

Fordham Urban Law Journal

Volume 48

Number 5 *A Taxing War on Poverty: Opportunity Zones and The Promise of Investment and Economic Development*

Article 4

2021

Clarifying Nonprofit Purchase Rights in Affordable Housing

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Brandon M. Weiss, *Clarifying Nonprofit Purchase Rights in Affordable Housing*, 48 Fordham Urb. L.J. 1159 (2021).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol48/iss5/4>

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CLARIFYING NONPROFIT PURCHASE RIGHTS IN AFFORDABLE HOUSING

*Brandon M. Weiss**

Disputes around the country are proliferating as limited partner investors attempt to thwart the ability of nonprofits to exercise statutorily defined rights of first refusal to acquire low-income housing tax credit developments upon the expiration of rent restrictions. Such efforts, increasingly being made by “aggregator” investors, frustrate congressional intent, violate long-held norms and expectations in the industry, are costly for nonprofits to litigate, jeopardize the ongoing affordability of an already scarce federally assisted housing stock, and threaten to displace low-income tenants. This Essay describes the problem, explores the collision of housing policy and tax policy that gives rise to it, considers various conceptual approaches to resolution, and provides specific policy recommendations using the Affordable Housing Credit Improvement Act of 2019 as a point of departure. The Essay argues that working with Congress to address this problem should be a higher policy priority for the Biden Administration than attempting to salvage former President Trump’s flawed Opportunity Zone initiative.

Introduction	1160
I. Background	1164
A. The LIHTC Framework	1164
B. The ROFR Provision.....	1166

* Associate Professor of Law, American University Washington College of Law. I would like to thank Cristina Lombardi and Charlie Metzger for their outstanding work organizing the 2021 symposium of the *Fordham Urban Law Journal*. Thanks also to Stephen Rutman, Shazell Archer, and Kevin Winnie for excellent assistance editing this Essay. The piece greatly benefited from discussions with Ted De Barbieri, Ellen Lurie Hoffman, Tracy Kaye, Matthew Lustbader, Bobby Rozen, and Blaine Saito. I am indebted to Jim Grow of the National Housing Law Project for his assistance with this project and for his mentorship over many years.

C. The Proliferation of Disputes.....	1168
II. Housing Policy and Tax Policy Mismatch	1172
A. Evolving Housing Policy.....	1172
B. A Collision with Tax Policy	1173
C. Theoretical Approaches to Resolving the Mismatch.....	1175
III. Addressing the ROFR Problem.....	1176
A. Federal Level	1176
B. State Level	1180
Conclusion	1182

INTRODUCTION

Two important questions emerged during the excellent symposium hosted by the *Fordham Urban Law Journal* in February 2021 on the topic of *A Taxing War on Poverty: Opportunity Zones and the Promise of Investment and Economic Development*. The final panel of the day addressed the future of Opportunity Zones,¹ former President Trump’s primary economic development initiative, under the new Biden Administration. Given the panoply of critiques that have been levied at Opportunity Zones,² the panel concluded the day by considering a couple of key issues: 1) what else might the federal government do with the billions of dollars in annual forgone tax revenue in lieu of providing the Opportunity Zone incentives and 2) given scarce policymaking bandwidth, what else might be a higher priority in the new administration’s community development policy agenda than salvaging this troubled Trump initiative. Elsewhere, I am writing on the former, arguing that the foregone revenue would be better spent increasing direct rental assistance to the lowest-income U.S. households.³ This

1. Congress created the Opportunity Zone program as part of the Tax Cuts and Jobs Act of 2017. *See* Pub. L. No. 115-97, § 13823, 131 Stat. 2054, 2183 (codified at 26 U.S.C. §§ 1400Z-1, 1400Z-2). The program provides a variety of tax incentives to taxpayers who invest capital gains in certain designated “low-income communities.” *See id.*

2. *See, e.g.*, Edward W. De Barbieri, *Opportunism Zones*, 39 YALE L. & POL’Y REV. 82 (2020) (highlighting corruption in the designation of Opportunity Zones, absence of use restrictions on eligible investments, and lack of community participation). Much of the *Fordham Urban Law Journal* symposium centered on considering critiques of the program.

3. *See* Brandon M. Weiss, *Opportunity Zones, 1031 Exchanges, and Universal Housing Vouchers*, 110 CALIF. L. REV. (forthcoming 2022) (critiquing the Opportunity Zone program as based on a flawed theoretical model and arguing that the value of the tax incentives would be better directed toward low-income rental assistance).

brief Essay considers the latter and offers one time-sensitive alternative.

