ARTICLES

Strategies and Tools for Preserving Low Income Housing Tax Credit Properties

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Introduction

The Low-Income Housing Tax Credit (LIHTC) program is the largest affordable rental housing program in the United States, creating over three million units since the program was created in 1986.[1] The program excels at serving low-income households with a range of needs and incomes. While the program primarily serves low-income households with incomes

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1. HUDUser, Office of Policy Development and Research (PD&R), Low-Income Housing Tax Credits, https://www.huduser.gov/portal/datasets/lihtc.html (May 24, 2019).

of thirty to sixty percent of the Area Median Income (AMI), close to half of LIHTC households are extremely low-income, with incomes below thirty percent of AMI.[2] And at a time when the U.S. political climate is highly polarized, the LIHTC program enjoys strong bipartisan support at both the federal and state levels.[3]

While the LIHTC program continues to make critical contributions towards meeting the nation's affordable housing needs, thousands of LIHTC units are exiting the program and converting to market-rate rents, at a time when more than a third of all renter households in the United States are rent-burdened.[4] As of 2015, close to 50,000 LIHTC units had exited the program nationwide, and the status of an additional 200,000 LIHTC units is unknown because of inconsistent state oversight.[5] Without intervention, thousands more units are likely to disappear from our nation's affordable housing supply in the coming decade.[6]

This article discusses federal and state policies that are fueling the loss of LIHTC properties and offers solutions that federal, state, and local governments, as well as other preservation stakeholders, could implement to advance the preservation of these affordable homes. In Part I, we briefly describe the LIHTC program and the affordability terms for LIHTC properties under federal law. Part II highlights the policy and programmatic reasons for why many LIHTC properties around the country are converting to market-rate rental properties. In Part III, we present national best practices that cities and states around the country are utilizing to ensure the preservation of LIHTC properties. Part IV focuses on efforts to limit the

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2. LIHTC properties that support these extremely low-income families generally work in tandem with other forms of subsidies, such as housing choice vouchers. Michael K. Hollar, Understanding Whom the LIHTC Program Serves: Tenants in LIHTC Units as of Dec. 31, 2012, at 28 (Dec. 2014), https://www.huduser.gov/portal/publications/pdf/2012-LIHTC-Tenant-Data-Report-508.pdf; *see also* NYU Furman Center, The Effects of the Low-Income Housing Tax Credit (LIHTC) (May 2017), http://furmancenter.org/files/NYUFurmanCenter_LIHTC_May2017.pdf.

3. *Id*. The Consolidated Appropriations Act of 2018 included a 12.5% increase in LIHTC allocations for the next four years. Corianne Scally, Amanda Gold & Nicole DuBois, *How the Tax Cuts and Jobs Act Puts Affordable Housing at Risk*, Urban Wire (July 12, 2018), https://www.urban.org/urban-wire/how-tax-cuts-and-jobs-act-puts-affordable-housing-production-risk.

4. Pew Charitable Trusts, American Families Face a Growing Rent Burden 4 (Apr. 2018), https://www.pewtrusts.org/-/media/assets/2018/04/rent-burden_report_v2.pdf.

5. Corianne Payton Scally, et al., The Low-Income Housing Tax Credit: Past Achievements, Future Challenges at VI (July 2018), https://www.urban.org/sites/default/files/publication/98761/lithc_past_achievements_future_challenges_final_0.pdf.

6. HUD, Office of Policy Development & Research, What Happens to Low-Income Housing Tax Credit Prop. at Year 15 and Beyond?, at 38 (2012), https://www.huduser.gov/publications/pdf/what_happens_lihtc_v2.pdf [hereinafter HUD].

qualified contract process, one of the major barriers to preserving LIHTC properties. Finally, Part V closes with a case study from Texas of barriers to preserving LIHTC properties, as well as a discussion of recent advocacy efforts to remove those barriers.

I. Overview of the Low-Income Housing Tax Credit Program and Affordability Terms

The LIHTC program was created as part of the Tax Reform Act of 1986[7] to provide tax credits for private entities when they construct or rehabilitate affordable housing properties. The Internal Revenue Service (IRS) allocates the tax credits to states each year based on population size, and then each state awards the credits to LIHTC projects pursuant to the state's Qualified Allocation Plan (QAP). In fiscal year 2019, the IRS allocated just over $9 billion in tax credits to the states.[8]

There are two types of tax credits: 9% and 4% credits. Nine percent credits, which come with a higher subsidy (seventy percent of the eligible costs to renovate or build low-income units in a project[9]), are allocated through a competitive process and are typically awarded to new construction and substantial rehabilitation projects. Four percent credits, which provide a smaller subsidy (thirty percent of the eligible costs to renovate or build low-income units in a project), are currently non-competitive and typically coupled with other federal subsidies, such as tax-exempt bonds.[10] Tax credits are claimed annually over a ten-year period beginning on the date a project is placed in service (typically the date of the certificate of occupancy).[11]

The QAP establishes the project criteria that states consider during the application process for both 9% and 4% projects.[12] QAPs can include baseline criteria that all LIHTC applicants must meet to be awarded credits, as well as points to incentivize certain standards, such as green energy features and longer affordability terms. The points are used to rank applications, with the highest scoring applicants typically receiving the credits. Since 4% projects have been noncompetitive to date, incentivized standards typically do not apply to these projects, except in certain states, such

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7. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended at 26 U.S.C. § 42).

8. Email from Laura Abernathy, State and Local Policy Director, National Housing Trust, to Lauren Loney (Apr. 4, 2019, 1:58 p.m. CST) (on file with authors); *see also* National Low Income Housing Coalition, 2018 Advocates' Guide: A Primer on Federal Affordable Housing & Community Development Programs 5–14, https://nlihc.org/sites/default/files/AG-2018/Ch05-S09_LIHTC_2018.pdf.

9. These project costs are referred to as the "qualified basis" in the Internal Revenue Code. 26 U.S.C. § 42(a)(2) (2019).

10. 26 U.S.C. § 42(b) (2019).

11. The property owner can, alternatively, elect to have the credit period begin on the year following the date the property was placed in service. 26 U.S.C. § 42(f)(1)(B)(2019).

12. 26 U.S.C. §§ 42(m)(B) & (C) (2019).

as Colorado, where 4% applications must earn a certain number of points as a threshold requirement to qualify for the credits.[13]

The federal rules require each state's QAP to address ten different criteria related to the following: location and housing needs in the proposed location, populations served, information about the project sponsor, and property characteristics.[14] Beyond these ten criteria, states have extensive leeway in administering the QAPs, including whether to require or incentivize preservation (see Part III for a discussion of best practices around such requirements and incentives).

For properties allocated tax credits prior to 1990, the properties were required to remain affordable for only fifteen years.[15] These properties are now well beyond their fifteen-year affordability period. Many of the properties that have exited the program are located in lower-income neighborhoods so the rents remain affordable—although, without additional capital investments, these properties are at great risk of physically deteriorating.[16]

The 1989 amendments to the LIHTC statute[17] required that properties allocated tax credits in 1990 or later remain affordable for thirty years, except for properties exiting through the qualified contract process (see Part II) or going through foreclosure.[18] The first fifteen years of the project are called the "compliance period."[19] During this time period, the IRS can recapture tax credits if the agency finds that a development is noncompliant with LIHTC rent restrictions, maintenance requirements, or other program requirements.[20] The "extended use period" begins on the first day of the compliance period and ends fifteen years after the end of the compliance period (or at the end of a longer period specified by the state hous-

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13. In Colorado, 4% tax credit applicants must earn a minimum of eighty points as a threshold requirement. Colo. Hous. & Fin. Auth., Low Income Housing Tax Credit Qualified Allocation Plan 2019, at 39 (Dec. 31, 2018), https://www.chfainfo.com/arh/lihtc/LIHC_Documents/2019_QAP.pdf.

14. 26 U.S.C. § 42 (m)(1)(C) (2019).

15. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended at 26 U.S.C. § 42).

16. National Low Income Housing Coalition & Public and Affordable Housing Research Corp., Balancing Priorities: Preservation and Neighborhood Opportunity in the Low-Income Housing Tax Credit Program Beyond Year 30, at 4 (Oct. 2018), https://nlihc.org/sites/default/files/Balancing-Priorities.pdf.

17. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2190, (1989) (codified as amended at 26 U.S.C. § 42).

18. 26 U.S.C. § 42(h)(6)(E) (2019). Advocates have also flagged early exits via planned foreclosures as an issue stymying the preservation of LIHTC properties and needing to be addressed. *See, e.g.*, Letter from National Housing Law Project, et al., to Laurie Brimmer, Internal Revenue Service (July 31, 2017), https://www.nhlp.org/wp-content/uploads/2018/04/IRS-Comments-2017.pdf.

19. 26 U.S.C. § 42(i)(1) (2019).

