Low-Income Housing Tax Credit: A Basic Overview

NATIONAL HOUSING LAW PROJECT

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HOUSING JUSTICE

National Housing Law Project

Low-Income Housing Tax Credit Program

Today We Will Cover

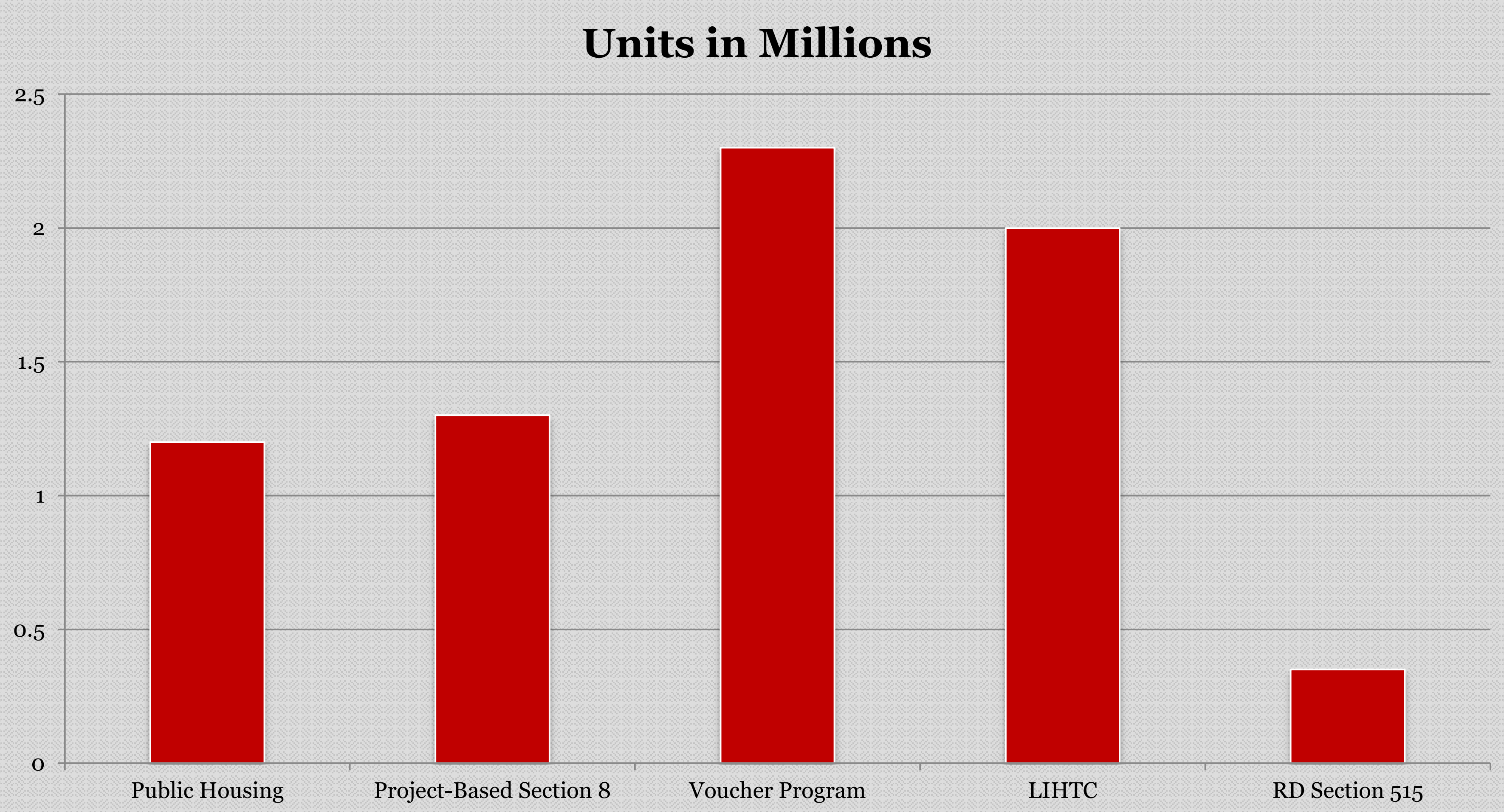
- Key features of the LIHTC program: rents, occupancy, eviction
- Differences from other affordable housing programs
- Common problems for tenants and applicants
- Locating and identifying developments
- Where to find the applicable law

Key Features of the LIHTC Program

- Largest & growing source for new affordable units
- Income eligibility and actual occupancy differs from HUD programs
- Rents NOT directly tied to tenant's income
- Lease with specific provisions may not be required
- No grievance procedure
- Good cause for eviction, but some ??
- Legal and operational structure reflects tax policy, not a housing program

<u>If another housing program is used with LIHTC, the more restrictive rules apply regardless of the source.</u>

Comparing the Subsidized Housing Programs



How the Program Works

- **Number of Units**: about 2,200,000, growing at about 100,000 annually, cost about $6-$8 billion/year; credit allocation now indexed
- **How Program Works: Subsidy Mechanism**:
  - Subsidy through tax system, not annual federal appropriations
  - Fixed amount of tax credits allocated to state Housing Finance Agency
    - Based on a per capita x $2.25
  - Investors buy income tax credits in qualified properties that received state allocation, creating cash equity for owner
  - In exchange for agreement to rent specific number of units to qualified tenants at restricted rents, usually below-market
  - Two tax credits available: 9% of depreciable basis, competitively allocated, and 4% of basis, comes with state bond financing, also capped and allocated by state HFA (competition varies)

