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More Affordable Housing, But Where, and for Whom? A New Jersey Study revealing the Low Income Housing Tax Credit's Impact, and the Ongoing Concentration of the Poor

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More Affordable Housing, But Where, and for Whom? A New Jersey Study revealing the Low Income Housing Tax Credit's Impact, and the Ongoing Concentration of the Poor

Abstract

Since its inception as part of the Tax Reform Act of 1986, the Tax Credit for Low-Income Rental Housing (Low Income Housing Tax Credit, "LIHTC") has been the most significant government subsidy for the provision of affordable rental housing.[1] The program has grown significantly in size, especially in recent years. In 2001, states received $1.50 per capita to dedicate to tax credits for qualifying projects; by 2010, this federal expenditure rose to $2.10 per capita.[2] Even in its early days, LIHTC was called the most generous tax credit in history.[3] By 2000, one million units of affordable housing- compliant with metro-specific rent caps and tenant income restrictions described in this paper- had been created nationwide by use of the LIHTC.[4] By 2008, that total reached over 1.76 million.[5]

Keywords

Tax Reform Act of 1986, Tax Credit, Low-Income Rental Housing, Low Income Housing Tax Credit, LIHTC, poor, inner cities, eligibility, incentives, administration, segregation, credit, Cornell, real estate

More Affordable Housing, But Where, and for Whom?

A New Jersey Study revealing the Low Income Housing Tax Credit's Impact, and the Ongoing Concentration of the Poor

By Brian N. Biglin

Since its inception as part of the Tax Reform Act of 1986, the Tax Credit for Low-Income Rental Housing (Low Income Housing Tax Credit, "LIHTC") has been the most significant government subsidy for the provision of affordable rental housing.[1] The program has grown significantly in size, especially in recent years. In 2001, states received $1.50 per capita to dedicate to tax credits for qualifying projects; by 2010, this federal expenditure rose to $2.10 per capita.[2] Even in its early days, LIHTC was called the most generous tax credit in history.[3] By 2000, one million units of affordable housing- compliant with metro-specific rent caps and tenant income restrictions described in this paper- had been created nationwide by use of the LIHTC.[4] By 2008, that total reached over 1.76 million.[5]

Despite this impact, the geographical distribution of the millions of housing units created by the LIHTC has perpetuated the concentration of the poor, usually in inner cities.[6] This is particularly true in New Jersey, in spite of its bold *Mt. Laurel*[7] mandate requiring municipalities to take affirmative steps to ensure that affordable housing is available statewide.[8] Other states have similar progressive mandates.[9]

While Essex County, New Jersey (the seat of which Newark) realized over 4,000 LIHTC units through 2007, only 353 low-income units were developed in the more populous— but also more suburban— Bergen County.[10] Within Essex County, 84% of the LIHTC units were built inside the 24 square mile City of Newark.[11] The nearby suburban cities of Belleville, Bloomfield, Glen Ridge, Montclair, Milburn, West Orange, and South Orange saw no LIHTC developments during the first 21 years of the program,[12] nor did any of the developing

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1 Florence Wagman Roisman. *Article: Racial Segregation in Housing: The Role of the State, the Necessity of Race-Conscious Remedies, and Other Lessons from the Mount Laurel Study.* 27 Seton Hall L. Rev. 1386, 1405 (1997).

2 Matthew Bender, Federal Taxes Affecting Real Estate § 5.04 (Low-Income Housing Tax Credits) (Lexis 2010). Interestingly, the per capita expenditure increased through 2009, reaching a peak of $2.30, but in 2010 the program suffered its first curtailment. *Id.*

3 Joseph Guggenheim, Tax Credits for Low Income Housing, 9th ed., at 1.

4 Larry Buron et al. Assessment of the Economic and Social Characteristics of LIHTC Residents and Neighborhoods, Forward (2000).

5 Danter Company, *Statistical Overview of the LIHTC Program, 1987 to 2008*, http://www.danter.com/taxcredit/stats.htm

6 *See, e.g.*, Roisman, *supra* note 1; Seema Ramesh Shah, *Note: Having Low Income Housing Tax Credit Qualified Allocation Plans Take into Account the Quality of Schools at Proposed Family Housing Sites: A Partial Answer to the Residential Segregation Dilemma?* 39 Ind. L. Rev. 691 (2006); and Dan Nnamdi Mbulu, *Article: Affordable Housing: How Effective are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families?* 8 Am. U.J. Gender Soc. Pol'y & L. 387 (2000).

7 So. Burl. Cty. NAACP v. Tp. of Mt. Laurel, 336 A. 2d 713 (N.J. 1975).

8 *See generally, e.g.*, Martha Lamar, Alan Mallach & John M. Payne, *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, 41 Rutgers L. Rev. 1197 (1989).

9 *See, e.g.*, Mass. Gen. Laws ch. 40B §§ 20-23; Henry W. McGee Jr., *Equity and Efficacy in Washington State's GMA Affordable Housing Goal*, 3 Wash. U. J. L. & Pol'y 539 (2000).

10 *LIHTC Database Access*, updated through 2007, http://lihtc.huduser.org/ [hereinafter *LIHTC Database*]. Bergen County is New Jersey's most populous county.

11 *See id.*

12 West Orange became the first generally affluent city in Essex County to have a development making use of LIHTC, in 2007. *See id.*

municipalities of Essex County's fringe.[13] This illustrates how the LIHTC has been used to improve affordable housing in the cities where such housing has traditionally been in the greatest demand, but not in the cities where the *Mt. Laurel* mandate seeks the increase of such supply.

After providing an overview of how the LIHTC functions in Part I, this paper will engage in a statistical analysis of the characteristics of the housing being created by the LIHTC in Part II. In particular, it will describe the tenant composition of LIHTC developments and the degree of socioeconomic integration seen in LIHTC developments and their immediate neighborhoods. It will then consider, in Part III, different viewpoints on the LIHTC's proper role in inclusionary zoning regimes such as *Mt. Laurel*, demonstrating how the goals of regional housing authorities administering the LIHTC, and the developers that seek the credit, have justifiably differed from those who seek the fulfillment of *Mt. Laurel* directives.

Overview of LIHTC

Eligibility

The LIHTC provides yearly business tax reductions for ten years to qualifying properties selected by state or local housing agencies. Once a qualified property is selected, it must comply (by continuing to meet eligibility) for 15 years.[14] An eligible property is a new or rehabilitated house or building that meets one of the following set-aside[15] tests:

a. at least 15 percent of the units are rent-restricted an occupied by individuals whose income is less than 40 percent of the area median gross income (the 15-40 test);
b. at least 20 percent of the units are rent-restricted and occupied by individuals whose income is 50 percent or less of the area median gross income (the '20-50 test'), or
c. at least 40 percent of the units are rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income (the 40-60 test).[16]

Rent restricted units are those for which gross rent does not exceed 30 percent of the income level component of the set aside test; thus, a landlord meeting the 20-50 test must restrict the rent in 20 percent of the units to 30 percent of half the area median gross income.[17] For instance, the restricted rent in a 20-50 development where median gross income is 40,000 per year would be $500 per month.[18]

Area Median Gross Income is based upon the U.S. Department of Housing and Urban

13 *See id.*

14 Laura Hunter Dietz, *Qualified low-income buildings*, 33A Am Jur 2d Federal Taxation P 15203 (West 2010). After 15 years, no additional credit can be received, so the developers' options include continuing to operate as low-income provider, increasing rents, selling to a new owner, or engaging in additional upgrades in the hopes of qualifying for a new credit, or other subsidies. A HUD property owner's survey reported that 71 percent of non-profit developers and 49 percent of for-profit developers planned to continue low-income housing provision with their buildings, with a significant amount undecided. *See* Martin D. Abravanel & H. Jennifer E. Johnson, *The Low-Income Housing Tax Credit Program: National Survey of Property Owners,* March 1, 2000, Annex Table 4.1, available at http://www.huduser.org/portal/publications/affhsg/lihtcsurv.html [*hereinafter* Annex Table 4.1].

