



Thought Leadership



Addendum: Strengthening the LIHTC Program- Preservation Lessons Learned

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Each generation of federally-assisted affordable rental housing since the mid-1950s has experienced unforeseen challenges to long-term viability. The affordable housing community's response over time has created a preservation movement that is now a core bipartisan element of national housing policy, exemplified by the National Preservation Working Group (NPWG). The NPWG is hosted by the National Housing Trust (nhtinc.org) and is an affinity group of nonprofit organizations, state and local governments and quasipublic agencies committed to preserving long term affordability and sustainability.

The issues posing threats to the affordable multifamily stock have included: physical and economic distress; expiration of use restrictions; and expiration of long-term rental assistance contracts. Now, new issues are threatening the long-term affordability of Low-Income Housing Tax Credit (LIHTC) properties, regarding the right of first refusal (ROFR) provisions for nonprofit sponsors, the Qualified Contract process, and the outright expiration of Extended Use Agreements. For each prior challenge, technical and funding solutions have been developed over many decades, and some larger preservation lessons have been learned:

- We need real-time data to detect and explain trends and fact patterns that threaten the affordable stock.
- Solutions require government action at the federal, state and local levels, including legislation, resources and regulation.
- Addressing novel or emerging challenges at the property level is challenging: immediate measures are needed to prevent imminent loss of units, while consensus is built on the best long-term systemic solution. As a result, negotiation, litigation, advocacy, innovation, legislation, and coalition-building must all proceed simultaneously.
- The preservation coalition is powerful, but so are other interests – we need to get in front of issues and craft achievable solutions.

How, then, can we apply these lessons to the current challenges in the LIHTC program?

- Early communication with investor partners is critical, well before year 15, to identify any concerns about the investor exit strategy. Most original CRA-motivated investors are not the source of problems.



- Surveillance and data are critical: NPWG, state & local governments and other communities of practice can provide alerts on unexpected challenges to plans for long-term affordability and nonprofit control.
- Resources need to be identified to support litigation when exit negotiations fail in individual properties. Dissenting secondary investors often count on the high cost and risk of litigation to force sponsors to accept onerous settlements.

- State and local governments have administrative leverage over investors that intend to continue in the LIHTC environment: allocators of new LIHTC and new soft funding can establish behavioral screens for participation. Examples of such actions include:
 - Forward-looking:
 - Qualified Allocation Plan language creating accountability for a past record of relevant litigation or disputes;
 - Requirements to forego Qualified Contract rights;
 - Requirements to agree to include best practices language in ROFR contracts, to comply with industry-standard interpretations as to implementation, and to adopt prospective federal requirements if enacted later.
 - Require longer Extended Use Agreements, to protect affordability directly and reduce the incentive for investors to challenge a Section 42 ROFR.

 - Retroactive, for existing properties:
 - Some properties are now simply aging out of all extended use restrictions, reminiscent of the problem nearly 35 years ago in HUD-assisted Section 236 properties. The solution was not simple – it required a mixture of financial incentives and process-oriented regulations in the Low Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA). This required a protracted bipartisan political effort, but it ultimately preserved a significant portion of the program’s units for essentially permanent affordability, much of it now in the hands of nonprofits and resident organizations.
 - Some states, notably Massachusetts, have enacted statutes granting a right of first offer or a right of first refusal to state government in the event of expired regulatory authority.¹
 - States can file Amicus Curiae interventions in current litigation on investor exits.

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¹ See, for example, Massachusetts General Laws Chapter 40T, “An Act Preserving Publicly Assisted Affordable Housing”. See <https://cedac.org/wp-content/uploads/2020/12/Chapter-40T-at-10.pdf>