Tenants’ Rights in the Low-Income Housing Tax Credit (LIHTC) Program

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Housekeeping

• All on mute. Use Questions function for substantive questions and for technical concerns.
• Problems with getting on to the webinar? Send an e-mail to trainings@justiceinaging.org.
• Find materials for this training and past trainings by searching the Resource Library, justiceinaging.org/resource-library. A recording will be posted to Justice in Aging's Vimeo page at the conclusion of the presentation, vimeo.com/justiceinaging.
• Enable closed captioning by selecting “CC” from the Zoom control panel.
Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we’ve focused our efforts primarily on fighting for people who have been marginalized and excluded from justice, such as women, people of color, LGBTQ+ individuals, and people with limited English proficiency.
To achieve Justice in Aging, we must:

• **Advance equity** for low-income older adults in economic security, health care, housing, and elder justice initiatives.

• Address the enduring harms and inequities caused by systemic racism and other forms of discrimination that uniquely impact low-income older adults in marginalized communities.

• Recruit, support, and retain a diverse staff and board, including race, ethnicity, gender, gender identity and presentation, sexual orientation, disability, age, and economic class.
CA LIHTC Properties
What We Will Cover

- LIHTC Program Overview
  - Program Structure
  - LIHTC Eligibility and Rent Rules

- Eviction Defense in LIHTC Properties
  - Good cause
  - Defenses to common LIHTC eviction situations: over-income and nonpayment of rent

- Opportunities for LIHTC Advocacy to Achieve Stronger Tenant Protections
  - State and Federal
  - Local
Introduction

- The LIHTC program is a federal housing program intended to benefit lower income households.
- LIHTC offers tax benefits (in the form of tax credits and other tax deductions) in exchange for capital used to construct or rehabilitate affordable housing.
- The federal government gives approximately $10.9 billion per year in LIHTC tax credits.
- Because the tax incentives are so valuable, and due to reduced investment in other affordable housing programs, LIHTC has become the primary vehicle to fund the construction and rehabilitation of affordable housing in the U.S.
Basic Program Structure

- The LIHTC program does not involve rental assistance or other direct government expenditure
  - Instead, credits are allocated by the U.S. Treasury Dept. to each state
  - State agencies award the credits to developers who then sell them to investors to raise capital for project construction/rehabilitation
- In exchange, project units must be leased to qualified low-income tenants at restricted rent levels for a minimum of 30 years, the “extended use period.”
  - Some states impose longer extended use periods, e.g., CA requires a 55-year restricted use period.
  - Not all units in a complex need to be restricted
Ongoing Owner Compliance

- Credits are claimed over the course of the first 10 years of a project and subject to credit recapture for another 5 years.
  - This 15-year period is called the compliance period.
- Once credits are claimed and safe from recapture, there’s no tax-related incentive to comply w/ program requirements, **creating a risk of noncompliance**.
- It’s primarily up to tenants to enforce program rules, assuming they have a private right of action under the applicable statute, regulation, or the regulatory agreement.
How the Program Works

IRS gives tax credits to each state based on their population. (population X $2.25 or at least 2.6M)

States (State Credit Allocation Agency) decide how to spend the credits based on the needs for affordable housing. (QAP Process)

The state awards tax credits to developers.

A specific number of units (usually 100%) are rented at restricted rates (usually below-market).

Developers use the money they raised from selling the tax credits to build housing.

Developers sell the tax credits to investors to raise enough money to build new housing.
Who Lives in California LIHTC Housing?

- **47% of LIHTC households are extremely low-income**, income at or below 30% of Area Median Income (AMI).
- **Race/Ethnicity of Heads of Households:**
  - 25% are White
  - 18% are African-American
  - 39% are Hispanic
- 13% report having at least one member with a disability.
- 32% of LIHTC households have children
- **40% of LIHTC households have at least one member 62+ years of age.**

Source: [HUD Office of Policy and Research, Understanding Whom the LIHTC Serves: Data on Tenants in LIHTC Units as of December 31, 2017.](https://www.hud.gov)
Tenant Eligibility (1 of 2)

- At beginning of the project, an owner must select one of 3 minimum set-aside tests to determine tenant eligibility:
  - **The 20-50 Test**: owner must rent at least 20% of its units to individuals whose income is 50% or less of the Area Median Income (AMI).
  - **The 40-60 Test**: owner must rent at least 40% of its units to individuals whose income is 60% or less of AMI; or
  - **Average Income Test**: owner must designate 40% or more of its units as low-income, with income limitations between 20% to 80% of AMI.
    - The average income limitation for all low-income units must be no more than 60% of AMI. A

- LIHTC owner must select a set-aside test even where 100% of units in a project are LIHTC units.