15' Set aside' simply refers to the percentage of units in a development that must meet LIHTC requirements for maximum allowed rental rate and maximum allowed annual income of the tenant household. In other words, the set aside is the minimum amount of apartments in an LIHTC-eligible development that must be served for affordable housing. As this paper will show, these minimum set asides are generally inconsequential, since affordable housing developers have preferred to far exceed them in most cases.

16 Dietz, *supra* note 14, at 15203.

17 *Id.*

18 $40,000 (.50) x .30 = 6,000 in rent per year, or $500 in rent per month.

Acknowledgements

The author gratefully acknowledges Professor Peter Simmons for encouraging and reviewing this paper, providing its first review, and teaching Rutgers students about the impact of the late Professor John Payne; the Class of 2011 arrived in Newark just a few months too late to know Professor Payne personally, but we have nonetheless come to appreciate his work. The author dedicates this paper to the memory of Professor Payne, whose tireless work for socioeconomic integration provided a new frame of reference with which to analyze any affordable housing program.

Development (HUD) methodology used for Section 8 of the *United States Housing Act of 1937*, where median household income estimates are based on census data and Department of Commerce County Business Patterns employment and earnings data.[19] These median annual income figures are calculated for metropolitan areas defined by HUD. But these 'metropolitan areas' are generally not defined according to the common usage of the term.[20] HUD's decisions on how to define a 'metropolitan area' are significant for determining median incomes and the set-aside values that flow from those medians. For example, HUD's 'Newark Metro' median income is nearly $30,000 higher than its "Jersey City Metro' median, despite these areas being adjacent to one another and similarly situated in terms of their need for affordable housing.[21]

In sum, eligible developments must meet the set-aside requirements in which property owners cap rent at a particular percentage of median gross income and ensure that those rent-restricted dwellings are inhabited by a household that has an income below the percentage of median gross income specified in the set-aside requirement (from 40 to 60 percent). Thus, eligibility requires more than just offering affordable housing; rather, it entails affirmatively creating and setting aside a supply of affordable housing for those who need it.

Incentives and the Legislative Intent

The just-described eligibility grounds identify what types of projects may apply for the LIHTC. The rationale for these eligibility grounds rests on a simple premise. This section will explain that premise and engage in a brief aside about the method chosen to effectuate it.

"The business of providing quality housing for those who have very little ability to pay is socially desirable (and necessary), but not inherently profitable, which explains the basis for a targeted incentive like the LIHTC"

Cost-reducing mechanisms like subsidies or tax credits are incentives since, if appropriate in size, they will cause rational actors to engage in a formerly unprofitable activity. The business of providing quality housing for those who have very little ability to pay is socially desirable (and necessary), but not inherently profitable, which explains the basis for a targeted incentive like the LIHTC.

The LIHTC is indeed an incentive for the private sector to build and renovate low-income rental housing to increase the affordable housing stock for those who need it.[22] It has been an alternative to public housing projects, which lost favor in the second half of the last century when it became clear that the first wave of "urban renewal" was largely a failure.[23] Historically, municipally-owned housing projects have had high building and maintenance costs,[24] and their poor designs have facilitated crime and vice.[25] In recent years,

19 Bender, *supra* note 2, at § 5.04[3][ii][B]

20 For instance, HUD identifies nine different "metropolitan areas" in New Jersey, including "Newark," which includes Essex and Union county, "Bergen-Passaic," which includes those two named counties, and "Jersey City," which encompasses all of Hudson County; most people, however, would consider these three 'metropolitan areas' to be components of a single, much larger metropolitan. *See* http://www.huduser.org/datasets/fmr/fmrs/fy2009_code/select_Geography.odb

21 *Compare* Danter Company, *Query Results: 2010 Income limits for existing properties (Essex, NJ)*, http://www.danter.com/taxcredit/getrents.asp?state=nj&county=essex *with* Danter Company, *Query Results: 2010 Income limits for existing properties (Hudson, NJ)*, http://www.danter.com/taxcredit/getrents.asp?state=nj&county=hudson. The "Newark metro" median is so high because some of the wealthiest boroughs in America are found in its western sections.

22 Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit.* 38 Vill. L. Rev. 872, 877 (1993).

23 *See, e.g.,* Brian N. Biglin, Note, *Toward Successful Urban Revitalization: Why New Jersey Should Relinquish Some of its Berman Power to Bulldoze for 'Redevelopment,'* 63 Rutgers L. Rev. 275, 291-308 (2010) (discussing the failure of the housing projects that were built on top of Newark's former Little Italy as one of many examples of the failure of big block, high rise housing projects); *see generally* Jane Jacobs, The Death and Life of Great American Cities (1961).

24 This form of "urban renewal" required massive federal support. *See, e.g.,* Martin Anderson, The Federal Bulldozer 1-38 (1964).

25 *See, e.g.,* Oscar Newman, Defensible Space: Crime Prevention Through Urban Design (1973); Jacobs, *supra* note 23, at 110-111.

developers' interest shifted toward smaller-scale projects, such as the simple rehabilitation of extant buildings.[26] Though large public housing authorities still operate in most large cities, the supply of public housing has shrunk while unmet demand for affordable housing has grown. Since the 1960s, Congress has thought it "more efficient for the private sector to use government subsidies to build, own, and operate housing."[27]

A tax incentive in the form of a credit for low-income housing was selected as a means to enact social policy by shaping market behavior. Congress made the LIHTC a permanent part of the tax code in 1993 when, after several years of experimentation, it decided to "provide a more coordinated and targeted tax subsidy."[28] It also arrived as many alternative types of subsidies such as Section 8 contracts with landlords suffered deep cuts.[29]

"Congress made the LIHTC a permanent part of the tax code in 1993..."

A tax credit is equivalent to a direct subsidy, and it is most appropriately called a tax expenditure because providing the incentive requires the government to forgo tax revenue.[30] It is widely supported as a way to push the private sector to accomplish social aims, especially since "the most convenient form of subsidizing a businessman is through his income tax."[31] There are other benefits of tax expenditures from the political and procedural viewpoint of the Congress, but that fact leads to an entirely different discussion.[32]

Besides its significance to taxpayers, the choice of a tax credit makes for very straightforward administration of a subsidy. With a credit, the government can plan its expenditure in advance—placing a ceiling (in dollar terms) on the amount of credits available in a year, permitting state or city agencies to award credits up to that defined limit. And, once awarded, a credit reduces a taxpayers' final tax payment on a dollar-for-dollar basis, as opposed to representing a deduction of their taxable income.[33] Thus, there is simplicity to tax credits in multiple respects.