Unlike the Opportunity Zone program, which does not require the provision of any particular goods or services,⁴ the federal Low-Income Housing Tax Credit (LIHTC)⁵ program has produced more than three million units of generally high-quality affordable housing for low-income households across the United States.⁶ While also no stranger to critique,⁷ the program remains politically popular on a bipartisan basis — Congress recently significantly increased the tax credit⁸ and is currently considering legislation to do so again.⁹ Biden campaigned on a promise to expand the credit “with a \$10 billion investment.”¹⁰ LIHTC essentially is the only significant federal program that provides annual support for the construction of new low-income housing. As a

4. See, e.g., Michelle D. Laysner, *The Pro-Gentrification Origins of Place-Based Investment Tax Incentives and a Path Toward Community Oriented Reform*, 2019 WIS. L. REV. 745, 770 (2019) (noting that businesses can claim Opportunity Zone incentives without providing any specific local benefits).

5. Congress created the Low-Income Housing Tax Credit program as part of the Tax Reform Act of 1986. Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189–208 (codified as amended at 26 U.S.C. § 42). For a comparison of the LIHTC and Opportunity Zone programs, see Tracy A. Kaye, *Ogden Commons Case Study: A Comparative Look at the LIHTC and OZ Tax Incentive Programs*, 48 FORDHAM URB. L.J. (forthcoming Oct. 2021).

6. See *Low-Income Housing Tax Credit (LIHTC)*, U.S. DEP’T HOUS. & URB. DEV., <https://www.huduser.gov/portal/datasets/lihtc.html> [<https://perma.cc/9WPE-6VF6>] (last visited Aug. 25, 2021) (stating that the program created at least 3.23 million housing units in 48,672 projects between 1987 and 2018).

7. Critiques have included that LIHTC is inefficient, fails to reach the lowest-income tenants without additional subsidy, can result in higher rent-burdens for tenants than other federal housing programs, and fails to adequately locate housing in high-opportunity neighborhoods. See, e.g., Katherine O’Regan & Keren Horn, *What Can We Learn About the Low-Income Housing Tax Credit Program by Looking at the Tenants?*, 23 HOUS. POL’Y DEBATE 597 (2013).

8. See Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 102, 131 Stat. 348, 1157 (increasing the amount of tax credits that states can allocate by 12.5% for calendar years 2018 through 2021).

9. See Affordable Housing Credit Improvement Act of 2021, S. 1136, 117th Cong. § 101 (as introduced on Apr. 15, 2021); see also Dirk Wallace & Peter Lawrence, *2021 Affordable Housing Credit Improvement Act Could Finance More than 2 Million Additional Affordable Rental Homes over 10 Years*, NOVOGRADAC (Apr. 15, 2021, 12:00 AM), <https://www.novoco.com/notes-from-novogradac/2021-affordable-housing-credit-improvement-act-could-finance-more-2-million-additional-affordable> [<https://perma.cc/G2YF-MCHK>] (noting that the bill would result in a 25% increase in LIHTC authority in 2021 and 2022).

10. See *The Biden Plan for Investing in our Communities Through Housing*, BIDEN HARRIS, <https://joebiden.com/housing/> [<https://perma.cc/A2ZY-GG9E>] (last visited Aug. 25, 2021).

permanent tax credit created in 1986 that appears here to stay, it is worth improving.

Unfortunately, as discussed herein, disputes are proliferating around the country that threaten the ongoing affordability of LIHTC housing of a particular type: namely, projects owned by nonprofit developers that are nearing the end of their initial restricted use term.¹¹ The disputes center on limited partner investors in LIHTC projects attempting to thwart the ability of nonprofit general partners to exercise statutorily and contractually defined “rights of first refusal” (ROFRs) to purchase a given project at the end of the initial compliance period from the tax credit partnership at below-market levels set by Congress. Such efforts by investors — described herein as the “ROFR problem” — frustrate congressional intent, violate long-held norms and expectations in the industry, are costly for nonprofits to litigate, jeopardize the ongoing affordability of an already scarce federally assisted housing stock, and threaten to displace low-income tenants. Investors use such efforts to, for example, pressure nonprofits into buying them out at high prices or force lucrative sales of the projects to third parties.¹² The fact that these efforts are increasingly being made by so-called “aggregators,”¹³ new investors not party to the original partnership that purchase LIHTC interests nearing the end of their initial rent-restricted terms, is all the more reason for alarm.

These disputes have begun to draw media coverage and broader attention to the issue.¹⁴ In one high profile case in southern Florida not far from Miami Beach, a nonprofit has spent \$1.5 million litigating the ROFR issue against HallKeen Management, a Massachusetts-based investor that purchased Bank of America’s interests in a LIHTC project for approximately \$400,000 and then sought to force a sale to a third party for \$21 million.¹⁵ In another case involving a Brooklyn

11. See *infra* Section I.A. for a discussion of the relevant LIHTC timelines, including the initial restricted use term.