26 U.S.C. § 42(g)(1)(A)-(C)
Tenant Eligibility (2 of 2)

- The applicable percentage of AMI is often referred to as a unit’s income limitation.
- AMI is calculated annually by HUD.
- AMI, not household income, is also used to determine rent.
- AMI depends on household size. For LIHTC projects, HH size is calculated by multiplying the number of bedrooms in a particular unit by 1.5, not a family’s actual household size.
- For LIHTC, household income is calculated in accordance with HUD Section 8 rules.
Determining Tenant Eligibility

- Assume a person applies to rent a **three-bedroom** LIHTC unit at a property subject to the **20-50 set-aside test**
- The applicant’s income cannot exceed 50% of the AMI for a household size of 4.5 (1.5 x 3 bedrooms)
- Assume that under HUD’s April 2022 calculations, 50% of the AMI for a household of 4.5 in this fictitious area is $37,750 per year
- To qualify for this unit, an applicant's' income cannot exceed $37,750 per year
How is Tenant Rent Calculated?

- Rent is **not based on a tenant’s actual income**.
- **Instead**, rent is based on a max rent formula that limits rent to 30% of the applicable income limitation (tied to AMI).
- Federal LIHTC rules set no other limits on the amounts or frequency of rent increases.
- Where tenants pay utilities, a utility allowance must be subtracted from the max rent calculation.
  - There are various methods for calculating the exact utility allowance. See 26 C.F.R. §1.42-10.
Calculation of Tenant Rent

Example:
- Sam and his two children live in a \textit{three-bedroom} LIHTC unit at a property subject to the \textit{20-50 set-aside test}.
- The income limitation for that size unit is $37,750.
- The owner cannot charge rent above 30\% of $37,750, i.e., $11,325/\text{year} or $943.75/\text{month}.
Possible LIHTC Rent Protections

- LIHTC rent may still be subject to state (not in CA) or local rent increase limitations and/or rent increase notice periods.
- The subject lease may provide some protection by locking in rent for the entire lease term.
  - However, LIHTC owners commonly use escalator clauses that allow rent increases during the lease term if AMI increases.
- Owners sometimes agree to deeper rent restrictions for some or all of a project’s units in order to gain an advantage during the credit application process.
  - These deeper rent restrictions should be memorialized in the regulatory agreement.
Key Rent Takeaway

- Because rent is based on AMI rather than tenant income, many LIHTC units, particularly in expensive housing markets, are unaffordable to Very Low-Income (VLI) and Extremely Low-Income (ELI) tenants
  - At minimum, these tenants are severely rent burdened
- Thus, it’s not accurate to say that the LIHTC program creates affordable housing but rather below market housing, which may or may not be affordable to the program’s intended beneficiaries
Finding Key Information

- The applicable income limitation (e.g., 50% or 60% AMI) is not typically included in the subject lease and is not otherwise readily available.

- Advocates can obtain this information:
  - By reviewing the regulatory agreement between the owner and the state tax credit agency.
  - By using your state’s public records request law to request relevant information from the state tax credit agency.
  - Some state tax credit agencies also provide this information on their website.
LIHTC Tenant Evictions in CA

- **Good Cause** is required to evict: What is Good Cause?
  - Good cause *not* defined in federal LIHTC law. IRS guidance says good cause is determined by applicable state and local law.
  - Not defined in CA QAP, but CA Compliance Manual defines as: “serious or repeated violations of a material term of the lease, as that definition is applied with respect to federal public housing.”
  - Includes:
    - Nonpayment of rent
    - Violations of lease or rental agreement
    - Interference with other tenants or property damage
    - Using property for unlawful purpose
    - Destruction or damage to property
Good Cause to Evict: Over Income

- **Over Income**
  - Once income-qualified at admission, tenant’s income can increase up to 140% of applicable income limit and remain in unit at subsidized rent and owner can continue to claim its credits.
  - If tenant’s income goes above 140% of applicable income limit, Next Available Unit Rule (NAUR) applies:
    - The over-income unit can continue to be treated as a low-income unit, so long as the NAUR of comparable size is leased to an income-qualified household.
    - Rules do not expressly prohibit owner from evicting the over-income tenant. Owner could choose to evict over-income tenant to provide unit to income-eligible tenant.
Good Cause to Evict: Non-Payment of Rent (1 of 2)

- **Nonpayment of rent resulting from unpaid fees:**
  - Nonpayment of rent claims often begin with a failure to pay a fee.
  - The following month, a portion of rent paid is often applied toward the unpaid fee, resulting in a tenant owing partial rent, plus any late fees.
  - When the tenant pays rent the following month, payment is again applied to rent and late fees owed, causing the tenant owing even more rent, and late fees are charged once again. This continues month after month until the tenant owes large amounts and faces eviction for nonpayment.
Fees LIHTC Housing Providers CANNOT charge:

- The LIHTC program prohibits an owner from charging a tenant for facilities and amenities whose construction or rehabilitation was financed with tax credits, e.g., laundry room, storage room, parking, etc. (26 U.S.C. § 42(d)(4)(B))
  - Advocates should review owner ledgers to ensure that past due rent is not the result of unpaid fees the tenant is not responsible for paying under the rule above.
Achieving Stronger Tenant Protections in the LIHTC Program
Who Can Change LIHTC Policy?