Ownership and Use Restrictions

- **Ownership**: usually limited partnerships; often sold after initial 15-yr. compliance period to general partner or others
- **Minimum Use Restrictions (per IRC § 42)**:
  - ***Occupancy and admissions***: owner choice of two: >20% of Units occupied by tenants @ <50% AMI, or >40% of units occupied by tenants @ <60% AMI; most LIHTC properties are 100% LIHTC units
  - ***Rents***: those units must have "affordable" flat rents set at 30% of income of tenants at top of applicable AMI category, with assumed family size of 1.5 persons/bedroom (e.g., 30% of 50% AMI)
  - ***Term:*** For properties developed between 1986 and 1989, restrictions last only 15 years; post-1989 developments have at least 30 years, and up to 55 years in some states
  - ***Non-Discrimination***: LIHTC owners may not refuse to rent to Voucher holders because of their status

Qualified Allocation Plan (QAP)

- State Housing Finance Agency (HFA) develops a QAP and reviews annually; properly noticed public hearing and public comment (e.g., housing types and location)
  - QAPs from 2000-2013 available at
  www.novoco.com/low_income_housing/lihtc/qap_2013.php
- *States may impose more restrictive requirements than Internal Revenue Code minimum:*
  - Deeper income targeting and lower rents
  - Longer use restrictions
  - Eviction prot'ns for DV survivors (VAWA now applies)
  - May provide a preference or set aside for special populations, disabled, elderly, homeless, DV survivors

Key Components

- **Who's Involved?** IRS, state credit allocation agency, owner, management (either owner or separate company)
- **Key Regulatory Features**: State agency regulatory agreement, Treasury regulations at 26 C.F.R. §1.42, Lease. Owner files annual compliance certification with state agency.
- **Finding Out Where this Housing Is Located in Your Community:** available at: http://www.preservationdatabase.org/datasources.html www.huduser.org/datasets/lihtc.html or

www.novoco.com/low_income_housing/resources/maps_data.php

Key Components

- **Tips for Determining What Kind of Housing Is Involved**: Lease; Rent Level; Owner type; Age of Housing (LIHTC can be used for new or rehab, but all post-1986); Regulatory Agreement; Ask manager
- **Getting Information**:
  - Statute: 26 U.S.C. § 42 (part of Internal Revenue Code);
  - Regs: 26 C.F.R. §1.42;
  - LIHTC 8823 Compliance Guide (on IRS website)
  - state regs & compliance guidance? Qualified Allocation Plan (QAP)?

Admissions

- Initial occupancy of rent-restricted units must be by tenants in specific income categories
- No discrimination against § 8 voucher holders
- No immigration restrictions, unless project has another funding source with such restrictions.
- Only other protections come from:
  - Fair housing laws
  - VAWA 2013 imposes obligations on LIHTC properties
  - Any state-imposed requirements per QAP & Regulatory Agreement
  - Possibly due process protections (governmental action & property interest issues)

Admissions: Student Eligibility

- Rules are ambiguous: Units occupied only by full-time unmarried students NOT ELIGIBLE for tax credits
- Exceptions:
  - Receiving assistance under Title IV of SSAct-TANF, in state or local job training program
  - All occupants are full-time students who are single parents or their dependents and no one is a dependent of anyone else
  - Unit entirely occupied by full-time married students who file joint tax return or students formerly under foster care
- Possible loss of credits means possible difficulty in admission or eviction

Jones Family

- Application to LIHTC property denied because of "insufficient income" and "poor credit"
- What steps do you take?
  - Get the policy
  - Analyze the situation
  - Look for applicable rules or theories
  - Engage the decision-maker

Rents

- **Income-based rents?** NO, LIHTC gross rents are flat rents based on AMI, not individual tenant income. *LIHTC rent not adjusted if income drops*.
- For restricted units, flat rents set @ either 30% of 50% of AMI, or 30% of 60% of AMI, w/an assumed family size of 1.5 persons/BR (one person for 0-BR unit), or @30% of any lower state-imposed tier
  - See sample rent calculation sheet
  - Rents can increase with changes in AMI, not decrease
  - Most ELI tenants have rental subsidies (such as Section 8 Vouchers), with tenant contributions determined under other program rules

Rents, Continued Occupancy & Utility Allowance

- **Recertification:** *Income*: Annually, except not required if 100% LIHTC property with restricted rents; *Student Status*: Annually
- In 9% credit units, **tenant right to continued occupancy unaffected** by increases in income until 140% of income limit (i.e., 140% of 50% AMI, or 140% of 60% AMI); then ? (next avail. unit rule)
- **Utility Allowance:** LIHTC rents are gross rents, for tenant-paid utilities, tenant must receive utility allowance, usually based on local PHA's utility allowance for comparable Section 8 Voucher units
- **Mandatory and other charges:** include in rent

Grievance Procedures

- None required by statute or regulation
- State Regulatory Agreement? (probably not)

Evictions

- **Good cause required** at end of lease term?
  - Yes, Rev. Rul. 2004-82 and Rev. Proc. 2005-37
  - State court cases under statute or due process (governmental action?)
  - Confusion re end of lease: IRS guide for Form 8823
  - Terms of state's Regulatory Agreement or required lease addenda? (in CA, Owner Certificate of Compliance)
  - Tenant possibly not on notice therefore not aware of right
- **Notice:**
  - No federal statutory or regulatory requirements re length of notice and/or content
  - Due process or state rules (if cause required)?
- Pre-judicial administrative review?: None

Takeaway Points

- LIHTC housing unique: operated as a tax program, not a housing program
  - As a result, few applicant and tenant protections
  - Little uniformity of basic policies
- Important to get to know owner/manager, because most policies are discretionary
- Important to engage Housing Finance Agency compliance machinery and staff
- Advocates can comment on state's Qualified Allocation Plan or regs to improve policies, e.g., re DV