12. See *infra* notes 39–43 and accompanying text.

13. See, e.g., Brandon Duong, *Losing Nonprofit Control of Tax Credit Housing?*, SHELTERFORCE (Oct. 16, 2020), https://shelterforce.org/2020/10/16/refusing-the-right-to-refuse/?utm_source=sfweekly&utm_medium=email&utm_campaign=101920 [<https://perma.cc/LK9Q-HNBM>] (describing the “rise of aggregators”). The term “aggregator” presumably comes from their propensity to buy up many such interests.

14. See, e.g., Beth Healy & Christine Willmsen, *Investors Mine for Profits in Affordable Housing, Leaving Thousands of Tenants at Risk*, WBUR (Apr. 29, 2021), <https://www.wbur.org/investigations/2021/04/29/investors-low-income-housing-boston-south-end> [<https://perma.cc/D5DU-3RLP>]; Duong, *supra* note 13.

15. See *Opa-Locka Cmty. Dev. Corp. v. HK Aswan, LLC*, No. 2019-16913-CA-01 (44), 2020 WL 4381624 *2–4 (Fla. Cir. Ct. July 7, 2020); see also Healy & Willmsen, *supra* note 14.

affordable housing complex in the gentrifying neighborhood of Bushwick, New York State Attorney General Letitia James filed an amicus brief in a ROFR dispute supporting the nonprofit developer against SunAmerica Housing, an investor affiliate of American International Group, Inc. (AIG).¹⁶ Such cases are likely to grow significantly in number as, year after year, an increasing number of LIHTC developments reach the end of their initial use restriction periods.

Part I of this Essay provides relevant background on the LIHTC program as outlined in Section 42 of the tax code, describes how the ROFR problem arises within this legislative framework, and presents a snapshot of the disputes unfolding around the United States. Part II explores on a theoretical level how the problem emerges as a mismatch between modern housing policy and tax policy: modern housing policy attempting to leverage private sector involvement in the delivery of low-income housing without sacrificing long-term affordability and tax policy requiring that investors be “true owners” of real estate projects in order to reap the tax incentives. This Part also considers several varying conceptual approaches to resolving this mismatch. Part III takes up the least disruptive and most politically palatable approach to resolution — within the context of the current LIHTC framework — and considers how the Biden Administration can work with Congress to resolve the problem legislatively, using the Affordable Housing Credit Improvement Act of 2019 as a point of departure. It also argues that state housing finance agencies should amend their credit allocation

16. See Brief for State of New York and City of New York as Amici Curiae, *Riseboro Cmty. P’ship Inc. v. Sun America Hous. Fund* 682, No. 20-4223 (2d. Cir. Apr. 14, 2021), https://ag.ny.gov/sites/default/files/riseboro_v_sunamerica_nys_and_nyc_amicus_brief_as_filed.pdf [<https://perma.cc/54UX-9X28>] (“The bottom line is that amici’s significant investments in the LIHTC space would be threatened by profit-driven entities taking ownership at the end of the tax credit period — or even just refusing to leave without additional concessions. Such entities, unlike housing non-profits, have no inherent commitment to preserving affordability. Should the widespread and longstanding norm of long-term non-profit ownership be upended, this sea change would jeopardize the benefits created by amici’s investments, enable for-profit investors to reap financial returns from those public investments beyond what the LIHTC program already generously provides, and undermine amici’s efforts to create and preserve desperately needed affordable housing.” (citations omitted)); see also Press Release, N.Y. Att’y Gen., Attorney General James Fights to Protect Affordable Housing in New York (Apr. 15, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-fights-protect-affordable-housing-new-york> [<https://perma.cc/VA2C-TAYX>] (“For private investors to try and skew the terms of this affordable housing program for their own financial gain is as harmful as it is unethical.”); Healy & Willmsen, *supra* note 14.

rules to ensure that tax credits flow to projects with strong nonprofit purchase rights.

If the Biden Administration hopes to prioritize community development policies that are certain to have an immediate and positive impact on the lives of low-income U.S. households, it will place the ROFR problem at the top of its policy agenda and work swiftly with Congress to enact a legislative fix.

I. BACKGROUND

A. The LIHTC Framework

Congress created the Low-Income Housing Tax Credit (LIHTC) program as part of the Tax Reform Act of 1986.¹⁷ Successor to the public housing program as the dominant means by which the federal government provides financial assistance for the development of low-income housing, the program is based on a model of leveraging private sector equity and expertise.¹⁸ Elsewhere, I have described the mechanics at length.¹⁹ For relevant purposes here, a typical transaction involves a real estate developer applying to a state housing finance agency for an award of federal tax credits. If the application is successful, the developer generally enters into a limited partnership as the general partner with a private investor limited partner — usually a bank or other large financial institution with the annual tax liability to make the nonrefundable credits of value.²⁰ The limited partner investor provides the equity needed to build a new affordable housing development and, in exchange, the partnership allocates the lion's share of the tax credits, depreciation deductions, and other tax benefits

17. Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189–208 (codified as amended at 26 U.S.C. § 42).