- The LIHTC program is administered by the Treasury Department, but it’s actually implemented on the ground by state housing agencies in accordance with their Qualified Assistance Plan (QAP)
- Opportunities for policy reforms at both the federal and state level
- Even local governments can influence how the LIHTC program operates
Federal Action

- **Congressional action** would be the most effective way to establish basic tenant protections:
  - Protections would apply nationwide and they may apply to both existing and future projects.
  - This would avoid having a hodgepodge of state rules and treating LIHTC tenants differently based on whether they live at a new or old project.

- The LIHTC program’s silence on key issues and broad policy goals leave a lot of room for **administrative action** by the Treasury Dept.
Federal Action is Difficult

- **Legislatively**, substantive policy bills are rare in Congress.
  - Legislating is usually done via appropriations, which is a poor vehicle for substantive policy reform.
  - Also, the LIHTC program narrative is currently driven by industry stakeholders, so federal policy is skewed toward program expansion and away from tenant protections.
- **Administratively**, Treasury is reluctant to act w/o specific Congressional direction.
State Action More Promising

- At the state level, you have two options, state housing agencies and state legislatures.
  - **State housing agencies** have absolute authority to enact reforms and apply them to future projects as part their tax allocation process.
  - But their authority to apply the same reforms to existing projects depends on a number of factors:
    - The authority given to a state agency by the state law that created it.
    - The rules governing administrative procedures in that particular state.
    - Existing regulatory agreements.
  - **State Legislatures** have a clearer path to enact these reforms:
    - They only have to worry about constitutional claims like impairment of contracts and takings, which can be easily overcome.
Local Government

- Local governments have authority to issue public activity bonds (PAB); these bonds are often paired with tax credits to fund LIHTC rehab projects
  - Indeed, PABs are required to obtain certain credits used to fund project rehabilitation
- Local governments can gain concessions from developers looking to develop a project in their jurisdiction using credits and bonds that will improve tenants’ rights and get deeper rent restrictions
Local LIHTC Advocacy

Lucie Hollingsworth, Senior Policy Attorney, Legal Aid of Marin
Marin County, CA

Pop: 262,000
AMI: $131,000
Avg. home value: $1.2 m.
2019 Landscape

- Marin County, California
  - Highest AMI in California
  - Most Racially Disparate County in California (2019, Race Counts Report)
  - 65+ increased 43% since 2010 (ACS)
  - Highest median age in California (ACS)
  - Lowest number of new units built relative to Bay area – 23 units per 1000 people (CA Dept. of Finance)
“Poor Enough to Qualify, Too Poor to Stay”
**Villas at Hamilton**

“40-60 Test”: 40% of 128 units must be affordable to a tenant earning less than 60% of AMI.

<table>
<thead>
<tr>
<th>Year</th>
<th>HH*</th>
<th>% Change in AMI year-to-year</th>
<th>SSDI/SSI COLA</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>$95,000</td>
<td>0.00%</td>
<td>5.8%</td>
</tr>
<tr>
<td>2009</td>
<td>$96,800</td>
<td>2.68%</td>
<td>0.0%</td>
</tr>
<tr>
<td>2010</td>
<td>$99,400</td>
<td>3.70%</td>
<td>0.0%</td>
</tr>
<tr>
<td>2011</td>
<td>$101,600</td>
<td>2.98%</td>
<td>3.6%</td>
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<tr>
<td>2012</td>
<td>$103,000</td>
<td>1.83%</td>
<td>1.7%</td>
</tr>
<tr>
<td>2013</td>
<td>$101,200</td>
<td>-2.36%</td>
<td>1.5%</td>
</tr>
<tr>
<td>2014</td>
<td>$97,100</td>
<td>-5.71%</td>
<td>1.7%</td>
</tr>
<tr>
<td>2015</td>
<td>$101,900</td>
<td>6.64%</td>
<td>0.0%</td>
</tr>
<tr>
<td>2016</td>
<td>$107,700</td>
<td>7.23%</td>
<td>0.3%</td>
</tr>
<tr>
<td>2017</td>
<td>$115,300</td>
<td>8.37%</td>
<td>2.0%</td>
</tr>
<tr>
<td>2018</td>
<td>$118,400</td>
<td>3.11%</td>
<td>2.8%</td>
</tr>
<tr>
<td>2019</td>
<td>$136,800</td>
<td>15.54%</td>
<td>1.6%</td>
</tr>
<tr>
<td>2020</td>
<td>$143,100</td>
<td>4.6%</td>
<td>1.3%</td>
</tr>
</tbody>
</table>
What to Do When We Can’t Rely on the Law to Protect Tenants?