Administration of the credit money

Each state receives a yearly allocation of credit money which, in effect, is its allocating agency's ceiling on the amount of credits administered in a year, directly constraining the amount of projects the allocating agency can bring into the program each year.[34] How a state with more requests than available credits uses its discretion to grant credits presents issues (described in Part II) regarding site placement and segregation. Importantly, the tax code requires state agencies to annually report to the Secretary of the Treasury regarding their allocations.[35]

In 2008, each state received credits totaling the greater of $2 per capita (thus, over $17 million for New Jersey) or $2.325 million (for very small states).[36] Each state's housing credit agency (sometimes the agencies are regional or municipal based, as in New York) grants

26 The notable (and notorious) North Jersey housing developer, Joseph Barry, built his Applied Companies development corporation in large part through rehabilitations of buildings for low- and moderate-income tenants. Lecture: Joseph Barry, at Rutgers School of Law Housing Law & Policy Seminar, February 2009. *See also* Applied Companies: The History of Our Company, http://www.appliedco.com/aboutUs/history.shtml.

27 Kaye, *supra* note 22, at 877.

28 Mbulu, *supra* note 6, at 412

29 *See* Kaye, *supra* note 22, 877-78. This story was also explained in Joseph Barry's personal account of the history of low-income housing development.

30 *Id.* at 872-74.

31 *Id.* at 873.

32 *Id.* at 874. Generally, there are procedural benefits for Congress because in increasing the tax credit they do not have to go through the procedures associated with creating and increasing spending. Congresspersons can also avoid telling their constituencies that they have "raised spending," even if they voted to increase the expenditure on low-income housing through a tax credit.

33 Guggenheim, *supra* note 3, at 5.

34 *Id.* at 53-54.

35 Bender, *supra* note 2, at § 5.04[1].

36 *Id.*

credits to qualified projects until the state reaches its annual ceiling—the amount allocated to it for that year, plus unused old credits, credits returned from projects which stopped using the credit before ten years, and credits allocated from other states.[37] Sometimes, special additional credits are granted, as has recently been the case in Gulf Coast regions rebuilding from natural disasters.[38] If a credit valued at $1 million over ten years is allocated to a qualifying project, then the state counts $100,000 toward its annual ceiling (the per year payout of the credit). The LIHTC further stipulates that at least 10 percent of the credits allocated each year must go to non-profit developers.[39]

LIHTC applicants must demonstrate their project's eligibility and other details to their state/regional allocating authority (the method of computing the size of a credit award can be found in the Appendix of this article). The agency will then select among the qualifying proposals, in accord with its allocation plan (which each issuing agency is required to develop).[40] Developers (even non-profits) normally form syndicates, because corporations can use unlimited amounts of the tax credit while use of the credit is capped for individual investors.[41] Once awarded, the state agency "is responsible for monitoring and inspecting projects for compliance," and the owners must make annual certification.[42] This includes annual reviews of tenant eligibility and certification that the set-aside ratio is still being met.[43] This ongoing administrative burden should be taken into account by investors undertaking affordable housing projects.[44]

LIHTC and Segregation: National Trends and a New Jersey Case Study

"California, the most populous state, had over 134,000 LIHTC units. Texas had the most, at nearly 197,000."

Impact of the credit

The Geographic Distribution of the LIHTC

Through 2008, $10 billion in credits had been awarded for the production of nearly 1.76 million new or rehabilitated housing units.[45] California, the most populous state, had over 134,000 LIHTC units. Texas had the most, at nearly 197,000. After Florida's 98,000 units came New York, with over 86,000 units. New Jersey had reached nearly 33,000 units of LIHTC housing through 2008. Other major users of the LIHTC included Ohio, Michigan, Illinois, and Pennsylvania; each of these had development more than twice as many units as New Jersey.[46]

Through 2007, Newark had been the beneficiary of 35 LIHTC projects resulting in 3,410 qualifying affordable units. In the same time span, 1,015 units were developed in Jersey City, and only 214 units in Hoboken, two cities that enjoyed considerable demand for market-rate housing development in the last two decades. In New York City, the Bronx, followed by Brooklyn, were the boroughs with the far greatest use of LIHTC.[47]

37 *Id.*

38 Dietz, *supra* note 14, at 15211

39 *Id.* at 15210

40 Guggenheim, *supra* note 3, at 3.

41 *Id.*

42 *Id.*

43 *Id.* at 71

44 Bender, *supra* note 2, at § 5.04 [2]

45 For an overview of credit allocations nationwide over the course of the LIHTC, see Danter Company, *Statistical Overview of the LIHTC Program*, 1987 to 2008, http://www.danter.com/taxcredit/stats.htm

46 For state-by-state records, see Danter Company, Detailed Allocations With Estimated Population, http://www.danter.com/taxcredit/allocpop.htm

47 All of these figures are reported by HUD and can be accessed online. *See LIHTC Database, supra* note 10.

Applied to census statistics, fully 2.8% of Newark's housing units came into their current being through the LIHTC, as of 2005. Although roughly one-quarter of the City's households are in poverty, it is still significant that 2.8% of the City's housing has been recently rehabilitated or newly built, and reserved for the low-income population.

The LIHTC has affected other distressed cities similarly. As of 2005, 2.04% of the housing stock was LIHTC conforming in the Bronx, and 2.20% of housing in Detroit was compliant with LIHTC.[48] Other distressed cities in New Jersey have used LIHTC to different extents. Trenton had seen 29 projects producing 1,393 units through 2005, making 4.12% of its housing stock LIHTC conforming. Camden's 1,246 units equaled 4.20% of its housing units. Paterson had seen less dramatic change: 12 projects yielded 551 units, which is only 1.2% of its total units. Among large cities, few have seen as much change as Cleveland, Ohio, where its nearly 8,800 LIHTC units created through 2005 made up 4.07% of its housing stock.[49]

In 2008, the last year that national statistics were released, over 91,000 LIHTC-conforming units were constructed, up from a low point in 2000 when only 59,000 units were built. The year with the largest growth in use of the LIHTC was 1989, when 126,2000 low income units were put into LIHTC service. In 1989 the average allocation per unit was $2,434. By 2008, the average allocation per unit was over $10,000, and the total allocation nationwide was nearly two and a half times larger than 1989.[50] The increase in per unit allocation (above inflation) suggests that developers have increased the average quality or size of a new or rehabilitated affordable unit.[51] It may be that the standard of living for some low-income Americans is increasing because of LIHTC, with developers using the more generous subsidy to build better-appointed spaces.[52] However, if these more generous awards are simply being consumed by higher across-the-board construction costs (particularly from labor and/or supplies), then it could be said that the growth rate of the LIHTC housing stock has been suppressed in spite increased Congressional allotments.

Some indicia of the characteristics of low-income housing in general will be briefly assessed next, an exercise which yields clues as to whether there's been a significant positive overall effect on the quality of affordable housing since the LIHTC began. Then, this paper will examine the characteristics of LIHTC housing, using Northern New Jersey as a case study.

Has LIHTC use increased the standard of living of low-income renters?

Residents of LIHTC units generally find improvement in their standard of living as compared to their former dwellings.[53] Whether the LIHTC has substantially ameliorated the conditions of low-income housing as a general matter is harder to discern. While reliable data suggests that there has been some improvement in the standard of living for those under the poverty line, it is difficult to know whether, and to what extent, the LIHTC contributed to this.