18. The federal government experimented with a number of other programs to subsidize the development of low-income housing prior to arriving at the LIHTC model. See generally Charles L. Edson, *Affordable Housing — An Intimate History*, 20 J. AFFORDABLE HOUS. & CMTY. DEV. L. 193 (2011).

19. See, e.g., Brandon M. Weiss, *Residual Value Capture in Subsidized Housing*, 10 HARV. L. & POL'Y REV. 521 (2016) (detailing the mechanics of the LIHTC program and arguing for a nonprofit developer preference in original LIHTC allocations).

20. See OFF. OF THE COMPTROLLER OF THE CURRENCY, *LOW-INCOME HOUSING TAX CREDITS: AFFORDABLE HOUSING INVESTMENT OPPORTUNITIES FOR BANKS 6–9* (2014), <https://www.occ.gov/publications-and-resources/publications/community-affairs/community-developments-insights/pub-insights-mar-2014.pdf> [<https://perma.cc/PL7C-X6YE>].

to the investor. These benefits alone typically provide the investor with a healthy return on investment.²¹

Relevant timeframes are key to understanding the ROFR problem. Section 42 of the tax code provides that investors claim the tax credits annually for ten years.²² LIHTC housing is subject to certain income-eligibility requirements and rent limits for an initial 15-year compliance period²³ and, for projects starting in 1990, an additional 15-year extended use period.²⁴ For the first 15 years, the tax credits are subject to recapture by the Internal Revenue Service (IRS) if, for example, the developer violates the rent or income restrictions or if the project falls into serious physical or financial distress.²⁵ After the first 15 years, tax credit recapture by the IRS is off the table and state housing agencies are primarily responsible for programmatic enforcement.

Both for-profit and nonprofit developers are eligible to apply to state housing finance agencies for an award of LIHTCs. In addition to other benefits,²⁶ nonprofits generally are much more likely than for-profits to maintain rents at below-market levels even beyond the

21. See, e.g., ERNST & YOUNG, LOW-INCOME HOUSING TAX CREDIT INVESTMENT SURVEY 6 (2009), https://www.nahma.org/wp-content/uploads/files/member/Tax%20Credit/Legislative%20Study_FINAL%20092509.pdf [<https://perma.cc/J3BZ-HSDM>] (noting average annual after-tax internal rates of return of approximately 10%); COHNREZNICK LLP, HOUSING TAX CREDIT INVESTMENTS: INVESTMENT AND OPERATIONAL PERFORMANCE 24 (2018) (noting that on a weighted average basis, actual yields have exceeded projected yields since 2000). Note that in addition to the financial benefits of LIHTC investments, banks that invest in LIHTC also receive valuable regulatory credit under the Community Reinvestment Act. *Id.* at 15 (“Banks are obligated, under the Community Reinvestment Act (CRA) regulations, to make loans, provide services, and make investments in low- to moderate-income neighborhoods in those areas in which they take deposits. . . . The strong financial performance track record of housing tax credit investments has historically been an ideal match for bank investors with a conservative focus. There are a limited number of qualified equity investments under CRA regulations, and many of these have less attractive yield and/or risk profiles than housing credit investments. Among the available investment options, housing credit investments appear to be a clear investor favorite.”).

22. 26 U.S.C. § 42(b)(1)(B).

23. *Id.* § 42(i)(1).

24. *Id.* § 42(h)(6)(D); see also *What Happens to LIHTC Properties After Affordability Requirements Expire?*, HUD USER, https://www.huduser.gov/portal/pdredge/pdr_edge_research_081712.html [<https://perma.cc/4PW5-FSDH>] (last visited Sept. 3, 2021).

25. See 26 U.S.C. § 42(j).

26. Nonprofit-developed affordable housing has been found to be more likely to provide the deepest levels of affordability, provide on-site social services for special needs, include larger units for families, and have other positive spillover effects on a neighborhood. See Weiss, *supra* note 19, at 552.

expiration of legally required restrictions.²⁷ As such, Section 42 requires that states award at least 10% of their tax credits to projects that involve nonprofit developers, though states may exceed that floor.²⁸

B. The ROFR Provision

Hoping to promote long-term affordability, Congress included a provision in Section 42 to facilitate the ability of nonprofit developers to buy out the limited partner investor after the initial 15-year compliance period.²⁹ The provision, Section 42(i)(7), is structured as a safe harbor — it ensures that none of the tax credits allocated to the investor will be disallowed by the IRS as the result of a qualified tax-exempt nonprofit holding a below-market “right of first refusal” to purchase the property after the initial 15-year compliance period.³⁰ In a typical real estate transaction, a “right of first refusal” grants the holder the right to purchase the property if the holder is willing to match the price of a third-party offer. However, in this case, the tax