20. *Id.* § 42(j). In practice, the extended use period is commonly referred to as the fifteen-year period following the end of the fifteen-year compliance period.

ing agency).[21] Following the fifteen-year compliance period, the property's owner no longer has to report to the IRS, and the responsibility for monitoring and enforcing compliance shifts to the state allocating agency for the remainder of the extended use period.[22] As discussed further in Part III, twenty-six states require or incentivize affordability terms beyond thirty years.[23]

The 1989 amendments also added a provision allowing LIHTC property owners to offer a Right of First Refusal (ROFR) to the tenants, a resident management corporation of the building, qualified nonprofit entities, or government agencies to purchase the property after the close of the fifteen-year compliance period before an owner can sell the property or go through the qualified contract process.[24] States, in turn, can require or incentivize LIHTC applicants to offer a ROFR in accordance with these standards. The ROFR must be offered at a "price which is not less than the minimum purchase price."[25] "Minimum purchase price" is defined as the sum of outstanding debt secured by the building (other than debt incurred within the five-year period ending on the date of sale) plus all applicable state, federal, and local taxes attributed to the sale.[26] As discussed below in Part II, there are three primary ways in which a ROFR can be provided to an eligible entity.

In 2020, properties that were placed in service after the 1989 amendments will begin reaching the end of their thirty-year affordability restrictions.[27] Except in states that adopted longer affordability terms, the year 2020 thus marks the beginning of a new wave of LIHTC properties converting to market rate rents. Over the next five years alone, 1,331 LIHTC properties—with more 52,000 units—are eligible to exit the LIHTC program when their affordability restrictions expire.[28] Moreover, as discussed next in Part II, many properties placed in service after 1989 are able to exit the LIHTC program even before reaching the end of their thirty-year affordability term.

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21. *Id.* § 42(h)(6)(D).
22. *Id.*
23. Laura Abernathy, *LIHTC Compliance After the Compliance Period: Once the Credits Are Gone* at 16, American Bar Association's Affordable Housing and Community Development Law Annual Conference (May 24, 2017), https://www.americanbar.org/content/dam/aba/images/affordable_housing/conferences/2017/annual/an17-tab29-doc1.pdf.
24. 26 U.S.C. § 42(i)(7) (2019).
25. *Id.*
26. *Id.* at § 42(i)(7)(B).
27. HUD, *supra* note 6, at 67.
28. *Id.*

II. Policy and Programmatic Barriers to Preserving LIHTC Properties

A. The Qualified Contract Process

Properties that have not reached the end of their thirty-year affordability term have a legal avenue to exit the LIHTC program after just fifteen years through a process called the qualified contract process, absent more restrictive state limits. These early exits are most likely in neighborhoods that have high land prices or that are experiencing gentrification pressures, where market-rate rents can be far above the restricted rental rates required by the LIHTC program.[29] In these communities, property owners have a significant economic incentive to exit the LIHTC program and convert to market-rate rents using the qualified contract process.[30]

The qualified contract process was added under the 1989 amendments to the LIHTC statute, allowing properties allocated tax credits in 1990 or later to exit the program after only fifteen years in service.[31] After the fourteenth year of the compliance period, LIHTC property owners interested in exiting the program can submit a request to their state allocating agency to procure a qualified contract.[32] The allocating agency then has one year to find a qualified buyer who will purchase the property at the qualified contract price and continue to operate the property as an affordable LIHTC property through the expiration of the extended use period.[33] If the agency is unsuccessful in securing a preservation buyer, the owner may exit the LIHTC program, and affordable rents are phased out over a three-year period called the "decontrol period," as low-income tenants leave the property and are replaced by market-rate tenants.[34] Although the basic elements of the qualified contract process are outlined in the federal law, the IRS has only finalized rules for the contract price,[35] not the process, and so states have substantial leeway in designing their own qualified contract processes.[36]

The primary reason that the qualified contract process is a barrier to preservation is the formula for the qualified contract price, which is set by

29. *Id.* at 4.

30. *Id.*

31. *Id.*

32. 26 U.S.C. § 42(h)(6)(E)(i)(II) (2019).

33. *Id.* § 42(h)(6)(I).

34. *Id.* §42(h)(6)(E)(ii). While landlords cannot refuse to renew a tenant's lease without good cause (e.g., failure to pay rent or engaging in criminal conduct) during this time, as low-income tenants choose to move out of the property the landlord may replace them with market-rate tenants. At the end of the three-year period, tenants lose the "good cause" protection (meaning the landlord can choose to not renew the lease even without good cause) and the landlord can raise the rent to market rate.

35. *Id.* § 42(h)(6)(F) (2019).

36. *Id.*; *see also* HUD, *supra* note 6, at 39.

federal law and IRS regulations.[37] The formula combines the fair market value of the non-low-income portion of the building and the price for the low-income portion of the building. The non-low-income portion of the building also takes into account the fair market value of the land underneath the entire building.[38] The low-income portion is an amount not less than the applicable fraction of existing debt for the building, adjusted investor equity, and other capital contributions, less project cash distributions.[39] The investor equity is increased by an annual-cost-of living adjustment. State housing agencies have no authority to adopt a fair market cap on the pricing formula.[40] This formula frequently leads to a sales price that is significantly higher than the fair market value, making it very difficult to have a successful preservation purchase.

Twenty-two of the twenty-six LIHTC properties that the Texas Department of Housing and Community Affairs (TDHCA) has marketed for sale through the qualified contract process since it began tracking these sales in 2010 have been listed at a price higher than the property's fair market value.[41] For instance, the Windsor Pointe Townhomes, a 192-unit complex in College Station, Texas, exited the LIHTC program in 2015 after being listed for a qualified contract price of almost $16 million, even though the property's fair market value was just over $10 million.[42] This was a particularly troubling conversion as long-time, low-income tenants were displaced from one of the most affordable complexes in the city, enabling the developer to convert the property to luxury student townhomes.[43] Largely as a result of this pricing discrepancy, Texas has never seen a successful qualified contract sale to a preservation buyer.[44]

Additional preservation barriers with the qualified contract process include inadequate efforts by state allocating agencies to notify and locate qualified buyers. Federal law does not require state agencies to affirmatively search for qualified buyers or provide notice to tenants when a property owner requests a qualified contract. The IRS only requires agencies to make the request available to the "general public, based on reasonable efforts."[45]

37. 26 U.S.C. § 42(h)(6)(F) (2019), 77 Fed. Reg. 26,175 (May 3, 2012).

38. *Id.*

39. *Id.*

40. *Id.*

41. Information obtained from a Public Information Request to the Texas Department of Housing & Community Affairs (received Apr. 12, 2019) (on file with authors) [hereinafter Public Information Request].

42. *Id.*

43. Clay Falls, *Residents Priced out of College Station Apartment Complex*, KBTX-TV3 (Apr. 6, 2016, 6:56 PM), http://www.kbtx.com/content/news/Residents-looking-for-new-homes-after-being-priced-out-of-College-Station-apartment-complex-374819971.html.

44. Public Information Request, *supra* note 41.

45. 26 C.F.R. § 1.42-18(d)(2) (2019).

In Texas, for example, although the state housing agency requires property owners to notify tenants of qualified contract requests, the agency makes no affirmative efforts to find a preservation buyer during the qualified contract period beyond posting the property for sale on its website and sending one email notice to a listserv made up of individuals and groups that have asked to be included on the listserv. The agency does not provide direct notice to the local housing department or housing authority when a property is going through the qualified contract process. Additionally, the agency does not market properties for sale during the qualified contract period to national nonprofit affordable housing developers that may have a higher capacity to complete a preservation deal.

Between 2014 and 2016, there were close to four hundred requests for qualified contracts across the country.[46] While no database contains all the outcomes of these requests, national preservation experts say that any successful qualified contract sale would be an anomaly given the formula for the qualified contract price.[47] They estimate that these qualified contract requests likely resulted in the loss of more than 32,000 LIHTC units.[48]

Oregon is the only state where national preservation experts are seeing successful qualified contract sales. Of the seven qualified contract requests that the state's housing agency has received to date, six have resulted in successful qualified contract sales, meaning that those properties will remain affordable through the expiration of their extended use periods—and likely beyond, because the buyers must be nonprofits or other mission-driven organizations committed to affordable housing preservation.[49] According to Oregon Housing and Community Services, this pattern is largely due to the agency's policy requiring the property owner to hire an agency-approved broker to market the property and to have extensive experience marketing LIHTC properties.[50]

Recognizing that the qualified contract process has a negative impact on LIHTC property preservation, many states have banned or restricted the use of qualified contracts. According to the most recent data from the National Housing Trust, nineteen states either incentivize or require LIHTC applicants to waive their right to a qualified contract for at least

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46. National Housing Trust, Qualified Contracts (QCs) in the Housing Credit Program (2018) (on file with authors).

47. Telephone interview with Laura Abernathy, State and Local Policy Director, and Ellen Hoffman, Federal Policy Director, National Housing Trust (Apr. 3, 2019).

48. *Id.* This number only reflects the number of units that have likely left the LIHTC program. It does not consider whether these units have remained affordable for other reasons, such as if market-rate rents are similar to the LIHTC restricted rents in some instances.

49. Email from Kimber Sexton, Asset Manager, Oregon Housing & Community Services to Lauren Loney, Legal Fellow, University of Texas School of Law (Mar. 29, 2019, 9:58 AM) (on file with authors).

