum number of the building's units to low-income individuals in accordance with one of the following three minimum set-aside formulas[18]:

20-50 test	The owner must rent at least 20% of its units to individuals whose income is 50% or less of Average Median Gross Income ("AMI") (26 U.S.C. §42(g)(1)(A)).
40-60 test	The owner must rent at least 40% of its units to individuals whose income is 60% or less of AMI (26 U.S.C. §42(g)(1)(B)).
Average Income test	The owner must rent at least 40% of its units to individuals whose income does not exceed the AMI limitation designated for a particular unit. (26 U.S.C. §42(g)(1)(C)).[19]

Critically, the amount of rent that an owner can charge for a LIHTC unit is not based on a tenant's actual income. Instead, the rules limit the amount of rent[20] that an owner can charge to 30% of the AMI limitation established under the set-aside formula chosen by the owner.[21] The AMI for a particular area is calculated on an annual basis by the U.S. Department of

[18] Most properties contain 100% LIHTC-restricted units. The rent calculations discussed here still apply to such properties.

[19] Unlike the 20-50 and 40-60 tests where a single AMI income limitation applies to all LIHTC units at the same property, under the Average Income test, each LIHTC unit has its own income limitation, ranging from 20% to 80% AMI. 26 U.S.C. §42(g)(1)(C)(ii)(III). This Average Income test is only available for properties placed in service after 2018. Under a currently proposed regulation, state tax credit agencies will have authority to enact required procedures for designating unit income limitations under the AIT. Low-Income Housing Credit Average Income Test Regulations, 85 Fed. Reg. 68816 (proposed October 29, 2020) (to be codified at 26 C.F.R Part 1). As of April 8, 2021, this proposed rule was not yet final.

[20] Rent for LIHTC purposes refers to gross rent, which includes utilities and does not include Section 8 rental assistance payments or other payments made under any comparable rental assistance program, among other exclusions. 26 U.S.C. §42(g)(2)(B).

[21] Technically, rent is limited to 30% of the "***imputed income limit***" applicable to the subject LIHTC unit. 26 U.S.C. §42(g)(2)(A) (emphasis added). However, the term "imputed income limit" simply refers to the applicable AMI limitation and the fact that the AMI is based on an imputed household size and not on the actual number of people living in a unit, as further explained immediately below. 26 U.S.C. §42(g)(2)(C).

Housing and Urban Development and varies based on household size. For LIHTC purposes, however, the applicable AMI is not based on a household's actual size. Rather, the applicable AMI is based on an imputed household size equal to 1.5 times the number of bedrooms in the subject LIHTC unit.[22]

Based on these rules, the LIHTC maximum rent formula can be summarized as 30% of the applicable AMI limitation based on the imputed household size of 1.5 times the number of bedrooms in a given unit. (See box for an example of how the LIHTC maximum rent formula works.)

Calculating Maximum Rent

Assume a tenant lives at a LIHTC property where the owner has elected to use the 20-50 test to determine its minimum set-aside. The tenant has an actual household size of six but occupies a three-bedroom unit, so the tenant's imputed household size is 4.5 (i.e., 1.5 multiplied by three bedrooms). The owner can charge the tenant up to 30% of 50% of the AMI for a household of 4.5 people. According to HUD's calculations,[1] 50% of the AMI for the area where the property is located for a household of 4.5 is $37,750 per year. The maximum rent the owner can charge annually is therefore $11,325 (30% of $37,750) or $943 per month.

HUD AMI calculations can be found at: https://www.huduser.gov/portal/datasets/il/il2020/select_Geography.odn.

Where the tenant is responsible for paying any basic utilities out of pocket, the maximum rent level calculated in accordance with the formula above must be reduced by the amount of a utility allowance established in accordance with one of the various methods provided under 26 C.F.R. §1.42-10.[23]

Unfortunately, the applicable AMI limitation (*e.g.*, 50% or 60% AMI) for a given unit is not typically included in the subject lease and is not otherwise readily available. If an owner is unwilling or unable to provide this information directly, tenants and advocates can obtain this information by reviewing a copy of the regulatory agreement between the owner and the state tax credit agency[24] or by requesting relevant documents from the state tax credit agency pursuant to the state's public records request law. Some state tax credit agencies also provide this information on their websites.[25]

---

[22] 26 U.S.C. §42(g)(2)(C).