27. See OFF. OF POL’Y DEV. & RSCH., U.S. DEP’T OF HOUS. & URB. DEV., MULTIFAMILY PROPERTIES: OPTING IN, OPTING OUT AND REMAINING AFFORDABLE ix (2006) (analyzing HUD data related to HUD-subsidized housing and noting, “As expected, nonprofit owners were much less likely to opt out [of the subsidy program] compared with for-profit owners. Nonprofit owners are often mission-driven to continue to provide affordable housing”); see also OFF. OF POL’Y DEV. & RSCH., U.S. DEP’T OF HOUS. & URB. DEV., WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND 7 (2012) [hereinafter HUD Y15 REPORT] (“Other factors also affect whether LIHTC properties will be repositioned to market rate. Many developments have socially motivated sponsors, often nonprofits whose mission is to create and preserve affordable housing in their neighborhoods. Even if no additional affordability restrictions prevent these organizations from converting properties to market rate, they typically maintain the units’ affordability to achieve their mission.”).

28. See 26 U.S.C. § 42(h)(5).

29. See *Homeowner’s Rehab, Inc. v. Related Corp. V SLP, L.P.*, 99 N.E.3d 744, 756 (Mass. 2018) (“The legislative history of § 42(i)(7) confirms that it was intended to facilitate the inexpensive transfer of properties to nonprofit organizations. . . . Lawmakers were concerned that properties financed under the LIHTC program would not remain affordable in the long term, because their owners would convert them to market-rate housing — or sell them to third parties who would — as soon as the affordability restrictions were lifted. . . . Their proposed solution was to make it easier for nonprofit organizations to purchase the properties.” (citations omitted)).

30. See 26 U.S.C. § 42(i)(7)(A) (“No Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified low-income building merely by reason of a right of 1st refusal held by the tenants (in cooperative form or otherwise) or resident management corporation of such building or by a qualified nonprofit organization (as defined in subsection (h)(5)(C)) or government agency to purchase the property after the close of the compliance period for a price which is not less than the minimum purchase price determined under subparagraph (B).”).

code defines *ex ante* the price at which the nonprofit will purchase the project upon the exercise of a Section 42 ROFR: essentially, the outstanding debt on the property plus any “exit taxes” that result from the sale — a price often referred to as “debt plus taxes.”³¹ As a safe harbor, the provision does not require that LIHTC partnerships grant nonprofit general partner developers a ROFR. Rather, the provision simply ensures that if a nonprofit successfully bargains for a below-market ROFR in the context of a LIHTC deal, other principles of tax law, discussed in Part II *infra*, will not operate to disallow the claiming of LIHTCs by the investor.

Notwithstanding the non-mandatory safe harbor nature of the provision, as the LIHTC industry matured in the years following the credit’s creation in the 1986 tax overhaul, ROFRs drafted pursuant to Section 42(i)(7) became a standard feature of LIHTC deals involving nonprofit developers.³² Investors viewed the tax credits, claimed over the first ten years, as their primary economic incentive for doing these deals.³³ By the end of the initial 15-year compliance period, all credits have been claimed and IRS recapture is no longer a threat.³⁴ Analysis of investor prospectus documents forecasting expected profits in nonprofit-developed LIHTC deals reveal that investors historically did not assume significant gains from the sale of the property at the end of the initial compliance period.³⁵ The general expectation was that investors would happily exit the partnership so long as any tax liability incurred from the exit was covered.

31. *See id.* § 42(i)(7)(B).

32. *See* WASH. STATE HOUS. FIN. COMM’N, NONPROFIT TRANSFER DISPUTES IN THE LOW INCOME HOUSING TAX CREDIT PROGRAM: AN EMERGING THREAT TO AFFORDABLE HOUSING 4 (2019) [hereinafter WSHFC REPORT] (“This nonprofit right of first refusal . . . is an important component of the program that has facilitated nonprofit ownership of many LIHTC projects. As a matter of industry practice, nonprofit partners have commonly secured this right in their LIHTC partnership agreements, sometimes supplemented with other transfer rights the parties have negotiated. Investors have consistently agreed to this arrangement at the outset because they generally foresee ‘little economic motivation to stay’ after all tax credits have been claimed from the project, and prefer to avoid ‘administrative burdens’ and related project costs many years into the future.” (citations omitted)).

33. *Id.*

34. *See supra* notes 22, 25, and accompanying text.

35. *Id.* at 4 (“For decades, the widespread expectation and practice has been that the nonprofit partners will secure ownership of LIHTC projects as a matter of course after the 15-year compliance period, usually by exercising the statutory ROFR at the specified minimum price. In most deals, the original financial projections will confirm that ultimate transfer to the nonprofit partner at the statutory ROFR price was the operating assumption of all parties.”).