50. *Id.*

fifteen years following the expiration of the compliance period.[51] In states that have not curtailed the use of qualified contracts, the availability of the qualified contract process after fifteen years is considered one of the biggest threats for preserving LIHTC properties, especially those located in high-cost and gentrifying neighborhoods.[52]

Many national groups, including National Housing Trust, National Housing Law Project, and National Low Income Housing Coalition, have called for federal legislation abolishing the qualified contract process for new LIHTC projects and, for current projects, changing the qualified contract price calculation to reflect fair market value.[53] In addition to these federal legislative efforts, these groups, among others, submitted comments to the IRS in 2017 regarding necessary reforms to the qualified contract process.[54] The commenters requested that the IRS issue guidance on how to "reduce unnecessary qualified contract transactions and to preserve much needed affordable housing."[55] They also requested that the IRS clarify what information state agencies must consider when deciding whether to accept a qualified contract request and that LIHTC owners be required to notify tenants when they make a qualified contract request. In addition, the coalition asked the IRS to penalize LIHTC owners who request a qualified contract when the owners apply for future tax credits.[56]

B. Rights of First Refusal

A Right of First Refusal (ROFR), when available, is often the only opportunity to preserve a LIHTC property that would otherwise easily exit the LIHTC program early through the qualified contract process. There are three primary ways in which ROFRs are provided to preservation-oriented nonprofit housing developers and other qualified entities.

First, a ROFR can be included in the partnership agreement when an eligible entity (such as a nonprofit housing organization or housing authority) owns an interest in the LIHTC development. In these instances, the ROFR is provided to the eligible entity designated in the partnership agreement, and the terms of the ROFR depend on what is negotiated by

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51. National Housing Trust, *supra* note 46.

52. Laura Abernathy, Qualified Contracts Threaten Affordable Housing Preservation (June 25, 2018), http://www.nationalhousingtrust.org/news-article/qualified-contracts-threaten-affordable-housing-preservation; Letter from National Housing Trust, et al., to Stockton Williams, Executive Director, National Council of State Housing Agencies (Apr. 23, 2018), https://www.ncsha.org/wp-content/uploads/2018/05/Joint-QC-Letter-to-NCSHA-4-23-2018.pdf.

53. *See, e.g.*, Letter from National Housing Trust et al., *supra* note 52; *see also* Letter from National Housing Law Project et al., to Laurie Brimmer, Internal Revenue Service (July 31, 2017), https://www.nhlp.org/wp-content/uploads/2018/04/IRS-Comments-2017.pdf.

54. Letter from National Housing Law Project et al., *supra* note 53.

55. *Id.*

56. *Id.*

the development's partners. The ROFR is typically triggered at the end of the fifteenth year of the compliance period. The Virginia Housing Development Authority, and possibly other state housing agencies, incentivize the inclusion of a ROFR or a purchase option in the partnership agreement through the state's nonprofit set-aside, by providing bonus points in the state's Qualified Allocation Plan to applicants that not only include a qualified nonprofit entity or local housing authority as a co-owner but also extend a ROFR to such entities.[57]

States may provide for additional requirements governing this ROFR process. For example, the Virginia Housing Development Authority's QAP provides that the purchase price in a ROFR cannot exceed the outstanding debt and the exit taxes of the for-profit entity.[58]

A second way in which ROFRs can be provided is through the property's Land Use Restriction Agreement (LURA) with the state. A ROFR provided through a LURA can be extended to other eligible entities (e.g., qualified nonprofit entities and local housing authorities) should any eligible entity named in the partnership agreement decide to not exercise the right to purchase the property. This approach is used in Texas, which our research suggests is the only state using this approach. In Texas, a developer of a 9% tax credit property can elect to provide a separate ROFR to the general population of nonprofit and other qualified entities in exchange for additional points available in the state's QAP.[59] Under the state's current regulations governing these ROFRs, if the LIHTC development owner does not secure a qualified entity to purchase the property, the Texas Department of Housing and Community Affairs will post the property for sale to other qualified entities according to its procedures. [60] The exact procedures—including the ROFR period, sales price, and types of entities eligible to purchase the property—vary depending based on when the LURA was executed and the policies in place at that time.

The final way a ROFR can be provided is through a state or local statutory requirement. These ROFR requirements typically apply to all government subsidized housing and not just LIHTC properties. Statutory ROFRs typically require the owner to give the relevant governmental agency, tenants, or their designees an opportunity to purchase the property if the property is going to be sold. The ROFR is often accompanied with a purchase option that is triggered whenever the owner seeks to exit the applicable subsidized housing program or the affordability term is expiring. See

57. Virginia Housing Development Authority, The Plan of the Virginia Housing Development Authority for the Allocation of Low-Income Housing Tax Credits 20 (2019), https://www.vhda.com/BusinessPartners/MFDevelopers/LIHTCProgram/LowIncome%20Housing%20Tax%20Credit%20Program/2019-QAP-Final.pdf.

58. *Id*.

59. 10 Tex. Admin. Code §10.407 (2019).

60. *Id*.

Part III for an overview of cities and states that require a statutory ROFR or purchase option.

Despite the promise that ROFRs offer for preservation, in many parts of the country ROFRs have not prevented owners from taking advantage of the qualified contract process and exiting out of the program. One reason that ROFRs have not consistently resulted in preservation deals is because the federal law governing ROFRs requires the purchase price to be "not less than" the "Minimum Purchase Price."[61] While the Minimum Purchase Price is typically favorable to eligible buyers ("qualified entities"), federal law allows the purchase price to be set at higher levels, which can bar successful preservation deals.[62]

For example, until the Texas Legislature mandated that the ROFR offer price be the Minimum Purchase Price,[63] the Texas housing agency allowed the ROFR price to be determined by fair market value or by a purchase and sale agreement with a third-party buyer, both of which could far exceed the Minimum Purchase Price.[64] In one recent case where a property in Austin exited the LIHTC program, the ROFR price in the LURA was set at thirty-one million dollars, far exceeding what a preservation entity could ever afford to purchase the property and maintain the affordable rents.[65] Several properties in Texas that were subject to these higher ROFR price calculations have gone through the ROFR process without being purchased by a qualified entity.

Short ROFR periods further hinder preservation by restricting qualified buyers' ability to secure funding to purchase a property through a ROFR. Some ROFRs are as short as ninety days.

Even if a ROFR provides for a reasonable purchase price and adequate time period to exercise the ROFR, housing nonprofits and other qualified buyers at a local level often lack the capacity needed to preserve LIHTC properties through a ROFR.[66] Acquiring and financing LIHTC properties for preservation is complex, and many local housing organizations need access to capacity building and technical assistance to be successful with a preservation deal. In particular, tenant associations—which are qualified entities for ROFR purchases—face significant capacity barriers. Other than places like Washington, D.C., which operates a robust tenant purchase

61. 26 U.S.C. § 42 (i)(7)(B) (2019).

62. *Id.* § 42(i)(7)(A).

63. Tex. H.B. 3576, 84th Leg., R.S. (2015).

64. 10 Tex. Admin. Code § 10.407(b) (2015).

65. Texas Dep't of Housing & Community Affairs, Real Estate Purchase & Sale Agreement (July 23, 2018), http://www.tdhca.state.tx.us/property-for-sale/docs/ROFR-Paradise%20Oaks/94132PSA_Redacted.pdf.

66. Edwin Melendez et al., *Year Fifteen and Preservation of Tax-Credit Housing for Low-Income Households: An Assessment of Risk*, 23 Hous. Stud. 67, 68 (2008).

program, few resources are in place to help tenant groups develop this capacity.[67]

C. Additional Preservation Barriers

A significant programmatic barrier to LIHTC preservation is that few states, and even fewer local governmental entities, have a comprehensive preservation strategy for preserving LIHTC and other subsidized affordable housing.[68] There is also little effort by state housing agencies and cities to track LIHTC properties that are at risk of converting to market-rate apartments, including those due to early exits through the qualified contract process. State agencies often maintain a database of active LIHTC properties, but may not include information related to preservation risk, such as when the compliance and extended use periods expire, the availability of a ROFR or qualified contract, and whether the property is owned by an entity that is more likely to exit the LIHTC program. This failure to track which LIHTC properties are at risk of exiting the program limits opportunities for state and local governmental entities and preservation organizations to intervene early and secure a preservation buyer before a property owner decides to sell a property or apply for a qualified contract.[69]

III. LIHTC Preservation Strategies and Policies

In addition to federal reforms, much can be done at the state and local levels to improve the preservation of LIHTC properties. In this section, we discuss the following best practices for state and local LIHTC preservation efforts:

1. Create a preservation database of Low-Income Housing Tax Credit properties;
2. Prioritize properties for preservation;
3. Organize a preservation stakeholder group;
4. Create a local preservation department;
5. Adopt robust notice requirements for properties exiting the LIHTC program;
6. Require longer affordability periods;
7. Increase state and local funding for financing preservation efforts; and

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67. Heather Way et al., Uprooted: Residential Displacement in Austin's Gentrifying Neighborhoods and What Can Be Done About It, App. 4, at 157 (2018), https://sites.utexas.edu/gentrificationproject.

68. Telephone interview with Laura Abernathy & Ellen Hoffman, *supra* note 47.

69. Ed Gramlich et al., The Preservation Guide Federal Housing & Homelessness Plans: Potential Tools in the Affordable Housing Preservation Toolbox 2 (Apr. 2010), https://nlihc.org/sites/default/files/Preservation-Guide2010.pdf.