[23] For a more detailed discussion of LIHTC utility allowances, see section 5.8.2 of NHLP's Green Book.

[24] This regulatory agreement must be recorded in accordance with state law and thus should be publicly accessible. 26 U.S.C. §42(h)(6)(B)(vi).

[25] Advocates can also use this rent calculator: https://ric.novoco.com/tenant/rentincome/calculator/z1.jsp. However, use of the calculator requires having updated and accurate information about the property, such as when it went into use, that advocates may still need to obtain elsewhere.

Other Factors Affecting LIHTC Rent

States Can Impose Lower Maximum Rents

Although the LIHTC program is a federal program, tax credits are actually awarded by state tax credit agencies and, as a result, these agencies have a lot of discretion in imposing stricter requirements on LIHTC projects within their jurisdiction. This includes authority to require lower AMI limitations than those established under federal LIHTC rules as a way to target lower-income individuals.[26] To determine if deeper rent restrictions apply to a unit at a specific project, see your state tax credit agency's Qualified Allocation Plan and the regulatory agreement[27] between the agency and the owner of the property.

Rent Increases

Federal LIHTC rules only establish the maximum rent that an owner can charge a tenant. Those rules do not limit the amount or frequency of rent increases, as long as the total rent charged by the owner does not exceed the LIHTC maximum. However, LIHTC rent increases are still subject to any applicable rent increase limitations and other rent control restrictions imposed by state and local law (if LIHTC properties are not exempted), as well as any applicable state and local notice requirements. LIHTC rent increases may also be limited by relevant provisions in the subject lease. Note that some LIHTC property leases contain what is known as an "escalator clause," which is a contractual provision that allows an owner to increase the rent during the lease term.

Since the LIHTC rent maximum is a function of AMI (and has no relation to a person's actual income), where rent is already set at the maximum, rent can only increase if the AMI also increases.[28] Like all other rent increases, a rent increase based on an increase in the AMI is subject to any applicable state and local rent increase limitations and notice requirements.

Conversely, if the AMI decreases, an owner is not required under the LIHTC rules to lower the rent.[29]

Effect of Rental Assistance

LIHTC owners commonly combine LIHTC financing with other subsidy programs to make rent more affordable for tenants. Consequently, it is often the case that a LIHTC property will be subject to other subsidy program regulations. Most commonly, but not exclusively, these

---

[26] Since maximum rent is a function of AMI, a lower AMI will have the effect of lowering the maximum rent the owner is allowed to charge.

[27] This document must be recorded pursuant to state law and should be publicly accessible through the local recorder's office. 26 U.S.C. §42(h)(6)(B)(vi).

[28] Typically, HUD publishes AMI figures on an annual basis.

[29] 26 U.S.C. §42(g)(2)(A).

include the Section 8 tenant-based Housing Choice Voucher (HCV) program, the Section 8 project-based rental assistance (PBRA) program, the Section 8 project-based voucher (PBV) program, and the Rural Development (RD) Section 515 program.[30] The maximum amount of rent an owner can charge under these programs is calculated differently than under the LIHTC program, so it is important to know which rent limit applies and how it affects a tenant's share.

> **HCV:** Where the total amount of rent authorized under a voucher exceeds the LIHTC maximum rent, an owner may be permitted to charge the higher amount.[31] However, an owner can charge the higher amount of rent only if the tenant's portion of the rent is not being used to pay the excess amount and is instead paid entirely with the Section 8 HCV rental assistance payment.[32] This is because a LIHTC owner is statutorily prohibited from collecting gross rent in excess of the applicable LIHTC rent limitation,[33] but Section 8 subsidy payments are not considered gross rent.[34]
>
> **PBRA:** Generally, the maximum rent to an owner who has executed a renewal contract under the Section 8 PBRA program is the comparable market rent as determined by HUD.[35] Where the PBRA rent exceeds the LIHTC rent maximum, the owner is permitted to charge the higher amount since the excess rent does not affect the tenant's contribution.[36]
>
> **PBV:** Generally, the total rent that an owner can charge under a PBV program is capped at 110% of the fair market rent for a comparable unit.[37] Where total PBV rent exceeds the LIHTC rent maximum, rent to the owner can be set at the higher amount if approved by the PHA without any impact on the tenant's contribution.[38]

---

30 Note that other types of financing, such as bonds, grants, and low-interest loans from a local public agency, for example, may impose further restrictions. Advocates should determine if this type of financing is involved in a given project and identify any attendant restrictions.