In some respects there has been little progress when it comes to improving housing for those in poverty. One hindrance inherent in the LIHTC's administration is the fact that

48 *See id.* Compare to 2.49% in Gary; 2.61% in Memphis; 2.62% in Flint, and 3.12% in St. Louis, as of 2005. *See id.*

49 The figures in this section again came from HUD's reporting at "LIHTC Database Access," http://lihtc.huduser.org/; this paper uses the latest Census Bureau statistics on total housing units within various cities to report the percentages herein. Cleveland's use of LIHTC was particularly astounding: it produced more qualifying units than Detroit, despite having half the population and half the number of projects.

50 Danter Company, *Statistical Overview of the LIHTC Program, 1987 to 2008*, www.danter.com/taxcredit/stats.htm. This increase in average allocation far outpaces inflation. The 1989 allocation is equivalent to roughly $4,242 in 2008 dollars, given the 74.3% inflation over that space of years.

51 *Id.* From 2005 to 2006, the average allocation nationwide per unit jumped from $8,673 to $10,218. However, after 2007 a slow decline in this amount began.

52 Bender, *supra* note 2, at § 5.04[1] tracks the increase in per capita allocations to the states. Congress has increased the per capita expenditure from $1.50 per person to well over two dollars, since 2001.

53 *See* Buron, *supra* note 4, at xi ("How do the LIHTC properties compare to tenant's previous residences?")

in some metro areas, because of high median incomes,[54] LIHTC eligibility requirements permit the tax credit to be applied to projects whose tenants are well above the poverty line.[55]

In a 2000 report on LIHTC properties in select metro areas across the country, HUD found that the majority of LIHTC residents (68 percent in fact) rated their apartments good or excellent.[56] Most believed that their living situation improved upon moving to an LIHTC property; 54 percent thought that their LIHTC unit was better, and only 22 percent preferred their old residence.[57] 23 percent of the respondents said that they had moved from public housing.[58]

LIHTC properties generally stand out as good places to live within less desirable neighborhoods. The study suggests that the quality-level of new or rehabilitated LIHTC residences outpaces that of nearby residences.[59] 54 percent of LIHTC residents said their neighborhood was poor, or just fair.[60] If, from the standpoint of a city planner, LIHTC is a tool to ameliorate the conditions of low-income neighborhoods and offer higher-quality dwellings that will retain residents within cities that might otherwise lose population, then the overall data suggests that LIHTC is a success.[61] This idea is corroborated by looking at the positioning of many of the LIHTC developments in Newark (*see* subsection B.2, *infra*). If a planner's ambition is to permit mobility for low-income populations (i.e. the opportunity to move to a suburb), or to affirmatively integrate any neighborhood, then the LIHTC has mostly failed (*see* subsections C.2 and 3, *infra*).

There is no clear answer as to whether the LIHTC has improved the standard of living for the poor. The theory underpinning a "yes" answer would be that the LIHTC, in addition to injecting new higher-quality living spaces into the low-rent market, affects the rest of the market by motivating other landlords to similarly improve their properties and/or lower their rents. This ideal scenario might be playing out in some areas. The data on Northern New Jersey, however, makes it impossible to attribute any improvements in the low-income housing stock directly to the LIHTC just yet. Also, North Jersey might have a problem in that the LIHTC can help many low-income residents, yet not the poorest among them, because the rent levels required for LIHTC eligibility are often set at high rates due to the high median incomes in the area.[62]

In Northern New Jersey, 144,600 renting households were in poverty in 2003, down from 176,000 in 1995.[63] Of these impoverished households, 7.2 percent lived in structures less than eight years old; this is a marked improvement over 1995, when 2.6 percent lived in buildings less than eight years old.[64] This is the best evidence that LIHTC and the thousands of units it produced in places like Newark are having a measurable effect.

"...the rent levels required for LIHTC eligibility are often set at high rates due to the high median incomes."

LIHTC benefits are not always directed to households in poverty, however.[65] In parts of

54 Review section I.A, *supra*, to see how the incomes of eligible tenants for LIHTC projects can be quite high in some HUD-defined metro areas.

55 *See* Mbulu, *supra* note 6, at 423-24. The author critiques LIHTC's underperformance when it comes to the poorest tenants, despite also reporting that "HUD ranked three-quarters of [LIHTC] households as 'very-low income.'" *Id.* at 418; *see also* discussion *infra* accompanying notes 76-79.

56 Buron, *supra* note 4, at Exhibit 3-13.

57 *Id.*

58 *Id.* at Exhibit 3-11.

59 *See Id.* at Exhibit 3-15.

60 *Id.*

61 Indeed, one stated goal of the New Jersey Home Mortgage Finance Agency in its allocating of LIHTC is revitalizing poor urban areas. This is covered *infra* at III.B.

62 *See* section I.A., *supra.*

63 Current Housing Reports, American Housing Survey for the Northern New Jersey Metropolitan Area in 1995 and 2003. [Hereinafter Surveys]. Table 4.1, "Introductory Characteristics- Renter Occupied Units." In the survey, "Northern New Jersey" included all areas of Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, and Union Counties.

64 *See Id.*

65 For a brief explication of LIHTC under-inclusiveness with regards to those in poverty, once again *see* Mbulu, *supra* note 6, at 418-425.

New Jersey, where regional median incomes can approach $100,000, a developer can meet his or her LIHTC eligibility requirements without renting to anyone who is in poverty. For instance, in the Newark metro in 2010 the county median income was $87,900 per year.[66] A LIHTC user going by the 20-50 test would thus have to make sure that a household or individual in a rent-restricted unit (designed to house, say, four occupants—since the median household income is based on the median household size of around four) made no more than roughly $44,000 per year.[67] This is nearly twice the national poverty line for a family of four.[68]

For the City of Newark, this is cruelly ironic. Since its namesake 'metropolitan area' includes some of the nation's wealthiest boroughs, the rent-restricted income by which LIHTC properties in its impoverished central city neighborhoods have to abide is inflated. That said, one would expect that many LIHTC developments in Newark, especially those created by non-profits with the express purpose of helping those with very low income, in fact restrict the rent lower than the LIHTC code requires. Nonetheless, there is a potential for LIHTC benefits to be channeled to a socioeconomic stratum that its framers may not have envisioned. Interestingly, however, this fact has not enticed many developers to attempt to mix LIHTC units with market rate units, even though the people renting at market rates might be only marginally wealthier than those qualifying for LIHTC apartments. (*See* subsection C.3, *infra*).

The 1995 and 2003 North Jersey Housing Surveys regarding housing conditions of the impoverished also show many persistent problems that raise doubt on the LIHTC's impact. The percentage of impoverished households that reported spending more than one day living in uncomfortably cold conditions in their own home did not decrease (roughly 30 percent).[69] A higher percentage reported heating system breakdowns and 'inadequate heating capacity' in 2003 than 1995.[70] A significantly higher amount reported that they had a toilet/sewer breakdown in recent months.[71] While only 2.4 percent reported living in cramped conditions of less than 300 square feet per person in 1995, this number increased to 7 percent in 2003.[72]

On the whole, the room for improvement when it comes to the living conditions of impoverished New Jerseyans is manifest. The LIHTC is a tool that can help, but it must be drastically improved by a) narrowing the range of eligible tenants in some metro areas, b) lowering the recent caps for the various set-aside options from 40 percent to 30 percent, and c) securing increasing funding from Congress.