For many years, the program operated according to this expectation with projects regularly transferred to nonprofits pursuant to Section 42 ROFRs.³⁶ By one estimate contained in a 2012 report by the U.S. Department of Housing and Urban Development (HUD), 95% of such properties were transferred to the original nonprofit developer post-initial compliance period.³⁷

C. The Proliferation of Disputes

Over the last several years, however, a new trend in the field has emerged, leading to burgeoning disputes around the country. As a growing number of LIHTC developments have reached the end of their initial compliance period, various financial entities began to see an opportunity at this critical moment in the life of the project to extract value. In some instances, these entities are the original investor limited partner.³⁸ But in an increasing number of cases, new investors, sometimes referred to as “aggregators,” buy out original investor limited partner interests in nonprofit-developed LIHTC partnerships with projects approaching year 15.³⁹ Investors in these disputes use a variety of tactics to pressure nonprofits⁴⁰ — for example, refusing to consent to applications for financing to conduct necessary capital

36. See HUD Y15 REPORT, *supra* note 27, at xiii (“By far the most common pattern of ownership change around Year 15 is for the LPs to sell their interests in the property to the general partner (GP) (or its affiliate or subsidiary) and for the GP to continue to own and operate the property. This pattern is overwhelmingly the case for properties with nonprofit developers.”).

37. *Id.* at 29.

38. See WSHFC REPORT, *supra* note 32, at 1.

39. See David Davenport, *Year 15: Facing off with the Aggregator — Newcomers Try to Toss Partnership Intent Out the Window*, in TAX CREDIT ADVISOR 27, 27 (2019) (“An aggregator — unlike a typical syndicator or investor that developers have worked with for years — is someone new to the general partner, who was not part of the initial transaction that led to the LIHTC partnership or affordable housing development, and who may view the partnership and its development as a financial instrument rather than an affordable housing real estate investment. As a result, once the development reaches the end of the compliance period, the aggregator aggressively may seek to dispose of the limited partner’s interest in the project partnership or company to achieve a cash windfall inconsistent with the original tax credit investor’s (and the real estate developer’s) intentions and expectations . . .”).

40. See WSHFC REPORT, *supra* note 32, at 5 (“These include disputing the conditions and scope of transfer rights; delaying, obstructing, and disagreeing with related valuations; refusing consent to refinancing, either outright or by placing significant conditions on consent; disputing fee calculations; arguing over typographical errors; and asserting alleged breaches of partnership duties from many years prior, including by arguing that rents should have been set higher to maximize profits.”).

improvements.⁴¹ Frequently, investors seek a payment in exchange for their exit from the partnership.⁴² An alternative approach is to insist on a sale to a third party.⁴³ Other efforts focus on removing the nonprofit general partner from the partnership, for example, via claims of breach of fiduciary duties.⁴⁴ With control of the project, an investor can attempt to eliminate the extended rent and income restrictions on the property through a technical procedure known as the “qualified contract” process.⁴⁵ Alternatively, investors can simply wait until the extended use restrictions expire and convert the property to market-rate use or sell to a third party that sees long-term upside value.

In all cases where a nonprofit holds a Section 42 ROFR, these various investor efforts can only succeed if the nonprofit cannot successfully acquire the property pursuant to the ROFR. Resource-constrained nonprofits often find themselves unable to challenge investor practices or enforce their rights under a ROFR in court.⁴⁶ Yet,

41. See NAT'L HOUS. TR., WHAT HAPPENS WHEN AN INVESTOR REFUSES TO RECOGNIZE THE NONPROFIT RIGHT OF FIRST REFUSAL 1 (2021) (noting that “[i]n a typical ROFR dispute, the prudent management of the affordable housing property is essentially frozen as the investor refuses to permit the general partner to undertake necessary capital improvements” and explaining how such disputes can lead to deteriorating property conditions, curtailed resident services, and an overall shorter useful life for the project).

42. See WSHFC REPORT, *supra* note 32, at 6; see also NAT'L HOUS. TR., *supra* note 41, at 2 (noting that, depending on the source of funds, such payments can have a variety of detrimental impacts, including reduced project reserves, increased property rents, additional debt on the property, or a significantly reduced balance sheet for the nonprofit).

43. See NAT'L HOUS. TR., *supra* note 41, at 2.

44. Compare Senior Hous. Assistance Grp. v. Amtax Holdings 260, LLC, No. C17-1115RSM, 2019 WL 687837, at *8 (W.D. Wash. Feb. 19, 2019) (rejecting the investor's claim that the nonprofit general partner should be removed from the partnership for breaching its fiduciary duty by soliciting third-party offers in an attempt to trigger its ROFR), with SunAmerica Hous. Fund 1050 v. Pathway of Pontiac, Inc., No. 19-11783, 2021 WL 391420, at *6 (E.D. Mich. Feb. 4, 2021) (holding that the nonprofit general partner violated its fiduciary duties “by attempting to effectuate a transfer of the Property . . . for a below market value against the interest of the Plaintiff and the Partnership”).