31 24 C.F.R. §982.507(c)(2). Here, rent is limited to the lesser of the "reasonable rent" and the "payment standard."

32 Generally, the HVC tenant's portion of the rent is limited to 30% of their adjusted monthly income. 42 U.S.C. §1437f(o)(2)(A). The local PHA pays the balance, but only up to the applicable payment standard. 26 U.S.C. §1437f(o)(2)(A)-(B); 24 C.F.R §982.505(a). If the total rent due to the owner exceeds the HCV payment standard, the tenant is responsible for paying the excess amount, even if it exceeds the tenant's statutorily determined portion of rent. 26 U.S.C. §1437f(o)(2)(B).

33 26 U.S.C. §42(g)(2)(A).

34 *Id*. at §42(g)(2)(B)(i).

35 Advocates will most often deal with projects that have renewed their PBRA contracts. The precise calculation of rent in the context of PBRA contract renewals will vary based on a number of factors. See HUD's Section 8 Renewal Policy Guidebook, available at https://www.hud.gov/sites/documents/508FIN_CONSOL_GUIDE6_8_17.PDF.

36 Unlike the HCV program, the total rent to the owner and the amount of rental assistance paid under the PBRA program are calculated in such a way that a tenant will never have to pay more than his or her statutorily determined portion of the rent. The same is true of the PBV program. Thus, the analysis is slightly different than under the HVC program.

37 42 U.S.C. §1437f(o)(H).

38 *Id*.

Where the total rent allowed under the PBV program is less than the LIHTC maximum, rent can be set at the LIHTC rent maximum, but only if the subject building is not located in a qualified census tract (as defined under 26 U.S.C. §42(d)).[39] Otherwise, the lower PBV rent amount applies.

RD Section 515: Under the RD Section 515 program (42 U.S.C. §1485), property owners receive a low-interest loan from the United States Department of Agriculture in exchange for keeping rents at affordable levels.[40] RD Section 515 properties that are further financed using LIHTCs can set rent at the LIHTC program maximum, as long as the amount does not fall below the basic rent.[41] However, the total amount of rent charged by the property owner should not impact the tenant's portion of the rent since it is statutorily limited in accordance with 7 C.F.R §3560.203(a)(1).[42]

---

[39] *Id.*; 24 C.F.R. §983.301(c).

[40] See 7 C.F.R. §3560 et seq. for program details.

[41] 7 C.F.R §3560.202(g). The basic rent is the amount of rent necessary to cover the cost of operating and maintaining the building and servicing its debt. 7 C.F.R §3560.11(a). An owner of an RD 515 property can never charge an amount of rent below the basic rent, not just when the LIHTC program is involved. 7 C.F.R §3560.202(a).

[42] Note that over 60% of RD Section 515 tenants receive additional rental assistance under the RD Section 521 Rental Assistance program. 42 U.S.C. §1490a(a)(2)(A).

TENANT ELIGIBILITY FOR LIHTC HOUSING

Tenant Income Eligibility Determined by Area Median Gross Income (AMI)

Tenant eligibility is based on the income limitation required under the minimum set-aside test applicable to the subject building.[43] Specifically, absent lower state-imposed limits, a tenant's income cannot exceed 50% of the AMI (under the 20-50 test), 60% of AMI (under the 40-60 test), or the imputed income limitation designated for a particular unit under the Average Income Test.[44] AMIs are calculated annually by the Department of Housing and Urban Development (HUD).[45] The applicable AMI, which varies based on household size, is not based on a tenant's actual household size for LIHTC purposes. Instead, LIHTC rules assume a household size equal to 1.5 multiplied by the number of bedrooms in the subject unit.[46] (See box directly below for example of how LIHTC income eligibility rules are applied.)