"In parts of New Jersey, where regional median incomes can approach $100,000, a developer can meet his or her LIHTC eligibility requirements without renting to anyone who is in poverty."

Distribution and attributes of Credit-produced housing

At a nationwide level

Of the 15,096 projects and 1.1 million units produced 1995-2005, the average LIHTC project was moderately large and dedicated almost all of its units to low-income tenants. On average, a project contained 73 units and was 95.1% comprised of LIHTC qualifying

66 The Danter Company reports the 2010 median income figures that HUD uses in determining 'fair market rents' for each metro area, including Newark. *See* Danter Company, *Query Results: 2010 Income limits for existing properties (Essex, NJ)*, http://www.danter.com/taxcredit/getrents.asp?state=nj&county=essex

67 A household occupying a LIHTC unit qualified under the 20-50 test may not make more than half the median household income for the HUD-defined metropolitan area. *See* section I.A., *supra.*

68 *See* U.S. Department of Health & Human Services, Computations for the 2011 Annual Update of the HHS Poverty Guidelines for the 48 Contiguous States and the District of Columbia, http://aspe.hhs.gov/POVERTY/11computations.shtml.

69 *See* Surveys, Table 4-6

70 *See id*.

71 *See id*.

72 *See id.* at Table 4-3. This increase may be attributable to high immigration rates into most Northern New Jersey cities.

units. Only 1.2% of projects dedicated less than 40% of their space to LIHTC units, even though developers can choose set-asides as low as 15 or 20 percent. Most developers dedicated as much as possible to LIHTC units; 82.6% of 1995-2005 projects were more than 96% dedicated to low income tenants.[73] This is consistent with HUD's finding that 92% of non-profit developers and 52% of for-profit developers listed "helping low income people" as their development objective.[74]

Nationwide from 1995-2005, 64 percent of projects were new construction, 34 percent rehabilitation, and 2 percent mixed both.[75] In the northeast region, however, rehabilitations were far more common; 58.6 percent of projects were rehabilitations and only 38.8 percent were new construction.[76] In Newark, roughly 50 percent of projects through 2005 were new construction, although in terms of units produced rehabilitated apartments outnumbered new apartments by 2:1.[77] Nationwide, 28.9 percent of LIHTC projects were completed by nonprofits, and 19.8 percent used tax-exempt bonds.[78] Remarkably, 41 percent of projects used no other subsidies, but most relied on one other subsidy source.[79] The average unit was just under 2 bedrooms in size, although 23% of LIHTC units contained three or more bedrooms.[80]

Generally, there is a fairly even distribution of LIHTC development across urban, suburban, and non-metro areas. Nationwide, 44% of projects and 49.3% of all units were in central cities; 31.3% of projects and 37.8% of units were produced in suburban areas, while the remainder appeared outside of metro areas.[81] This balance can mostly be attributed to use of the LIHTC in newly-developing areas of the south and west.[82] In the northeast, meanwhile, 61.4% of LIHTC units were produced in central cities. Of central city units, 46.1% were the product of rehabilitations, compared to 26.5% of suburban units.

The system of HUD-designated Difficult Development Areas (DDAs) and Qualified Census Tracts (QCTs), which gives extra incentive under the LIHTC to build in these tracts,[83] appears to be working: 42.4% of all projects 1995 to 2005 were located in DDAs or QCTs.[84]

Among all central city LIHTC developments, 34.2% of the units are in census tracts where more than 30% of people are in poverty, and 65.4% of central city units have been produced in neighborhoods that have majority renter populations, suggesting that the LIHTC has been used in places where its benefits are in high demand.[85]

In Northern New Jersey (a primer for Part III)

In northern New Jersey, LIHTC projects are heavily concentrated in central cities, generally in poor areas. The distribution of projects across the City of Newark and its adjacent cities depicts this vividly.[86]

As reported in the introduction, 84 percent of the LIHTC units produced in Essex County through 2007 appeared in Newark. Most of the rest appeared in poor adjacent

73 Table 1: Characteristics of LIHTC Projects, in HUD National Low Income Housing Tax Credit (LIHTC) Database: Projects Placed in Service through 2005 (Nov. 2007) (A report prepared by Abt Associates for HUD).

74 Annex Table 4.1, *supra* note 14.

75 *Id.* at Table 2

76 *Id.* at Table 12.

77 *See LIHTC Database*

78 Projects Placed in Service through 2005, *supra* note 73, at Table 2

79 *See id.* at Table 5.

80 *Id.* at Table 1.

81 *Id*. at Table 14.

82 *See id.* at Table 15.

83 *See* discussion *supra*, Section I.C.

84 *Id.* at Table 19

85 *Id.* at Table 22.

86 All statistics and data about LIHTC developments in this section are attributable to the *LIHTC Database*.

cities such as East Orange (227 units), Orange (345 units), and Irvington (60 units). A look at neighboring counties shows that LIHTC projects generally appear in large numbers in distressed cities like Elizabeth, Jersey City, and Paterson. Yet other cities that contain large numbers of working class residents had seen little or no activity: through 2007 there had been no LIHTC projects in Harrison, Kearny, Belleville, or Bloomfield. Only two projects could be found in Passaic, two in Bayonne, and three in Union City. The trend is the same across the Hudson: Mount Vernon, next to the Bronx, had seen only 10 LIHTC projects, all on its poorer south side.

In Newark, 22 of the 35 LIHTC projects produced through 2007 are located in a narrow swath of the city's west side south of Central Avenue and north of Clinton Avenue.[87] Six projects are located in the smaller poor areas of the North Ward, four projects are found in the southern Weequahic section, and only one small LIHTC development appeared in the city's East Ward—the middle-class 'Ironbound' section.[88]

Based on the distribution of LIHTC units in Newark, it can be concluded that LIHTC projects are readily conceived in distressed urban areas that have the attributes of either abundant vacant land or buildings in need of repairs. Community development non-profits, and, more recently, for-profits, interested in remaking distressed neighborhoods and offering modern low-rise housing in lieu of the often-demolished mid-century projects, have seized upon the ample vacant land in the central and western portions of Newark. Examples include the United Community Corporation,[89] the New Community Corporation[90] (both non-profits) and the for-profit group of developers who have produced over 200 units of look-alike, suburban-style townhouses along and between Kinney and 18th Avenue.

Across the city– and in every case in Weequahic– rehabilitations have frequently been awarded LIHTC support. Larger apartment buildings from the early 20th century have been rehabilitated and converted to low-income housing in four separate cases in the northern section of Weequahic. Similar in this regard are the unique Lincoln Park Tower, Lock Street Apartments, and Bakery Village, an award-winning Brownfield Redevelopment at a former factory site on the Bloomfield-East Orange-Newark border.[91]

With one exception, every LIHTC project in Newark has been 99 or 100 percent dedicated to low-income units. This is in accord with the national trend, and not surprising for a variety of reasons. First, there is substantial need for low-income housing in Newark; second, developers wish to maximize government funding made available for inner city rehabilitation projects that might be seen as risky by banks; third, goal-oriented non-profits and want to building the greatest possible amount of decent affordable housing, [92] and lastly, there remains a prevailing view that Newark, as the home to so many poor and working class citizens, is a fitting place for non-profit investment to occur.[93]

The exception is the Tiffany Manor development on the Newark-Belleville border, where a factory site was renovated and turned into market rate housing, with 26 of 130 units in LIHTC conformity under a "20-50" set aside. Such developments are rare not only

87 This section is the poorest in the city and generates a large portion of the city's elevated violent crime numbers. It also endured the greatest amount of 'slum clearance' projects resulting in high-rise public housing, most of which has been torn down (and often replaced with LIHTC subsidized developments).