45. See HUD Y15 REPORT, *supra* note 27, at 38–39 (describing the qualified contract process by which an owner can seek regulatory relief from the extended use restrictions). Free from the rent restrictions, investors can seek to raise rent levels significantly to market levels — a particularly appealing strategy in already expensive or gentrifying neighborhoods. State-specific policies may limit an investor's ability to use the qualified contract process. Note that program rules protect tenants from eviction for a three-year period following termination of the rent restrictions via the qualified contract process. See 26 U.S.C. § 42(h)(6)(E)(ii).

46. See WSHFC REPORT, *supra* note 32, at 6 (“Though some nonprofits fight back, many lack the resources or will to do so Based on the sheer volume of litigation alone to date, it is obvious that substantial revenues have already been diverted from

in a number of cases around the country — in states including Florida,⁴⁷ Washington,⁴⁸ Massachusetts,⁴⁹ New York,⁵⁰ Michigan,⁵¹ and in what appears to be a rapidly expanding list⁵² — litigation has emerged in recent years over the exercise of Section 42 ROFRs.⁵³

While a comprehensive review of the litigation is beyond the scope of this Essay, the cases generally revolve around disagreements as to the requisite conditions precedent that must be satisfied for a nonprofit to exercise its purchase rights under Section 42(i)(7). Two key and related issues are central to these arguments: 1) whether the consent of the partnership and/or investor limited partner to sell the property is necessary for the nonprofit to exercise its ROFR and 2) whether a bona fide third-party offer is necessary to trigger the ROFR.⁵⁴ These inquiries often take the form of considering whether the ROFR defined in Section 42 should be interpreted under state common law, which typically requires a willingness to sell by the owner and a bona fide arm's-length third-party offer to trigger the exercise of a ROFR.⁵⁵

The investor limited partners in these cases argue that Congress's choice of the term "right of first refusal" in Section 42 is clear and means conclusively that common law principles should be used in

nonprofits and LIHTC projects. When transfers to nonprofits are systematically thwarted, or nonprofits are drained of resources that would otherwise go into these projects, the LIHTC program suffers and its goals are undermined." (citations omitted)).

47. *See Opa-Locka Cmty. Dev. Corp. v. HK Aswan, LLC*, No. 2019-16913-CA-01 (44), 2020 WL 4381624 (Fla. Cir. Ct. July 7, 2020).

48. *See Senior Hous. Assistance Grp.*, 2019 WL 687837, at *2–3.

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

50. *See Riseboro Cmty. P'ship Inc. v. SunAmerica Hous. Fund 682*, 482 F. Supp. 3d 31 (E.D.N.Y. 2020).

51. *See SunAmerica Hous. Fund 1050 v. Pathway of Pontiac, Inc.*, No. 19-11783, 2021 WL 391420 (E.D. Mich. Feb. 4, 2021).

52. *See Davenport*, *supra* note 39 (noting that the author, a trial lawyer who represents general partners in "LIHTC disputes nearing or at the end of the compliance period," now represents more than 60 clients in 12 states).

53. The number of informal disputes likely far exceeds the number of disputes that reach formal litigation.

54. *See, e.g., Riseboro Cmty. P'ship*, 482 F. Supp. 3d at 36 ("Defendants counter that Riseboro may exercise its ROFR to purchase the Apartment Complex only after two conditions precedent are satisfied: the Partnership must be willing to sell and a third-party must have made a bona-fide offer to buy.").

55. *See, e.g., Homeowner's Rehab, Inc. v. Related Corp. V SLP, L.P.*, 99 N.E.3d 744, 754–55 (Mass. 2018) ("At common law, . . . a right of first refusal cannot be exercised unilaterally, but can only be exercised where two conditions are met. First, the right of first refusal must be triggered by 'a bona fide and enforceable offer to purchase' the property Second, the owner of the property must have decided to accept that third-party offer." (citations omitted)).

interpreting Section 42 ROFRs.⁵⁶ These are not purchase options, which typically would give a party a right to purchase regardless of the owner's desire to sell and without the need for a triggering third-party offer.⁵⁷ Rather, investors argue, these are classic rights of first refusal, requiring owner willingness to sell and a bona fide third-party offer.