8. Create strong purchase right policies for qualified entities.

Ideally these tools would be developed as part of a comprehensive affordable rental housing preservation strategy tailored to addressing local needs and barriers. A comprehensive preservation strategy—which can be created at a state, regional, or local level—can be targeted towards just LIHTC properties or can incorporate other types of federally subsidized or non-subsidized multifamily housing. Exemplary strategies, such as the strategic plan created in Colorado,[70] are typically developed by diverse stakeholder groups and utilize a diverse portfolio of preservation policies and tools.

1. Create a Preservation Database of Low-Income Housing Tax Credit Properties

An effective preservation strategy must start with good data. Stakeholders must have a basic understanding of the local LIHTC inventory, which properties are most at risk of exiting the LIHTC program, and which properties make the best candidates for preservation.[71] As the National Housing Trust notes, "Without sufficient data to understand which properties are most at risk, it's impossible to target resources effectively or be prepared to act when a property is threatened."[72]

Important data to incorporate in a preservation database include: (1) the location of the property; (2) the types and terms of the affordability restrictions on the property (e.g., the date the property is eligible to exit via the qualified contract process, and whether there are any city affordability restrictions on the property); (3) whether a ROFR exists and, if so, the terms of the ROFR if they differ in that state (e.g., length of notice period and price formula); (4) the type of owners (public, for-profit, or nonprofit); (5) the property's compliance history, including property inspection history; (6) the median rents and incomes in the property's census tract and whether they are changing; and (7) any changes in demographics and housing market activity that indicate whether the area is undergoing displacement pressures from gentrification.

While a very useful national preservation database has been developed to help provide communities with information to preserve federally-assisted housing, including LIHTC properties,[73] this database does not incorporate local housing conditions or variations in state administration

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70. Colorado Housing Preservation Network, Housing Preservation Network Strategic Plan 2016–2017 (on file with authors).

71. Gramlich et al., *supra* note 69, at 33.

72. National Housing Trust, Data Collection and Analysis, https://www.nationalhousingtrust.org/data-collection-and-analysis (last visited Apr. 12, 2019); National Low Income Housing Coalition, The Preservation Guide 33 (Apr. 2010), https://nlihc.org/sites/default/files/Preservation-Guide2010.pdf.

73. National Housing Preservation Database, About the Database (last visited Apr. 21, 2019), https://preservationdatabase.org/about-the-database.

of the LIHTC program that impact preservation, such as the qualified contract and ROFR processes. For example, in Texas, assessing a property's risk for exiting the LIHTC program requires reading through the land use restriction agreement (LURA) for each property to determine the property's affordability term, the existence of a ROFR, and the formula for the ROFR price, which can differ across properties, even those built in the same year.

There are many great examples across the United States of local, regional, and statewide affordable housing preservation databases tailored to local conditions. These databases are typically focused on a broader scope of properties than just LIHTC properties. The following are considered to be among the best preservation databases in the country.

a. The Colorado Housing Preservation Network

The Colorado Housing Preservation Network's (HPN) database was created in 2016 and is spearheaded by the Colorado Housing and Finance Authority. As of March 2018, HPN's database contained information for 1,300 affordable properties and 90,000 units, including approximately 55,000 units with affordability restrictions in place.[74] The remaining 35,000 affordable units were "naturally affordable" at market rates. The database includes: (1) the type of affordability restrictions in place, if any, (2) the expiration date of the affordability restrictions, (3) the name of the owner, (4) area median income levels, and (5) number of bedrooms.[75]

b. DC Preservation Catalog (Washington, D.C.)

The DC Preservation Catalog is a database of subsidized affordable housing properties in the District of Columbia maintained by two nonprofits: the Urban Institutes' Neighborhood Info DC and the Coalition for Nonprofit Housing and Economic Development.[76] The database tracks not only properties with expiring subsidies but also those in disrepair and in need of rehabilitation. The database draws from government data as well as on-the-ground knowledge shared by participating members who are familiar with specific properties. The database tracks property names, addresses, owner information, types of subsidies and expiration dates, failing physical inspection scores, and the number of rent-restricted units. It also rates properties based on their risk of exiting the LIHTC program. The DC Preservation Catalog is searchable via a map which allows users to narrow their search by location or by whether a property is at a higher risk of converting to market rate in the next twelve months.

74. Telephone Interview with Beth Truby, Preservation Program Manager, Housing Preservation Network (Mar. 28, 2018).

75. *Id.*

76. NeighborhoodInfo DC, DC Preservation Catalog Online (Jan. 30, 2019), https://www.neighborhoodinfodc.org/dcpreservationcatalog.

2. Prioritize Properties for Preservation

An effective preservation strategy also prioritizes certain properties to target for preservation, identifying properties with characteristics that make them good candidates for preservation.[77] Not all properties will be strong candidates for devoting precious preservation resources. For example, some properties will be too expensive to preserve because of the high qualified contract prices or the high market valuation of the property. Other properties may be lower priority preservation candidates because they are in poor physical condition, making them too expensive to rehabilitate, or are located in an area with concentrated poverty with poor access to high-quality schools, jobs, grocery stores, and other amenities.[78] Fair housing considerations, such as the obligation to affirmatively further fair housing, may compel cities and states to prioritize precious preservation resources in desegregated communities with enhanced access to opportunities.

The information from a preservation database—along with a host of additional data—is an integral part of prioritizing properties. Whether a property is a good candidate for preservation can vary substantially between communities and will depend on both property and neighborhood characteristics, as well as local policy priorities.

For example, HPN in Colorado has a detailed three-tier priority matrix for preservation, which considers risk factors and access to opportunity considerations.[79] The matrix's risk factors include the property's physical condition and financial viability, the history of public investment in the property, the percent of high priority populations served at the property (e.g., extremely low income, family, senior, etc.), and the size of the property. HPN also considers various "opportunity" factors to determine whether a particular preservation purchase would present a unique opportunity to purchase a project at a below-market price.[80]

In Massachusetts, the Community Economic Development Assistance Corporation (CEDAC) has a three-tier "Prioritization Matrix for Preservation Projects" for its affordable housing inventory, including LIHTC properties.[81] CEDAC considers risk of loss due to market conversion, physical condition, financial viability, and "market condition opportunity." Market condition opportunity assesses the economic benefit of purchasing the property and converting it to market rates. CEDAC prioritizes larger properties for preservation.[82]

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77. National Low Income Housing Coalition & Public Affordable Housing Residents Coalition, *supra* note 16, at 4.

78. *Id.*

79. Colorado Housing Preservation Network, Colorado Housing Preservation Network's Priority Matrix for Preservation Properties (on file with authors).

80. *Id.*

81. Roger Herzog & Bill Brauner, State Housing Preservation Priorities (June 22, 2009), http://www.prezcat.org/sites/default/files/MA%20Preservation%20Matrix_0.pdf.

82. *Id.*

3. Organize a Preservation Stakeholder Group

A preservation stakeholder group with the express purpose of facilitating the preservation of affordable housing is another core component of successful preservation strategies. Preservation groups can be local, regional, or statewide in focus. The structure and makeup of preservation groups take many forms depending on the political will of state and local government entities; the substantive goals of the group; and the existing relationships between nonprofit developers, for-profit developers, and tenant advocacy groups. Some preservation groups include for-profit housing developers and finance organizations, while others do not.

Preservation stakeholder groups play a variety of roles in preservation efforts, including creating and hosting preservation databases; reaching out to property owners regarding the owner's plans for the property at the end of the compliance period; coordinating the efforts of government, nonprofit, and for-profit developers making preservation purchases; advocating for effective preservation policies and priorities; and assisting with capacity-building efforts aimed at helping tenants and nonprofit housing organizations take advantage of purchase rights.

CEDAC has been a leader in creative affordable housing preservation efforts. CEDAC includes a wide variety of stakeholders and convenes two working groups that are particularly important to affordable housing preservation in Massachusetts.[83] The Interagency Working Group (Mass IWG) includes senior staff from the state's Department of Housing and Community Development, the City of Boston, the Massachusetts Housing Investment Corporation, and HUD.[84] CEDAC also hosts the Preservation Advisory Committee (PAC), which is comprised of a wide variety of public and private stakeholders, including developers and nonprofit advocacy groups.[85] PAC convenes quarterly to discuss big-picture preservation policy considerations and to assign tasks to the Mass IWG, when necessary. CEDAC was integral in passing Massachusetts's important statewide preservation law, 40T, which has helped preserve thousands of affordable units since its adoption in 2009.[86]

The Preservation Compact is a group of preservation stakeholders focused on preserving affordable multifamily properties in Cook County, Illinois, where Chicago is located. Preservation Compact's partners include financial organizations, state and local housing authorities, planning commissions, nonprofit advocacy organizations and developers, for-profit

83. Telephone Interview with Bill Brauner, Director of Housing Preservation and Policy, Community Economic Development Assistance Corporation (Apr. 9, 2018).