88 That development is below South Street, very far removed from the stable, prospering core of the Ironbound, and much closer to the other struggling parts of Newark.

89 *See* United Community Corporation, Housing & Development: Low-Income Housing, http://www.unitedcommunitycorporation.org/low-income-housing.html.

90 New Community Corporation, About New Community, http://www.newcommunity.org/about/

91 Developer RPM Development Group won the 2002 Smart Growth Award from New Jersey Future, a smart-growth organization. See description of the project and its award at: http://www.njfuture.org/index.cfm?ctn=9t45e1o30v9g&emn=5u92y86g2h42&fuseaction=user.item&ThisItem=414

92 *See generally* Annex Table 4.1, *supra* note 14.

93 *See* New Community Corporation, About New Community Corporation, available at http://www.newcommunity.org/userimages/file/About%20NCC.pdf (stating the organization's "mission 'to help residents of inner cities improve the quality of their lives to reflect individual, God-given dignity and personal achievement.'").

in Newark but across the region and country. The extent to which LIHTC has or has broken down socioeconomic segregation is limited, and will be further assessed shortly.

LIHTC housing in Newark has been predominantly split between new low-rise, townhouse style developments that occupy entire blocks and rehabilitations of mid-rise apartment buildings. Most projects have produced between 50 and 150 units; LIHTC credits have not been used in Newark for small-scale projects such as rehabilitation of a single 3-unit house or duplex, although this is common in some cities. The largest single project yielded 754 units; only one other project- the Hill Manor Apartments on Martin Luther King Jr. Blvd—was nearly as large, and it has since been demolished.[94]

The quality of the housing produced in Newark appears to be quite high, and the developments, with the exception of the defunct Hill Manor (now replaced with low-rise housing), have had great staying power. The rehabilitations often produced affordable units in high-quality brick buildings in good locations; some of them overlook Weequahic Park, while another anchors the Lincoln Park neighborhood. Most have good transit availability, being located on or near Broad Street, Clinton Avenue, or Springfield Avenue. Lock Street Apartments and Bruce Street Gardens are unlike many of the developments in that they are adjacent to central Newark's major institutions like New Jersey Institute of Technology and University Hospital. These developments, in addition to the Tiffany Manor and the rehabilitated apartments along Lincoln Park and Weequahic Park, demonstrate that the LIHTC has not only housed the poor in traditionally poor neighborhoods, but is mixing quality, affordable housing into some more desirable and/or centrally located areas of Newark. Nonetheless, the concentration of large-scale low-rise developments placed among public housing and generally distressed neighborhoods of Newark's west side raises a red flag for many. Though these developments represent an improvement over public housing projects in terms of quality and layout and are truly ameliorating previously divested neighborhoods, they are not progressive in terms of fostering socioeconomic diversity.

Who lives in credit-produced housing? (Also a primer for Part III).

"Though these developments represent an improvement over public housing projects in terms of quality and layout and are truly ameliorating previously divested neighborhoods, they are not progressive in terms of fostering socioeconomic diversity."

A nationwide survey of LIHTC projects found that 14% of LIHTC projects had predominantly white residents, 77% have predominantly minority residents, and only 9% had substantial proportions of both.[95] The survey found that 44% of projects have about the same percentage of minority residents as their surrounding neighborhood; over half have a higher share of minority households than the neighborhood at large, suggesting a segregating impact.[96] 60% of LIHTC property residents nationwide were black, and 81% were racial/ethnic minorities; at non-profit properties, 96% of tenants were minorities.[97] The mean household income of LIHTC residents in 1999 was $18,449 (roughly the poverty line at that time), and at that time 27% of LIHTC households made under $10,000/year. Eleven percent of tenant households made more than $30,000/year.[98] Ten percent were receiving public income assistance, and 69% were currently working for pay.[99] Among LIHTC projects, six percent of households were using section 8 vouchers, and 31% were in units with project-based section 8; the mean annual household income of this group was just over $12,000.[100]

94 The project was a rehabilitation of a pre-existing high-rise project.

95 Buron, *supra* note 4, at xiii "Do LIHTC properties foster racial diversity?"

96 *Id.* at 4-19

97 *Id.* at 3-1

98 *Id.* at 3-3

99 *Id.*

100 *Id.* at 3-6, 3-19

Socioeconomic segregation and the LIHTC: should the LIHTC be used to reduce such segregation at a micro and/or macro scale?

LIHTC developments are usually 'islands of the poor.'

Developers rarely choose the minimum LIHTC set-asides; rather, they usually build and/or renovate with the goal of producing buildings entirely dedicated to rent-restricted units.[101] The stated aim of the LIHTC is to maximize provision of decent, affordable housing, but many are frustrated by the continuing clustering of poverty and the fact that the LIHTC has not been utilized to fight socioeconomic segregation.

The opportunity to use the LIHTC to generally socioeconomically diverse living arrangements has rarely been seized. In both urban and suburban developments, the tenant composition tends to be close to 100 percent low-income. In Mount Vernon, New York, only three of its 11 LIHTC projects had any market rate units, and those three projects were still roughly 90% low-income. Developments in Monticello, New Rochelle, and White Plains almost exclusively took the form of "islands of the poor" within relatively prosperous areas. Much the same held true in Yonkers, though it did have one notable example– St. James Terrace– where low-income units made up a portion of an otherwise market-rate development.

Of the hundreds of developments across New Jersey through 2007, only 21 had more than a nominal level of mixing between affordable units and market rate units, although it is clear that such socioeconomically mixed developments have drastically increased since 2000. Prior to 2000, only four New Jersey developments were mixed-income: the Tiffany in Newark, and small developments in East Orange, Montville, and Atlantic City. Since 2000, mixed-income developments have tended to appear in the booming cities along the Hudson River and in other suburban towns toward central New Jersey. The trend in North Jersey started with Lafayette Village in Jersey City, a new development focused on low-income housing, but with a significant reserve of market-rate apartments. Another early example was Marian Towers in Hoboken, a rehabbed building which reserved 32 of 156 units for market-rate renters. A similar development of over 100 units occurred in West New York. In 2005, two more projects became LIHTC compliant in Jersey City: Pacific Court and Journal Square tower. 21 of 72 units at the former are low-income, while the latter set aside roughly 20 percent of its 130 units for low-income tenants. Mixed-income developments have sprouted in Mount Laurel, Woodbury, Plainfield, Cresskill, Maple Shade (where there is a development with 293 LIHTC units out of 408 total), Camden, Trenton, and New Brunswick. A 2006 development in affluent West Orange offered 37 LIHTC units together with 16 market rate units. Nonetheless, fully low-income developments have remained the most common scenario for both suburban and urban developments.[102]

"Developments in Monticello, New Rochelle, and White Plains almost exclusively took the form of 'islands of the poor' within relatively prosperous areas."