Although it is a federally funded program, the LIHTC program is primarily administered by state tax credit agencies that may impose stricter program requirements. Some state tax credit agencies use their authority to set lower AMI limits as a way to target lower-income individuals. That is why it is important to review your state tax credit agency's Qualified Allocation Plan and the regulatory agreement[47] between the state tax credit agency and the property owner to determine the applicable LIHTC income limits for a particular LIHTC project.[48]

Calculating Area Median Income

Assume a person applies to rent a three-bedroom LIHTC unit at a property subject to the 20-50 set-aside test. Here, the applicant's income cannot exceed 50% of the AMI for a household size of 4.5, i.e., the imputed household size based on 1.5 multiplied by the three bedrooms in the unit. If 50% of the AMI for a household of 4.5 for this area is $37,750 per year, the applicant must have an annual income at or below $37,750 to qualify to occupy the unit.

Family income for LIHTC purposes is determined in accordance with HUD Section 8 rules.[49] A tenant must meet the LIHTC eligibility requirements upon moving in and must recertify his or

---

[43] The property owner selects one of these three set-aside tests at the very beginning of the project and that election is irrevocable. 26 U.S.C. §42(g)(1).
[44] *Id*. §42(g)(1).
[45] HUD AMI calculations can be found here: https://www.huduser.gov/portal/datasets/il/il2020/select_Geography.odn.
[46] 26 U.S.C. §42(g)(2)(C)(ii).
[47] This document is must be recorded pursuant to state law and should be publicly accessible. 26 U.S.C. §42(h)(6)(B)(vi).
[48] Advocates can also use this rent calculator: https://ric.novoco.com/tenant/rentincome/calculator/z1.jsp. However, use of the calculator requires having updated and accurate information about the property, such as when it went into use, that advocates may still need to obtain elsewhere.
[49] 26 U.S.C. §42(g)(4) (by cross-reference to 26 U.S.C. §142(d)(2)(i)); 26 C.F.R. §1.42-5(b)(vii). See HUD's 4350.3 Multifamily Occupancy Handbook available at https://www.hud.gov/sites/documents/DOC_35649.PDF.

her income eligibility every year thereafter unless the property consists entirely of LIHTC units.[50] For properties with 100% LIHTC units, the owner can ask tenants to recertify their incomes annually but is required to conduct tenant recertifications only once more after move-in.

Note that you could have a situation where some of the available units at a property are set at 50% AMI and others at 60% AMI and the prospective tenant's income is below 50% AMI, meaning the person qualifies for either type of unit. In a situation like this, nothing in federal law prohibits the owner from placing the person in the 60% unit, even though the person is qualified to occupy the 50% unit where rent would be more affordable.[51]

Citizenship Status

The LIHTC program has no citizenship requirement. However, only U.S. citizens and certain categories of non-citizens are eligible for the majority of HUD housing programs, including the Section 8 Housing Choice Voucher (HCV), Project-Based Rental Assistance (PBRA) and Project-Based Voucher (PBV) programs.[52] U.S. citizenship is also required under the Rural Development (RD) Section 515 program.[53] The citizenship requirements in these HUD and RD programs do not prohibit assistance for eligible individuals who form part of a mixed-status family.[54] In the case of mixed-status families, assistance is prorated based on the number of eligible individuals in the household.[55] In LIHTC-only units or projects, however, there is no need to prorate assistance since citizenship is not an eligibility requirement.

Student LIHTC Rules

A full-time student is defined as an individual who is enrolled full-time for at least five months out of the year at an educational institution described in the Internal Revenue Code.[56] I.R.C. §170(b)(1)(A)(ii) does not cover educational institutions that offer only online instruction.[57]

Note that this rule only applies to units occupied *exclusively* by full-time students not meeting any of the enumerated exceptions; it does not prohibit a full-time student from living at a LIHTC unit also occupied by at least one other non-student adult.

---

[50] 26 C.F.R. §1.42-5(b)(vi).

[51] Note that state tax credit agencies have the authority to go further than the federal LIHTC rules and may require an owner to place a tenant in the most affordable unit in this situation. Review your state's QAP to determine if it addresses this issue.

[52] 42 U.S.C. §1436a(a); 24 C.F.R. §5.506.