84. *Id.*

85. *Id.*

86. Emily Achtenberg, Chapter 40T at 5: A Retrospective Assessment of Massachusetts' Expiring Use Preservation Law (May 1, 2015), https://cedac.org/wp-content/uploads/2016/06/Chapter-40T-at-5-6.2.15-1.pdf.

developers, HUD, and universities.[87] The Preservation Compact is active in a wide variety of preservation efforts, including policy advocacy and the development and implementation of preservation strategies. Preservation Compact has a Leadership Committee and working groups for each of its activities,[88] along with an Interagency Council and Interagency Working Group, which bring together representatives from local, state, and federal governmental agencies, as well as grassroots and other nonprofit organizations by invitation, to focus on direct interventions in at-risk properties.[89] Since 2008, the Compact has helped preserve more than fifty government-subsidized properties—6,200 affordable rental units—through its efforts to connect tenants and property owners to preservation resources, including identifying preservation buyers.[90]

4. Create a Local Preservation Department

Several cities around the country have created special departments, programs, and staff positions dedicated to multifamily housing preservation.[91] Providing resources dedicated specifically to preservation helps ensure that preservation is not lost among the many other responsibilities of city housing departments. For example, the District of Columbia recently created an Affordable Housing Preservation Unit led by an Affordable Housing Preservation Officer.[92] The preservation unit and officer position were recommended by Mayor Bowser's Housing Preservation Strike Force as one of six key strategies for improving affordable housing preservation efforts in the District of Columbia.[93] The preservation unit is responsible for preserving both non-subsidized and subsidized affordable housing units in the District, including conducting outreach to property owners,

87. Preservation Compact, "Partner Organizations," *available at* https://www.preservationcompact.org/about-us/partner-organizations/.

88. Information based on phone interview with Stacie Young, Preservation Compact, on April 16, 2018.

89. *Id.*

90. The Preservation Compact, Interagency Council Celebrates 10 Years and 6,200 Affordable Units Preserved (n.d.), *available at* http://www.preservationcompact.org/wp-content/uploads/Interagency-10-Yr.-PR.pdf (last visited June 18, 2019).

91. *See, e.g.*, New York City Dep't of Hous. Pres. & Dev., Housing New York: A Five-Borough, Ten-Year Plan, http://www1.nyc.gov/assets/hpd/downloads/pdf / housing_plan.pdf; L.A. Hous. & Cmty. Inv. Dep't, Preserving and Monitoring At-Risk Housing (2019), https://hcidla.lacity.org/Preserving-and-Monitoring-At-Risk-Housing.

92. Office of the Mayor, Mayor Bowser Appoints Ana Lopez Van Balen as the District's First Affordable Housing Preservation Officer (Mar. 5, 2018), https://mayor.dc.gov/release/mayor-bowser-appoints-ana-lopez-van-balen-district%E2%80%99s-first-affordable-housing-preservation.

93. D.C. Housing Preservation Strike Force, Final Report: Six Recommendations for Addressing Affordable Housing Preservation, 2016, at 4 (Nov. 9, 2016), https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/Strike%20Force%20Report%20Final%2011-9.pdf.

negotiating preservation deals, and providing financing and technical assistance.[94]

5. Adopt Robust Notice Requirements for Properties Exiting the LIHTC Program

When a property seeks to exit the LIHTC program, states and local governments can require the property owner to give adequate advanced notice that reaches all interested stakeholders. Stakeholders that may be interested in purchasing a LIHTC property need sufficient time to procure financing or collaborate with other partners to coordinate a preservation purchase. The notice process should also provide potential preservation buyers with enough information about the property to arrange a preservation deal.

As a best practice, Massachusetts's preservation law "40T" has particularly robust notice provisions, requiring LIHTC property owners to provide three notices prior to exiting the LIHTC program. The notice must be provided to all tenants in person or via first-class mail, as well as to any applicable tenant organization, the city, and the state housing department.[95] The preservation law requires the following notices: (1) a notice two years prior to the end of the affordability restrictions (regardless of whether the owner is actually going to terminate affordability restrictions);[96] (2) a one-year notice prior to the end of the affordability restrictions if the owner is planning on terminating the affordability restrictions or allowing a termination of the restrictions to occur;[97] and (3) a notice of intent to sell prior to the sale of the property, after which the Massachusetts Department of Housing and Community Development has the option for ninety days of submitting an offer to purchase the property.[98]

Other cities and states with robust notice requirements include New York City, where LIHTC owners must provide twelve months' notice to tenants and the New York Department of Housing Preservation prior to taking "any action that will result in the conversion of assisted rental housing."[99] California has a similar requirement: All owners of federally-assisted affordable housing properties, including LIHTC developments, must give at least twelve months' notice of the expiration or intent to opt out of the affordability restrictions.[100] The notice must be provided to ten-

94. *Id.* at 19.

95. Mass. Gen. Laws ch. 40T § 2(a) (2019).

96. *Id.*

97. *Id.*

98. *Id.* § 3(a)–(c). The preservation law contains several exemptions from the notice of intent to sell requirement including foreclosure sales, a proposed sale of a property which has affordability restrictions not expiring for at least fifteen years, and a sale in which the proposed purchaser is required to continue the affordability restrictions.

99. N.Y.C. Admin. Code § 26-802(a) (2019).

100. Cal. Gov't Code §6583.10, *available* at http://www.hcd.ca.gov/policy-research/preserving-existing-affordable-housing.shtml.

ants as well as the mayor, local public housing authority, and state housing department.[101]

6. Require Longer Affordability Periods

Long-term affordability restrictions are a critical tool for creating a stable LIHTC inventory. As discussed above, the federal LIHTC program requires only thirty years of affordability and, absent state or municipal intervention, owners can request a qualified contract to exit the program after only fifteen years of service. Many states and municipalities have concluded that thirty years of affordability is insufficient, particularly given the millions of dollars in subsidies that each LIHTC property typically receives. Twenty-six states either require or incentivize LIHTC applicants to commit to affordability terms longer than the thirty years.[102]

As examples, Wyoming and Delaware provide point incentives in their QAPs for applicants who commit to affordability terms of sixty-five and sixty years, respectively.[103] California requires all LIHTC properties to commit to fifty-five years of affordability.[104] And Massachusetts, Michigan, and Vermont all require ninety-nine years of affordability.[105]

Cities also play a key role in securing longer affordability terms in LIHTC properties. Cities that provide financing to LIHTC applicants can leverage this money to require longer affordability terms. If a property exits from federal and state affordability terms via a qualified contract, the city's affordability term continues, ensuring longer-term affordability of the property.

For example, the City of Austin's Rental Housing Development Assistance program requires a minimum of forty years' affordability for LIHTC properties that receive funds from the city.[106] Boston requires LIHTC properties receiving city subsidies to have a ninety-nine-year affordability term.[107] Boston has noted that, although there was some push back by for-profit developers when the city first implemented this "perpetual affordability" requirement, intense competition for LIHTC credits was ultimately enough leverage for developers to agree to the provision.[108] The City is

101. *Id.*

102. *Id.*

103. Abernathy, *supra* note 23.

104. California Tax Credit Allocation Committee, *Compliance Online Reference Manual* (Jan. 2017), http://www.treasurer.ca.gov/ctcac/compliance/manual/manual.pdf.

105. Abernathy, *supra* note 23.

106. Austin Hous. Fin. Corp., Rental Housing Development Assistance (RHDA) Program 9 (Jan. 12, 2013), http://www.austintexas.gov/sites/default/files/files/Housing/Application_Center/RHDA/FY_12-13/rhda_fy1213_guidelines_attachments_2013.pdf.

107. Cheryl Cort, Long-Term Housing Affordability for the District of Columbia 7–8 (Feb. 2017), https://www.smartergrowth.net/wp-content/uploads/2017/03/LongTermAffordability_FINAL_web.pdf.

108. *Id.*

substantially involved throughout the life of these properties and makes sure to provide sufficient underwriting.[109] Denver amended its preservation ordinance in October 2018, changing the affordability term from twenty to sixty years for all affordable housing developments that receive city subsidies.[110]

7. Increase State and Local Funding for Financing Preservation Efforts

While funding for the preservation of LIHTC properties often comes from a new allocation of tax credits, through a process called "resyndication," the most successful and impactful preservation programs also utilize state and local government funding. These funds are used to directly support the costs of acquiring and making improvements to LIHTC properties—as well as for related programmatic needs, such as capacity-building efforts for tenant groups and nonprofits working to preserve subsidized properties. The following examples feature some of the ways cities are dedicating their financial resources towards preserving LIHTC and other subsidized multifamily rental properties.

a. Washington, D.C.

For the past three years, Washington, D.C., has allocated more than $100 million each year in funding for D.C.'s Housing Production Trust Fund (HPTF), with the bulk of the funding used for multifamily housing preservation and production.[111] Between 2001 and 2017, the fund helped preserve and produce more than 11,500 affordable units.[112]

The District of Columbia also recently created a Housing Preservation Fund, which raises public and private funds to provide short-term bridge acquisition and pre-development financing for preservation projects. The District seeded the revolving loan fund with a $10 million contribution, with the hope of growing the fund to $30 million.[113] This initiative was another key strategy proposed by the District's Housing Preservation Strike Force.[114]

The District funds nonprofit groups that assist tenants with purchasing their affordable rental housing by facilitating tenant organizing as well as technical assistance with sales negotiations. The District's Office of the Tenant Advocate, which received three million dollars in funding from the

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109. *Id.*

110. City of Denver, Council Bill No. CB18-1089, amending Denver Municipal Code §27-50(a) (effective Feb. 1, 2019), https://denver.legistar.com/LegislationDetail.aspx?ID=3686496&GUID=42D691FE-E699-440A-AA22-ED2E7D85D7B9.