Mixed-income developments in New Jersey are, thus, most likely to be found in areas with high housing demand where the dense, diverse surrounding neighborhoods already feature much demographic mixing (e.g., Jersey City), or in wealthy areas like Cresskill or West Orange where high median incomes allow for the rent-restricted LIHTC units to be rented by a tenant who is effectively middle class. Fully-dedicated LIHTC projects are mostly likely to be found in poor sections of inner cities like Newark, or in suburban areas where the developments are set aside as islands for affordable housing within an area of uniformly higher priced housing.

In 2003, public interest organizations in New Jersey, noting the lack of diversity in LIHTC

101 *See* discussion that follows about projects in general across New Jersey and New York. All data for this section comes from the *LIHTC Database.*

102 *See id* for all statistics.

developments, sued the New Jersey Housing Mortgage Finance Agency (NJHMFA), which allocates the state's share of tax credits, asserting that it was bound to "affirmatively further" the Federal Fair Housing Act by preventing discrimination and promoting integration.[103] "Armed with statistics highlighting the impact of the state agency's subsidized housing plan on segregation, the groups were rightfully concerned that the obligation was far from being met."[104] The New Jersey courts "declared that the state agency was bound by that duty and that all of its housing development activities, including the construction of its Qualified Allocation Plan ("QAP")– the means by which the state agency decides to award tax credits– also were subject to the obligation."[105] However, the court said that the NJHMFA had fulfilled its duties, and further, that race did not have to be taken into account.[106]

Regional integration and views on the Mt. Laurel's *role*

Given that LIHTC projects are predominately sited in poorer sections of New Jersey cities and rarely developed in the state's upper and middle class enclaves, it is clear that the allocation of LIHTC credits, viewed in isolation, has not been in accord with the regional sharing aim for provision of affordable housing articulated by the *Mt. Laurel* holdings.[107] The LIHTC, an incentive to build low-income housing, which attaches extra incentives for housing created in high-cost areas, would seemingly help New Jersey carry out its goals.[108]

There are two primary questions at this point: why has the LIHTC not been used as a tool for accomplishing the *Mt. Laurel* mandate, and should it even be such a tool?

As to the first question, New Jersey's LIHTC-allocating agency, the Housing & Mortgage Finance Agency, ought to have some input. There are several questions that it would be well suited to answer. 1) Has the demand for the LIHTC by inner city developers exhausted the credit's availability for suburban developments? 2) Have suburban developers even been interested in the LIHTC in a substantial way? 3) If such interest exists, has the NJHMFA's allocating strategy prioritized urban developments instead, and if not, does the NJHMFA believe it *could* successfully entice suburban developers to use the LIHTC by amending its Allocation Plan? Of course, at this point, we arrive a crucial normative question: are inner-cities in fact the better places to subsidize new and rehabbed affordable housing through means such as LIHTC, in spite of *Mt. Laurel*?

That second question invites a wide range of viewpoints. The New Jersey courts have already put forth one viewpoint. In 2004, the Appellate Division affirmed the use of LIHTC to target urban revitalization without regard to *Mt. Laurel*. In *In re 2003 QAP*, the court found that the New Jersey HMFA's mission was to increase the supply of affordable housing and revitalize New Jersey's urban areas.[109] The court approved the HMFA's 2003 allocation plan even though the "predominant focus [was] still on the allocation of tax credits to the urban areas."[110] Thus, if the state allocating agency does not shape its plans with regard to the *Mt.*

103 *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003 QAP),* 848 A.2d 11, 13 (N.J. Super. Ct. App. Div. 2004), cert. denied, *861 A.2d 846 (N.J. 2004).*

104 Shah, *supra* note 6, at 691

105 *Id.*

106 *Id.* at 691-92.

107 *See generally* Roisman, *supra* note 1. The Mount Laurel mandate states that "The New Jersey Constitution requires every developing municipality, through its land use ordinances, to provide a realistic opportunity for the construction of its fair share of the region's low and moderate income housing needs. Mount Laurel I, 67 N.J. at 174-75, 179-81, 187, 336 A.2d 713. Because the urban poor were disadvantaged by exclusionary zoning practices, the Court required every municipality, in its land use regulations, to provide a realistic opportunity for decent, affordable housing for the resident poor occupying dilapidated housing." In re Adoption of Uniform Housing Affordability Controls, 390 N.J. Super. 89, 93 (App.Div. 2007) (citing *Mount Laurel I*, 67 N.J. at 174-75, 179-81, 187).

108 *See generally* John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts* 20 Vermont L. Rev. 665, 673-680 (1996) (explaining the difficulty that many New Jersey municipalities experience in fulfilling their obligation to create affordable housing opportunities required under *Mt. Laurel*).

109 *In re 2003 QAP,* 848 A.2d 11, 14 (2004).

110 Shah, *supra* note 6, at 705

Laurel mandate, the judiciary will still approve such plans and refrain from making LIHTC allocations an object for the enforcement of its *Mt. Laurel* regime. Others, however, suggest the court take a different stance.

"[LIHTC] can serve a particular unmet need in *Mount Laurel*: that for subsidized rental housing," says Florence Wagman Roisman, who considers LIHTC to be one of the state's "best opportunities for promoting racial and ethnic desegregation as well as economic integration and mobility from urban to suburban areas."[111] Roisman broadly suggests that allocating agencies focus on site selection and tenant selection criteria to meet these goals with the tax credit. She also suggests affirmatively pairing section 8 voucher holders with housing developers using LIHTC, since voucher-holders generally cannot obtain housing in many suburb with the section 8 voucher alone.[112] Further, tax credit beneficiaries would have to sign an agreement where they agree to not deny housing to a prospective tenant on the basis of the section 8 voucher, under Roisman's proposal.[113] Roisman adds that the HMFA point system that decides which project proposals will receive the credit ought to give at least an extra point to projects that use section 8 waiting lists to find tenants, and that the State Attorney General's office and public interest groups should take measure to ensure that LIHTC project owners are complying with all non-discrimination laws.[114]

These and other possible avenues for harmonizing LIHTC with *Mt. Laurel* have gained the interest of some public interest lawyers and housing advocates who support that mandate and who are dissatisfied with the provision of tax credits in New Jersey to this point.[115] Their primary interest when it comes to integration is the distribution of low-income housing across all municipalities.[116] A more particular version of this view focuses on the lack of racial integration in LIHTC projects, spurring proposals that race be considered in allocating agencies' point systems.[117]

Yet another viewpoint is possible, and this paper ends by setting it out. This perspective suggests that the LIHTC, even if potentially helpful in achieving regional integration, actually has a higher and better use for which it is much more befitting. This view sets the *Mt. Laurel* mandate aside when discussing the LIHTC, and focuses on how socioeconomic integration can be achieved at a highly local level—on a project-by-project basis, for example. This approach acknowledges the benefits of further affordable housing development in central cities, and prefers LIHTC allocations in traditional urban neighborhoods that contain important infrastructure amenities—such as mass transit—that are crucial to low-income and upper-income tenants alike. This approach perceives affordable housing development in core urban areas as the best hope for achieving real socioeconomic integration through the LIHTC, especially in an era where more and more wealthy people are moving to urban centers. Instead of meeting this demand with housing developments built exclusively to house such wealthy new residents (thereby creating micro-level segregation), the LIHTC can be used to help developers meet the demand for affordable housing that exists contemporaneously with the considerable market-rate demand that attracted them to neighborhood.