[53] 7 C.F.R. §3560.152.

[54] 42 U.S.C. §1436a(b)(2)

[55] *Id*.

[56] 26 U.S.C. §170(b)(1)(A)(ii). See also IRS, Grace Roberts et al. Guide for Completing Form 8823 Low-Income Housing Agencies of Noncompliance or Building Disposition, Rev. 01-2011 (Jan. 2011) at 17-1, available at https://www.irs.gov/pub/irs-utl/lihc-form8823guide.pdf.

[57] *Id*.

> ***A LIHTC unit cannot be occupied exclusively by a full-time student(s) with the exception of the following situations:***
>
> - *The student is receiving benefits under the Temporary Assistance for Needy Families (TANF) program;*
> - *The student was previously in foster care;*
> - *The student is enrolled in a federal, state or local job training program;*
> - *The student is a single parent with dependent children; or*
> - *The students are married and file a joint tax return.*
>
> *(26 U.S.C. §42(i)(3)(D)*

Advocates should be aware that owners often misunderstand the rules and consequently seek to evict households consisting of a mix of full-time students and non-students. Advocates should also know that owners afraid of credit recapture often deny admission to smaller, younger applicant households because of the perception that such households will likely access post-secondary education in the near future and thereby trigger the LIHTC student rules.

Other Factors Affecting Admission

LIHTC rules do not prohibit a property owner from screening tenants using criteria that are common in private, market-rate housing, such as minimum credit scores, minimum income thresholds, prior landlord-tenant history, and other financial criteria.[58] Because of the lack of federal substantive rules and procedural protections, owners of LIHTC properties often apply arbitrary criteria with little relevance to whether someone will be a good tenant, *e.g.*, screening policies that exclude applicants with a criminal history without consideration of relevant mitigating circumstances.

And, in contrast to prospective tenants applying for admission to other federal housing programs, prospective LIHTC tenants are not entitled under federal law to a written explanation of why they were denied admission and do not have a right to challenge the decision.[59] This lack of procedural protections opens the door to arbitrary and discriminatory admissions decisions that are difficult to identify.

Effects of Other Subsidies

It is common for a LIHTC property to also receive one or more subsidies under other federal housing programs as a way to make rents more affordable for tenants. Those other programs

[58] Although it seems irrational to use market-rate housing criteria to determine admission to affordable housing, nothing in the federal LIHTC rules prohibits the practice.
[59] State tax credit agencies have authority to require written notice and an explanation of why an application was denied. Advocates should review their state's qualified allocation plan to see if such a requirement applies to LIHTC properties in their state.

have their own eligibility requirements, which can create confusion about which eligibility requirements apply to a given tenancy.[60]

> The **Section 8 HCV program** is a tenant-based subsidy program that has its own eligibility criteria that are applied by the Public Housing Authority (PHA), not the property owner.[61] Thus, an applicant must meet HCV eligibility criteria (determined by the PHA) and, independently, the applicant must also meet LIHTC program eligibility requirements and the owner's rental application screening criteria (determined by the owner). However, a LIHTC property owner cannot refuse to lease a LIHTC unit to an HCV holder because of their voucher status.[62] Because an owner could get around the prohibition on HCV discrimination by simply applying minimum income standards that it knows an HCV-qualified tenant cannot meet, the prohibition on refusing to rent to an HCV holder necessarily means that LIHTC property owners must modify otherwise-applicable minimum income standards when considering applicants with vouchers.
>
> Similarly, the **Section 8 PBRA** and **PBV** programs have their own eligibility criteria.[63] Tenants applying to a LIHTC property that also participates in one of these Section 8 programs must qualify under both the LIHTC program rules and the applicable Section 8 program rules in order to receive additional rental assistance.[64]
>
> The **RD Section 515** program also has its own eligibility requirements, but unlike the Section 8 HCV and PBRA programs, a tenant or prospective tenant that is ineligible under the RD Section 515 program is still eligible to live at a LIHTC/RD Section 515 property if he or she only meets the LIHTC eligibility requirements.[65]

Other Protections

The federal Fair Housing Act prohibits discrimination in the rental of property on the basis of disability, race, color, religion, sex, familial status, or national origin. LIHTC properties are, of course, subject to this prohibition as well as to applicable state and local anti-discrimination laws in most cases.