111. D.C. Dep't of Hous. & Cmty. Dev., Housing Production Trust Fund, https://dhcd.dc.gov/page/housing-production-trust-fund.

112. *Id.*

113. D.C. Dep't of Hous. & Cmty. Dev., Public-Private Affordable Housing Preservation Fund, https://dhcd.dc.gov/page/public-private-affordable-housing-preservation-fund.

114. D.C. Housing Preservation Strike Force, *supra* note 93, at 20.

District in 2016,[115] helps support tenants in exercising their rights of first refusal available under local and federal law. The District also provides robust funding for capacity building of nonprofit housing preservation organizations.[116] Thanks to this support, today the District is home to a large number of high capacity nonprofits organizations that are actively engaged in the affordable housing preservation sector.[117]

b. Portland, Oregon

In 2008, the City of Portland launched the 11 x 13 Campaign to preserve eleven subsidized apartment complexes that were at risk of losing their affordability restrictions by 2013.[118] The City and other partners were ultimately able to preserve all seven hundred affordable rental homes in the eleven properties.[119] The City dedicated $22 million in subsidies and loans towards the initiative (primarily through tax increment financing), which leveraged $100 million in private investments and more than $120 million in federal assistance.[120] The apartments must remain affordable for at least sixty years.[121]

Portland relies heavily on tax increment financing and general obligation bonds to fund affordable housing preservation and other affordable housing projects. In the North and Northeast areas of Portland, the city has committed to providing more than $100 million in tax increment financing funds towards reducing the displacement of low-income residents.[122] In 2016, Portland voters approved $250 million in general obligation bond funding for affordable housing production and preservation citywide,[123] and, in 2018, voters in the three-county Portland region approved a $653 million affordable housing bond.[124]

115. DC Fiscal Policy Inst., A Resident's Guide to the DC Budget, Appendix: An In-Depth Look at the DC Budget's Seven Appropriate Titles (Feb. 22, 2018), https://www.dcfpi.org/all/residents-guide-dc-budget.

116. Way et al, *supra* note 67, App.4, at 157.

117. *Id*.

118. Portland Housing Bureau, Eleven by Thirteen Preservation Campaign (Aug. 2013), http://www.preserveoregonhousing.org/11_x_13_Report_Aug.2013.pdf.

119. *Id.*

120. *Id.*

121. *Id.*

122. Way Et al, *supra* note 67, App.4, at 183.

123. City of Portland Hous. Bureau, Affordable Housing Bond Stakeholder Advisory Group: Summary of Purpose, Role and Responsibilities, https://www.portlandoregon.gov/phb/article/728791 (last visited Apr. 25, 2019).

124. Elliot Njus, *$653 Million Metro Affordable Housing Bond Passes: Election Results 2019*, Oregonian/OregonLive (Nov. 7, 2018), https://www.oregonlive.com/politics/2018/11/2018_metro_affordable_housing_bond.html.

c. Denver, Colorado

Denver's Regional Transit-Oriented Development Fund is a $24 million revolving, below-market loan fund. Through this fund, Denver offers low-cost loans to affordable housing developers and others seeking to purchase and preserve affordable housing near public transit infrastructure. The fund is capitalized with public, private, and philanthropic funds. Loans from the fund are typically for five to seven years, at which time the property is refinanced with other loans or subsidies such as LIHTCs. Since the fund's creation in 2010, Denver has invested $32.8 million towards the preservation of 1,354 affordable rental homes along with other related projects, leveraging more than $200 million from project partners.[125]

8. Create Strong Purchase Right Policies for Qualified Entities

States and cities can improve preservation-oriented organizations' ability to preserve LIHTC properties by adopting stronger ROFR and purchase-option policies for qualified nonprofit entities. The strongest policies make both a ROFR and a purchase option available to preservation-minded organizations separate from the partnership agreement in the event that the partnership agreement does not contain a ROFR or purchase option or if the entity designated in the partnership agreement chooses not to exercise its purchase rights.

Unlike a ROFR, which is triggered when an owner chooses to sell the property, a purchase option requires an owner to sell a property to an eligible entity at a previously designated point in time and price, such as when the owner is seeking to exit the LIHTC program through the qualified contract process or at the end of the property's affordability term with the state or city. Citing the shortcomings of the current ROFR provision in federal law, federal legislation filed in 2017 attempted to create a purchase option, rather than a ROFR, at the Minimum Purchase Price for LIHTC properties moving forward.[126]

Regardless of whether a ROFR is included in a partnership agreement or statutory mandate, consideration needs to be given to the purchase price in ROFRs and purchase options in order to maximize the chances that a preservation buyer will be able to purchase the property. For example, to promote maximum preservation through a ROFR, states could prohibit the purchase price from exceeding the Minimum Purchase Price formula contained in the federal LIHTC statute.[127] Additionally, given the recent,

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125. Enterprise, Denver Regional Transit-Oriented Development (TOD) Fund (2019), https://www.enterprisecommunity.org/financing-and-development/community-loan-fund/denver-regional-tod-fund (last visited Apr. 12, 2019).

126. Affordable Housing Credit Improvement Act of 2017, S.B. 548, 115th Cong., § 303 (2017).

127. See discussion in Part II, "Rights of first refusals."

contradictory court decisions in Massachusetts[128] and Washington,[129] states and cities should consider specifying in ROFR policies that a bona fide offer is not needed to trigger the ROFR or that the qualified buyers have, instead, a purchase option at the end of the fifteen-year compliance period.

Several states and cities have adopted ROFR or purchase option requirements for subsidized rental housing including LIHTC properties. For example, the Massachusetts Department of Housing and Community Development has a ROFR for the Department or its designee for thirty days after receiving a copy of the executed third party purchase contract.[130] Prior to executing a purchase contract, an owner must provide the Department with at least ninety days' notice of the owner's intent to sell.[131] An important part of the statute requires the owner to make certain key information available to the Department within ten days of submitting the Notice of Intent to sell, such as monthly operating expenses, physical inspection reports, and rent rolls.[132]

New York's preservation statute provides tenants and their designees with both a ROFR and purchase option.[133] The purchase option is triggered when the LIHTC owner takes any action that would result in the termination of the property's affordability restrictions, while the ROFR is triggered when the owner decides to sell the property.[134] The ROFR requirement provides tenants or a qualified nonprofit entity (as the tenant's designee) with sixty days to notify the owner and department of their intent to exercise the ROFR, and then another 120 days to submit the offer.[135]

In California, LIHTC owners must provide a purchase option to qualified entities (as set forth in the statute) before terminating "any subsidy contract" or before selling a property that is within five years of the expiration of the property's rental restrictions.[136] The owner must obtain the list of qualified entities from the California Department of Housing and Community Development and then provide those entities with a one-year notice of opportunity to purchase.[137] The notice must include information about the property such as itemized monthly operating expenses

128. Homeowner's Rehab, Inc. v. Related Corp. V SLP, L.P., 99 N.E.3d 744, 757 (Mass. 2018).

129. Senior Hous. Assistance Grp. v. AMTAX Holdings 260, LLC, 2019 WL 687837 (W.D. Wash. Feb. 19, 2019). The Massachusetts court found that a bona fide offer is not required to trigger a ROFR, but the Washington court came to a completely contradictory conclusion, finding that a bona fide offer is required in order to trigger a ROFR.

130. Mass. Gen. Laws ch. 40T §4 (2019).

131. *Id.* at §3 (2019).

132. *Id.* at §3(c).

133. N.Y.C. Admin. Code §§26-802 to 806 (2019).

134. *Id.* §§ 26-801(f), -802(a), -806(a) (2019).

135. *Id.* §§ 26-805(a), (c) (2019).

136. Cal. Gov't Code § 65863.11(b–j) (2019).

137. *Id.* § 65863.11(g).

and copies of financial and physical inspection reports.[138] A qualified entity then has 180 days to make a bona fide offer to purchase the property at fair market value.[139]

Absent a city or state statute requiring a ROFR or purchase option, state LIHTC allocating agencies can incentivize applicants to include ROFRs or purchase options by offering additional points in the QAP for the 9% program or, alternatively, requiring these purchase rights as threshold requirements for both the 4% and 9% programs. For example, as mentioned above, Virginia and Texas both provide additional points in the competitive QAP scoring for 9% properties that provide a ROFR to a qualified entity.[140] In Virginia, however, the ROFR incentive is limited to those properties that have a nonprofit as a co-owner in the partnership agreement and only provides a ROFR to that particular entity.[141] Texas' ROFR incentive is much broader because all 9% applicants—regardless of whether a qualified entity is a co-owner—can elect to include a ROFR in exchange for points, and that ROFR is available to any qualified entity designated in the statute, with certain types of entities receiving priority.[142]

IV. Limiting the Use of the Qualified Contract Process

As discussed above in Part II, the qualified contract process, as currently structured, is one of the largest barriers to LIHTC preservation. Limiting LIHTC development owners' participation in the qualified contract process is one of the most effective preservation policies available to cities and states. The following are examples of best practices adopted across the country to disallow or disincentivize these early exits. Some of the tools are targeted for future generations of LIHTC properties, while other tools can be applied to impact current LIHTC properties.