1. Educate
   ○ Regulatory Agreement
   ○ City planner, staff, and contractors

2. Organize
   ○ Create tenant’s union
   ○ Identify issues – rent and services
   ○ Get organizing help

3. Find/Contact Owners

4. Public Shaming
   ○ Press release, media contacts
   ○ Press conference

5. Meet with Electeds – Local and State
The Villas Tenant Union (1 of 3)

- “I lost my career in sound engineering when I experienced sudden, complete deafness. I’m one of the lucky ones and I managed to find a job as a bus boy to supplement SSI.”

- “I am 71 and I still have to work to pay my bills. I don’t see myself ever retiring but terrified if my health deteriorates.”

- “I can’t afford to keep my dog anymore.”
The Novato senior population (65+) is increasing far faster than the national rate, growing by 31% from 2005 to 2015.

- 6.3% of Novato’s seniors currently live in poverty.
- In Novato, more than half of low and very low income households spend over 50% of their income on housing.
The Villas at Hamilton (with 128 units) is the largest “affordable” rental complex for seniors in Novato
  ○ Affordable is defined as paying 30% or less of one’s household income for housing

However, many tenants at Hamilton report spending between 50 to 100%+ of their fixed income on rent.

<table>
<thead>
<tr>
<th>TENANT (anonymous)</th>
<th>MONTHLY INCOME</th>
<th>RENT AFTER INCREASE</th>
<th>PERCENTAGE OF INCOME</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tenant #1</td>
<td>$2,300</td>
<td>$1,580</td>
<td>69%</td>
</tr>
<tr>
<td>Tenant #2</td>
<td>$2,000</td>
<td>$1,300</td>
<td>65%</td>
</tr>
<tr>
<td>Tenant #3</td>
<td>$1,700</td>
<td>$1,232</td>
<td>72%</td>
</tr>
<tr>
<td>Tenant #4</td>
<td>$910</td>
<td>$1,310</td>
<td>144%</td>
</tr>
<tr>
<td>Tenant #5</td>
<td>$1,511</td>
<td>$1,185</td>
<td>78%</td>
</tr>
<tr>
<td>Tenant #6</td>
<td>$2,500</td>
<td>$1,308</td>
<td>52%</td>
</tr>
</tbody>
</table>
Who Are LIHTC Owners?

● This is what they say:
  ○ “Affordable Housing Access is a 501(c)(3) nonprofit corporation. Founded in 1999, its mission is creating and preserving quality affordable housing and empowering low-income individuals and communities through social services and community building.”

● This is who they are:
  ○ For-profit developers/Real Estate Investment Trusts (REITs)
    ■ (4%, non-competitive)
  ○ In 2019, yielded an average 4.75 rate of return for investors
  ○ In addition to the tax benefits, Affordable Housing Access pays NO property taxes to the city or county
  ○ No requirement to be permanently affordable
A.H.A. & V.P.M. MEET WITH Villa Tenants!!!

AFFORDABLE (AHA) ACCESS HOUSING, LLC MILKS SENIORS FOR $!!

Affordable Housing Access!!!!!

Keep Senior Housing Affordable!!!
The Results

- Monthly tenant meetings with management
- Management received training in trauma-informed care and working with senior populations
- All “supplemental fees” (pet, parking sticker, etc.) were reduced or eliminated
- Rent increases postponed (pandemic), however, when AHA planned rent increases in 2022, Legal Aid of Marin was contacted first
- Rental assistance information and other local support services brought on site and regularly announced.
Possible Solutions Until The Law Is Changed

- Appeal to a REIT’s public reputation
- Local jurisdictions and regulatory agreements
- Local rent stabilization – you can’t impose local changes on how rent is calculated but you can advocate for LIHTC to be covered on rent increase limits
- Proposed state legislation to cap rent increases \textbf{AB 846} (Bonta)
Questions?

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Equity for Older Adults Cohort

- Justice in Aging and NCLER are excited to share an upcoming opportunity for legal services programs interested in advancing equity for older adult clients
- **Application** is due by May 19
  - **Register** for the information session on Wednesday April 26 at 12 PT/3ET
  - Reach out to ConsultNCLER@acl.hhs.gov with any questions