---

[60] This discussion is limited to a comparison of income eligibility requirements under LIHTC program and other federal housing programs. However, these programs impose other requirements that advocates should account for.

[61] See 24 C.F.R. §982.201.

[62] 26 U.S.C. §42(h)(6)(B)(iv).

[63] See 24 C.F.R. §5.653 et seq. (describing income eligibility and income targeting requirements for the Section 8 PBRA program) and §42 U.S.C. §1437f(o)(13) (outlining eligibility requirements for the Section 8 PBV program).

[64] The landlord is responsible for obtaining and verifying information related to income eligibility under the PBRA program. 24 C.F.R. §880.603(b). In contrast, the local Public Housing Authority determines tenant eligibility for the PBV program. *Id*. at §983.251(a). Once the PHA refers an PBV eligible prospective tenant to a landlord, admission is still subject to landlord screening and selection. *Id*. at §983.255(b).

[65] 7 C.F.R. §3560.152(a).

OVER-INCOME TENANT SITUATIONS – THE NEXT AVAILABLE UNIT RULE

Nothing in the Low-Income Housing Tax Credit (LIHTC) rules prohibits continued occupancy when a current tenant's income increases above the applicable LIHTC income limitation. If a tenant's income increases ***up to*** 140% of the applicable income limit, the unit continues to be treated as a low-income unit for purposes of the LIHTC program without the owner or tenant having to do anything more,[66] provided the tenant was income-eligible when he or she moved in.[67] Treating an over-income unit as low-income unit means that the tenant remains LIHTC-eligible and that his or her rent remains restricted to 30% of the applicable Area Median Income. It also means that the owner can continue claiming valuable tax credits.[68] *Id*.

If a tenant's income increases ***above*** 140% of the applicable income limitation, the LIHTC property owner must usually apply the Next Available Unit Rule ("NAUR").[69] Under the NAUR, the over-income unit continues to be treated as a low-income unit, provided all units of comparable size that are currently available or that subsequently become available are leased to individuals who meet the building's income restrictions.[70]

If an owner fails to comply with the NAUR (by leasing the next available unit of comparable size to an income-ineligible tenant), all over-income units of comparable size or larger in the same building lose their low-income status.[71] This will almost certainly mean that the owner will not be able to meet its minimum set-aside commitment and, thus, will be unable to claim valuable tax credits or perhaps be subject to recapture of credits already claimed.

Some owners may take the position that a tenant's over-income status constitutes good cause to evict[72] on the ground that the tenant no longer meets the program's income requirements, but nothing in the LIHTC rules requires an eviction on this basis. In fact, the LIHTC rules specifically envision a situation where a tenant's income exceeds program income limitations, and the rules provide the NAUR as a way to deal with this situation short of eviction. Furthermore, because the NAUR allows an owner to remain program-compliant and eligible to receive its tax credits, an owner faces no financial liability on account of a tenant's over-income status. Moreover, evicting an over-income tenant would also undercut the stability good cause

66 26 U.S.C. §42(i)(3)(A) (setting out project eligibility requirements under the LIHTC program, including treating LIHTC units as low-income).
67 26 C.F.R §1.42-15(b).
68 Id.
69 26 C.F.R. §1.42-15(c). Because every unit in a 100% LIHTC unit must be leased to an income eligible tenant, the NAUR does not apply in 100% LIHTC properties.
70 26 C.F.R §1.42-15(c)The U.S. Treasury Department recently proposed regulations on how to apply the NAUR to LIHTC properties that use the Average Income Test for calculating a building's minimum set-aside. The proposed regulation can be found at https://beta.regulations.gov/document/IRS-2020-0038-0001. The proposed rule was not final as of the time this document was published.
71 26 C.F.R. §1.42-15(f).
72 Good cause is required to evict a tenant from a LIHTC unit. Rev. Rul. 2004-82, Q&A#5.

protections are intended to provide tenants and would do so without a statutory or practical basis.

For more information please contact Marcos Segura msegura@nhlp.org.

National Housing Law Project
www.nhlp.org
August 2021