A. Require LIHTC Applicants to Waive Their Right to Use the Qualified Contract Process

Several states require LIHTC applicants to waive their right to use the qualified contract process as part of the state's QAP—as either a threshold requirement (that is, applying to all applicants) or in exchange for points in the competitive 9% tax credit application process. Idaho's QAP provides fifteen points for project applicants who commit to providing forty years of

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138. *Id.* § 65863.11(h)(3).

139. *Id*. § 65863.11(i).

140. Va. Hous. Dev. Auth., The Plan of the Virginia Housing Development Authority for the Allocation of Low-Income Housing Tax Credits 20 (2019), https://www.vhda.com/BusinessPartners/MFDevelopers/LIHTCProgram/LowIncome%20Housing%20Tax%20Credit%20Program/2019-QAP-Final.pdf.

141. *Id.*

142. Tex. Loc. Govt Code § 2306.6726(b) (2019); 11 Tex. Admin. Code § 11.9(e)(7) (2019).

affordability, including a waiver of the applicant's right to request a qualified contract during that time.[143]

In Colorado, 4% and 9% LIHTC applicants must agree to waive their right to request a qualified contract until the property has been in service for at least twenty and forty years, respectively.[144] Applicants receive additional points if they waive their rights to terminate the extended use period for even longer periods of time.[145]

Wyoming provides substantial incentives in its QAP for project applicants who commit to affordability restrictions for up to sixty-five years.[146] Applicants who commit to affordability periods beyond thirty years are required to waive their right to request a qualified contract until the end of the affordability period agreed to in the application.[147]

B. Bar LIHTC Owners Who Request Qualified Contracts from Future LIHTC Allocations

A challenge for states adopting policies that bar or disincentive the qualified contract process is that these policies apply only to future properties and not those currently in the state's LIHTC inventory. To get at this issue, the State of North Carolina has adopted a unique approach in its QAPs: Any developer who has requested a qualified contract for a LIHTC property can be disqualified from receiving tax credits.[148] In addition to endorsing the North Carolina approach, the National Council of State Housing Agencies recommends that state housing agencies require purchasers of existing LIHTC properties to waive their rights to request a qualified contract as a condition of approving the transfer of any LIHTC property or any interests in the property.[149]

143. Idaho Hous. & Fin. Agency, Low-Income Housing Tax Credit Program Qualified Allocation Plan for the State of Idaho), § 6.5(1) at 30 (Mar. 14, 2019), https://www.idahohousing.com/documents/2019-approved-qap.pdf.

144. Colo. Hous. & Fin. Auth., Low Income Housing Tax Credit Qualified Allocation Plan 2019, at 20 (Dec. 31, 2018), https://www.chfainfo.com/arh/lihtc/LIHC_Documents/2019_QAP.pdf.

145. *Id.* at 42.

146. Wyo. Cmty. Dev. Auth., 2018 Affordable Housing Allocation Plan 25 (2018), https://nlihc.org/sites/default/files/2018_Allocation_Plan_Final_for_website_091517.pdf.

147. *Id.*

148. N.C. Hous. Fin. Auth., The 2018 Low-Income Housing Tax Credit Qualified Allocation Plan for the State of North Carolina, https://www.nchfa.com/sites/default/files/forms_resources/18-QAPFinal.pdf.

149. National Council of State Housing Agencies, Recommended Practices in Housing Credit Administration 31 (Dec. 2017), https://drive.google.com/file/d/1zhLyBTtK7qfyWgWfOWjtpd7g-FvEDE-y/view.

C. Discourage Early Exits Via the Qualified Contract Process

Several state housing finance agencies actively discourage LIHTC owners from requesting a qualified contract and require collaboration to explore preservation alternatives. The Michigan State Housing Development Authority requires owners to meet with the agency's director to discuss options for keeping the property affordable.[150] Similarly, in Minnesota, each applicant is assigned an agency underwriter to discuss alternatives to the qualified contract process.[151] The Idaho Housing and Finance Association took a different approach to discouraging qualified contracts, increasing the administrative fee for requesting a qualified contract to $20,000.[152]

V. Lessons from Texas on LIHTC Preservation

Like many other states, Texas has been seeing a wave of affordable properties exiting the LIHTC program. The biggest current threat to Texas' LIHTC inventory is the qualified contract process. Texas has already lost at least thirty-three LIHTC properties with 5,667 units through the process, and as of March 2019, the qualified contract process has never resulted in a successful preservation purchase in the state.[153] Under state law, LIHTC properties allocated tax credits prior to 2002 can exit the program via the qualified contract process after just fifteen years of providing affordable housing, unless the property received 9% credits and elected to provide for a longer compliance period in exchange for QAP points.[154] As many as 835 LIHTC properties with close to 80,000 units in the state are currently entitled to go through the qualified contract process.[155]

Even though post-2001 LIHTC properties in Texas must be affordable for at least thirty years as a result of state legislative reforms,[156] this period still falls short of the national best practices discussed in Part III. Nine percent

150. Mich. State Hous. Dev. Auth., Low Income Housing Tax Credit Program Qualified Contract Procedures Guide 7 (May 2018), https://www.michigan.gov/documents/mshda/mshda_crh_pr_qualified contract00_qualified_contracts_procedure_guide_305717_7.pdf.

151. Minn. Hous. Fin. Agency, Housing Tax Credit Program Qualified Contract Process Guide 4 (Apr. 2017) (on file with authors).

152. Idaho Hous. & Fin. Agency, Low-Income Housing Tax Credit Program Qualified Allocation Plan for the State of Idaho § 17.1, at 52 (Mar. 14, 2019), https://www.idahohousing.com/documents/2019-approved-qap.pdf.

153. Public Information Request, *supra* note 41.

154. The Texas Legislature adopted a law in 2001 requiring all subsidized affordable housing to meet a minimum thirty-year affordability term. S.B. 322, 77th R.S. (Tex. 2001) (codified at Tex. Gov't Code § 2306.185(c) (2019)). State regulation explicitly bars post-2001 LIHTC properties from requesting a qualified contract until the property has been in service for at least thirty years. 10 Tex. Admin. Code § 10.408(b) (2019).

155. Tex. Dep't Hous. & Cmty. Aff., HTC Property Inventory (XLSX) as of Feb. 21, 2019 Board Meeting, http://www.tdhca.state.tx.us/multifamily/htc/docs/HTCPropertyInventory.xlsx/ (last visited Apr. 23, 2019).

156. Tex. Gov't Code § 2306.185(c) (2019).

credit applicants can earn points in the application process for providing a longer affordability term, but the extended term in the last two QAPs has been for only five additional years.[157] TDHCA has removed any incentive to elect an affordability term beyond a total of thirty-five years, and 4% properties have no state incentive to exceed thirty years.

While Texas's right of first refusal policies have advanced the preservation of many properties, these policies do not extend to all properties. As discussed in Part II, through the state's QAP, Texas incentivizes 9% tax credit properties to include a ROFR in the property's LURA that extends to qualified entities beyond just those in the partnership agreement.[158] However, this incentive does not extend to 4% properties, which constitute approximately twenty percent of LIHTC properties in Texas.[159]

Even when a LIHTC property has a ROFR in its LURA, Texas has multiple policies that dilute the effectiveness of these ROFRs. To date, ten of the thirty-three properties in Texas that have exited the LIHTC program through the qualified contract process had ROFRs in their LURAs with the state.[160] One issue is the length of the ROFR. Depending on the year of the tax credit allocation, the period in which the ROFR can be utilized may be as short as ninety days, which makes it very difficult for a nonprofit developer to exercise the right in a timely manner.

A second issue is that some of the ROFR prices for older LIHTC properties are based on fair market value, which can be too high for qualified buyers to take advantage of, especially when the property is located in a strong housing market. Even if a ROFR requires that the property be offered for sale at the Minimum Purchase Price, TDHCA allows the property to be sold for greater than the Minimum Purchase Price if a qualified buyer is willing to pay a higher price, which means that nonprofit entities that offer greater amenities or lower rents for tenants can be outbid by other nonprofits offering fewer services or supports for tenants.

TDHCA's notice policies for properties for sale through a ROFR in the LURA or a qualified contract are also weak. TDHCA provides notice about these properties by posting a notice on its website and via a listserv that qualified buyers can sign up for. These notification portals are insufficient at reaching a broad pool of prospective preservation buyers. TDCHA does not take any other action to market the properties or contact potential preservation buyers.

An additional threat to preservation in Texas is the lack of a comprehensive program or strategy for preserving LIHTC properties that are at risk of

157. Tex. Dep't Hous. & Cmty. Aff., 2018 Qualified Allocation Plan 39, https://www.tdhca.state.tx.us/multifamily/docs/18-QAP.pdf; Tex. Dep't Hous. & Cmty. Aff., 2017 Qualified Allocation Plan 35, https://www.tdhca.state.tx.us/multifamily/docs/17-QAP.pdf.

158. 11 Tex. Admin. Code § 11.9(e)(7) (2019).

159. *See supra* note 142.

160. *See supra* note 41.

exiting the program. Neither the state nor local governments in Texas have adopted a strategy to guide LIHTC property preservation. In addition, neither TDHCA nor any of the cities in Texas track LIHTC properties that are at risk of converting to market-rate apartments. While TDHCA maintains a database of active LIHTC properties, it includes only basic information and is not, by itself, useful for tracking at-risk properties, because it does not keep track of information such as when compliance and extended use periods expire, which properties have ROFRs, or whether a property is owned by an entity that is more likely to seek an early exit from the LIHTC program.