This micro-focused approach posits that developers using the LIHTC should mix market-rate housing units with rent-restricted LIHTC-subsidized units. In this way, diverse tenants will be integrated in a very real way—living under the same roof and becoming invested in the same neighborhood.[118] The LIHTC program countenances this very usage

111 Roisman, *supra* note 1, at 1405.

112 *Id.* at 1414-15.

113 *Id.*

114 *Id.*

115 *See generally id.* at 1405-15; Shah, *supra* note 6.

116 *See generally* Roisman, *supra* note 1, at 1405-15; Shah, *supra* note 6 (with a particular and laudable interest in the relation between integration and the quality of local education).

117 *See generally* Shah, supra note 6, at 706-11

118 This was accomplished once thus far in Newark, and once in nearby West Orange. In the increasingly

"This approach perceives affordable housing development in core urban areas as the best hope for achieving real socioeconomic integration through the LIHTC..."

of the tax credit in the manner that it allows developers to enjoy the credit when their development contains rent-restricted units on the order of 40 percent of the total units, or even as low as 15 percent in some scenarios.[119] If developers were encouraged to avail themselves of these minimum set-asides in becoming qualified for LIHTC funding, and if the HMFA showed a preference for such proposals in its Allocation Plans, the LIHTC could accomplish the most direct form of socioeconomic integration possible (albeit a type of integration not addressed by the *Mt. Laurel* mandate). Further, the annual impact of the LIHTC in terms of actual affordable housing units created would not change; rather, the subsidy for affordable units would simply be spread out across more developments in more locations.

Encouraging this use of the LIHTC is consistent with other policy goals in New Jersey, such as smart growth,[120] transit oriented development,[121] and the successful revitalization of 'areas in need of redevelopment.'[122] Simply put, a program which entices housing development and increased population density in a city center is more amenable to New Jersey's overall urban policy than a program used to disperse people across the landscape.

Reasonable people can, and do, disagree on which of these viewpoints pursues a more important priority, and on whether achieving the *Mt. Laurel* regime is more socially beneficial than small-scale integration and urban revitalization. It is hard to disagree, however, about the fact that segregation is continuing, and that, despite avenues for avoiding it, it is symptom that has persisted in spite of the benefits provided by the Tax Credit for Low Income Housing.

Afterword

This paper has explored the LIHTC's raw impact, made basic observations that are troubling for those interested in integration (whether regional or local), and made a distinct proposal for the ideal use of the LIHTC in New Jersey and elsewhere. However, as the final subsection made clear, there are many unanswered questions that call for an explanation of the prevailing trends in LIHTC usage up to this point. Such questions will remain unanswered until new, probative research accompanies more recent and comprehensive statistics about LIHTC usage (HUD's LIHTC database lags three to four years behind). Answers may be provided if agencies like the NJHMFA provide their own statistics on who is seeking and receiving LIHTC credits. This paper calls on these parties to develop such a resource for the benefit of those wishing to understand the LIHTC's role in producing affordable housing and accomplishing integration.

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prosperous central neighborhoods of Jersey City, this mixing has also been achieved in a handful of developments.

119 *See* text accompanying footnote 16, *supra.*

120 *See*, *e.g.*, Municipal Land Use Law: Purposes of the Act, N.J. Stat. Ann. § 40:55D-2 (West 2011); State Planning Act, N.J. Stat. Ann. § 52:18A-196 (West 2011); *see also* Andres Duany, Elizabeth Plater-Zyberk & Jeff Speck, Suburban Nation: The Rise of Sprawl and the Decline of the American Dream 230 (2001) ("New Jersey's visionary law establishes a clear ideal for the full range of models, from rural conservation to urban redevelopment.").

121 *See generally* Gregory K. Ingram et al., Smart Growth Policies: An Evaluation of Programs and Outcomes 177-87 (Lincoln Institute 2009) (noting that one of New Jersey's top priorities has been to "revitalize the state's urban centers" by building up dense, transit-connected "nodes.").

122 *See generally* Biglin, *supra* note 23, at 290 ("…much municipally condemned land lies fallow or poorly used in spite of even the best redevelopment plans having once been proferred.")

Appendix

Computing and using the credit (supplement to Part I Sections A and C).

The size of the credit received, which is to be reduced from the final tax bill, is computed by multiplying the 'qualified basis' of each approved low-income project by the 'applicable percentage' for the building.[123]

The qualified basis is given by multiplying a project's eligible basis by its applicable fraction (low-income occupancy rate).[124] The eligible basis includes construction costs of "facilities for the use of the tenants, other facilities reasonably required by the project, and amenities (e.g., appliances and air conditioning units) to the extent that the cost of such facilities and amenities in the low-income units are comparable to the cost of the items in any unsubsidized" units in the development.[125] The land costs, the costs of market rate units, and financing costs are not part of the basis for the credit.[126] The costs of residential common areas, a unit occupied by a full-time security officer, and "facilities reasonably required by the project" are includable.[127] The eligible basis as determined by the costs above is reduced by the amount of any federal grants made to the building during the ten-year compliance period.[128] The applicable fraction applied to this is the smaller of the "unit fraction" or the "floor space fraction," which simply denotes the fraction of units in the building that are low-income and the fraction of the floor space which is reserved for low-income tenants, respectively.[129]

For any building located in a HUD-designated 'qualified census tract' or 'difficult development area,' "the building's eligible basis is 130 percent of what it would otherwise be under the rules."[130] Qualified census tracts are those where more than half of the households have incomes less than 60 percent of the median gross income or where the poverty rate is 25 percent or higher; difficult development areas are any area which HUD designates as having high construction, land, and utility costs relative to area median gross income, but encompassing not more than 20% of the population of a metropolitan area.[131]

An across-the-board requirement for rehabilitations of extant buildings is that the building must have been acquired by purchase (not through nontaxable exchange), must not have been previously substantially improved (if at all) in the ten years before acquisition, and must not have previously been in service as a LIHTC property.[132]

To determine the size of the credit, the qualified basis is multiplied by an applicable percentage rate determined by the IRS which floats slightly from month to month, holding around 8 percent for new construction and major rehabilitations, and around 3 percent for most rehabilitations and projects where the developer has other received federal subsidies. [133]The applicable percentage at the time of the tax credit award is the percentage that applies each year for the length of the credit. Over the 10-year credit period, this means the present value of the credit is roughly 70 to 80 percent of the qualifying costs of new buildings and major rehabilitations, and roughly 30 percent of the same for other buildings.[134]

123 Dietz, *supra* note 13, at 15202.

124 Bender, *supra* note 2, at § 5.04[4]. If a building is used as transitional housing for the homeless, the qualified basis is increased by the lesser of either the costs of providing support services to assist tenants in finding permanent housing or 20 percent of the qualified basis of the building. See Dietz, supra note 13, at 15206.

125 Bender, *supra* note 2, at § 5.04[4][b].

126 *Id.*

127 Dietz, *supra* note 13, at 15209.

128 *Id.* at 15207.

129 *Id.* at 15206.

130 *Id.* at 15208.

131 *Id.*

132 *Id.* at 15209.

133 *Id*. at 15202, 15205

134 *Id.*