A. *Case Studies from Austin's East Riverside Corridor*

The East Riverside corridor is a gentrifying, higher-opportunity area located east of Interstate Highway 35, just two to three miles from Austin's Central Business District. The area, which is a major transit corridor for the city, has seen rapid redevelopment in the past several years. The following are two multifamily rental properties along the corridor that highlight the preservation barriers imposed by the qualified contract and ROFR processes.

1. Country Club Creek Apartments

Country Club Creek is a 212-unit LIHTC property that opened in 1996 with an extended use period of thirty years. In 2017, the property owner sought to exit the LIHTC program, after just twenty-one years of affordability, by submitting a request with the state housing agency (TDHCA) for a qualified contract. Country Club Creek had a ninety-day, fair-market-value ROFR in its LURA, which the property owner had to follow before going through the qualified contract process. Through the state's procedures for ROFRs in LURAs, since Country Club Creek did not secure a qualified buyer to purchase the property, Country Club Creek was listed for sale on TDHCA's website at $22.4 million. TDHCA did not receive any offers to purchase Country Club Creek during the ROFR period.[161] However, multiple preservation buyers in Austin have said they were unaware of the opportunity to purchase the property through the ROFR at the time, highlighting problems both with the short ROFR notice period and ineffective marketing of the property by TDHCA.

After the ROFR period expired without a preservation buyer, the property owner requested a qualified contract and TDHCA listed the property for sale at $26 million—a price well above the fair market value of the property with the affordable housing restrictions in place. At least two preservation organizations investigated purchasing the property during the qualified contract period, but the high price made a preservation purchase unworkable. Ultimately, no preservation buyers stepped forward to

161. Interview by Lauren Loney with Raquel Morales, Asset Management Division, Texas Department of Housing & Community Affairs in Austin, Tex. (Jan. 14, 2018).

purchase the property through the qualified contract process. As a result, the units will be converted to market rate by 2020.

2. Paradise Oaks Apartments

Paradise Oaks is a 248-unit LIHTC property that also opened in 1996 with an extended use period of thirty years. In 2018, the property owner secured a purchase and sale agreement on the property, which triggered the ninety-day ROFR for the property. The ROFR required a fair market value offer, which was determined by the purchase and sale agreement price of $31 million.[162] TDHCA posted the property for sale on its website at this price. Preservation buyers in Austin were unable to finance a preservation deal at the ROFR price, and the ROFR period expired in November 2018.

Since Paradise Oaks is a pre-2002 property, the new owner will be eligible to apply to TDHCA for a qualified contract following a second ROFR period.[163] Given the location of this property and the fair market value without the affordability restrictions in place, local housing advocates are worried that Paradise Oaks will go through the second ROFR period and the qualified contract process without a preservation buyer and exit the LIHTC program as early as spring of 2021.

B. Recent LIHTC Preservation Advocacy in Texas

The loss and threatened loss of LIHTC properties along the East Riverside corridor has spurred a series of recent preservation advocacy initiatives in Texas. These initiatives have been centered on four areas: (1) creating an assessment and database of at-risk LIHTC properties; (2) working with the state housing agency to improve its preservation policies and practices; (3) building a preservation coalition; and (4) legislative reforms.

After learning about the loss of Country Club Creek Apartments, we created a database of the LIHTC properties in Austin that are at the highest risk of leaving the LIHTC program. Through this process, we identified seventeen properties as "at-risk" because they met the following three criteria: the property was allocated tax credits prior to 2002 and is thus eligible for the qualified contract process, the property is owned by a for-profit entity (versus non-profit organizations or governmental entities), and the property has no ROFR in its LURA or has a fair market value ROFR in its LURA. This assessment required reviewing each property's Land Use Restriction Agreement (LURA) because the LURA terms (such as the ROFR pricing and terms) varied so significantly from one project to the next during these years. We have shared the Austin database with the City of Austin's Department of Neighborhood Housing and Community

162. Texas Dep't of Housing & Community Affairs, *supra* note 65.

163. Email from Beau Eccles, General Counsel, Texas Department of Housing & Community Affairs, to Lauren Loney (Oct. 17, 2018) ("[I]t is [TDHCA's] position that an acquiring owner would have to go through the ROFR process, anew, prior to being eligible for a qualified contract.") (on file with authors).

Development as well as local nonprofit housing organizations that can use this information to prioritize properties for preservation.

We are currently working with city staff from Dallas, Houston, and San Antonio, along with several nonprofit organizations, to extend this database to other parts of the state, but there is no place lined up yet to host the database. Building the database is time intensive, especially given the variations in the relevant LURA provisions. The statewide housing advocacy organization, Texas Housers, has been advocating for state legislation that would require the state to maintain the data.[164]

Our exposure to the variations in Texas's LURAs while creating the database helped us advocate on behalf of a local tenant advocacy organization, ¡BASTA!, when its staff discovered in 2018 that a post-2001 LIHTC property was planning on requesting a qualified contract after only fifteen years in service. Even though state law requires all post-2001 LIHTC properties to remain affordable for a minimum of thirty years, we discovered that some LURAs entered into after 2001 allow an early exit from the LIHTC program via a qualified contract after only fifteen years of affordability. After we brought this issue to the attention of TDHCA, the agency said it would enforce the law by barring the qualified contract process for all applicable properties, although the agency will not be amending the incorrect LURAs.[165]

We have also worked with TDHCA on changing its rules to better promote the preservation of LIHTC properties. Through TDHCA's rulemaking process in 2018, we submitted comments recommending changes in the ROFR and qualified contract procedures, including more robust notice procedures during ROFR sales periods and clarification on qualified contract eligibility for properties that have committed to affordability periods of longer than thirty years.[166] In response, TDHCA amended its qualified contract eligibility rules to clarify that if a property's LURA "indicates a commitment to an Extended Use Period beyond 30 years," the owner is ineligible to request a qualified contract until the expiration of that period.[167]

Another Texas preservation initiative has been the formation of the Texas Affordable Housing Preservation Coalition, which started meeting in 2019 to help shape state and local preservation policies and initiatives. The coalition already has diverse participation from across the state, including city staff from Austin, Houston, and San Antonio; nonprofit developers; affordable housing and tenant advocacy organizations; and several other statewide stakeholders. TDHCA has invited several coalition members to participate in a preservation roundtable for the state's 2020 QAP planning process.

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164. *See* Tex. S.B. 2250, 86th Leg., R.S. (2019) (voted out of the Texas Senate Intergovernmental Relations Committee on April 24, 2019).

165. Email from Beau Eccles, *supra* note 163.

166. Lauren Loney, Comments to the Texas Department of Housing & Community Affairs (Oct. 17, 2018) (on file with authors).

167. 10 Tex. Admin. Code § 10.408(b) (2019).

In regards to promoting LIHTC preservation through state legislation, several preservation bills were filed in the 2019 session of the Texas Legislature. One bill requires applicants for LIHTC credits to waive their right to request a qualified contract through the expiration of the extended use period on all existing LIHTC properties in the applicant's portfolio in order to earn new tax credits.[168] This bill would be the first bill in the country to retroactively prohibit qualified contracts. A second bill changes the ROFR notice period in LURAs for new LIHTC properties from 180 days to 360 days and restricts the ROFR price to the minimum purchase price as defined in I.R.C. Section 42(i)(7).[169] A third bill requires TDHCA to create a preservation strategy for LIHTC properties, including a system for prioritizing properties for preservation and conducting more outreach to qualified buyers.[170] The bill also requires TDHCA to develop a database of LIHTC properties that are at risk of losing their affordable status in the next two and five years.[171]

Conclusion

Significant challenges exist across the country for preserving LIHTC properties. The biggest current threat to the nation's LIHTC inventory is the qualified contract process, which allows many properties to exit the program after just fifteen years of providing affordable housing. Weak state and local preservation policies also pose a barrier to preservation. LIHTC property owners in gentrifying communities have the strongest incentive to exit the LIHTC program and take advantage of higher market-rate rents.

Despite these challenges, many best practices have been implemented at the state and local levels to curtail qualified contract requests and create successful preservation programs. These preservation tools have already saved tens of thousands of affordable LIHTC units nationwide. State and local policies such as preservation databases and working groups, longer affordability periods, eliminating the use of qualified contracts, and more robust rights of first refusal have been especially impactful in furthering the preservation of LIHTC properties.

Relying on national best practices, preservation advocates in Texas have recently started to push for a range of preservation strategies and tools using a four-pronged approach, with a focus on building a preservation database, improving state agency policies, enacting legislative reforms, and building a preservation coalition. While these efforts are still new, this work can, we hope, serve as a model for advocates in other states with weak LIHTC preservation policies. Without large-scale interventions, thousands of affordable rental units will continue to disappear from our nation's affordable housing supply.

168. S.B. 543, 86th Leg., R.S. (Tex. 2019).

169. S.B. 864, 86th Leg., R.S. (Tex. 2019); H.B. 3272, 86th Leg., R.S. (Tex. 2019).

170. S.B. 2250, 86th Leg., R.S. (Tex. 2019) (voted out of the Texas Senate Intergovernmental Relations Committee on April 24, 2019).

171. *Id*.