Alternatively, nonprofits argue that Section 42 ROFRs cannot possibly be interpreted as common law ROFRs because of a key feature in Section 42: namely, the below-market “debt plus taxes” purchase price defined by Congress in the tax code.⁵⁸ A typical common law ROFR does not have a pre-set purchase price — as described above, a traditional ROFR allows the holder to match a price offered by a third party.⁵⁹ In setting a predetermined below-market purchase price, Congress thus could not have intended this mechanism to operate as a common law ROFR. After all, as one court reasoned in a decision favorable to a nonprofit, what unrelated third party would go to the expense of putting together a bona fide offer on a property if it knew that such offer would trigger a nonprofit's right to purchase the property at a below-market price?⁶⁰ Given Congress's intent to use Section 42(i)(7) as a mechanism to preserve the long-term affordability of this housing stock, surely Congress would not have granted a ROFR that in practice would never be exercised. As such, nonprofits in these cases argue that a bona fide third-party offer must not be a requirement.⁶¹ Furthermore, they argue that investor consent to sell is

56. *See, e.g., Senior Hous. Assistance Grp. v. Amtax Holdings 260, LLC*, No. C17-1115RSM, 2019 WL 687837, at *7 (W.D. Wash. Feb. 19, 2019) (holding for the investor that “the term right of first refusal is not ambiguous or open to interpretation. This term is precisely defined in both standard and legal dictionaries and has a specific clear meaning in a contract concerning real estate”).

57. *See, e.g., Riseboro Cmty. P'ship.*, 482 F. Supp. 3d at 37 (“A ROFR stands in contrast to an ‘option’ to purchase, which may be triggered unilaterally, even against the owner's unwillingness to sell at the time the option-holder invokes the option.” (citations omitted)).

58. *See, e.g., Opa-Locka Cmty. Dev. Corp. v. HK Aswan, LLC*, No. 2019-16913-CA-01 (44), 2020 WL 4381624, at *9–10 (Fla. Cir. Ct. July 7, 2020) (“Put simply, these below-market, ‘minimum purchase price’ rights of first refusal only exist[] because Section 42(i)(7) exists. Accordingly, . . . Defendants' argument ‘fails to acknowledge’ that a Section 42 ROFR, such as the ROFR here, ‘is not purely a creation of the common law’ but is granted pursuant to Section 42 and must therefore be interpreted in light of Section 42.” (citations omitted)).

59. *See, e.g., Homeowner's Rehab*, 99 N.E.3d at 755 (“[A] right of first refusal is only a preemptive right, prohibiting the owner from selling the property to a third party ‘without first offering the property to the holder . . . at the third party's offering price.’” (citations omitted)).

60. *Id.* at 758.

61. *See, e.g., Opa-Locka Cmty. Dev. Corp.*, 2020 WL 4381624, at *6.

either not required or is a matter of parsing the specific language of the relevant limited partnership agreement.⁶²

Thus far, the courts collectively have rendered a relatively split decision on these cases. In Massachusetts and Florida, state courts have sided with the nonprofits attempting to exercise their ROFR rights. In federal courts in Washington, New York, and Michigan, nonprofits have lost on these issues. As this litigation spreads around the country, courts are likely to continue to reach differing conclusions.

II. HOUSING POLICY AND TAX POLICY MISMATCH

A. Evolving Housing Policy

In considering how best to resolve the ROFR problem, it is helpful to zoom out from the weeds of this litigation and evaluate more theoretically how we arrived here. The LIHTC program emerged in a political climate that viewed public housing as a flawed federal program. National housing policy sought to elevate the role of the private sector in the provision of subsidized housing.⁶³ The goal was to leverage the discipline and acumen of the private sector in underwriting, developing, and managing the low-income housing stock. The LIHTC structure does this, in part, by ensuring that sophisticated financial entities have a vested interest in a project's success. The recapture provisions are key in this regard — with millions of dollars of tax credits at stake, the investor limited partner is highly motivated to ensure that the project is successful. Proponents of the privatized LIHTC model think of investor limited partners as playing something of a quality control role.

Yet, as profit-motivated entities, investors are only motivated to play this role to the extent that it aligns with their financial goals. Preserving long-term affordability beyond the expiration of the

62. See *Homeowner's Rehab, Inc.*, 99 N.E.3d at 761 (“In reaching this conclusion [that investor consent is not required], we emphasize that we are only interpreting the language of the agreements that the parties executed here.”).

63. Other prior privatized approaches, including the Section 221(d)(3) BMIR, Section 236, and Project-Based Section 8 programs, enlisted private for-profit developers but lacked the investor feature of LIHTC. See generally James Grow & Brandon Weiss, *Preservation of Affordable Housing*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 411 (Tim Iglesias & Rochelle E. Lento eds., 2d ed. 2011) (describing the mechanics of these programs). As rent restrictions expired, housing developed by these programs ran into many of the same sort of expiring use challenges as described in this Essay regarding the LIHTC stock. See *id.* at 412 (“The time-limited nature of the mortgage and associated regulatory agreement thus planted the seed for a substantial expiring use problem to sprout decades later.”).

requisite use restrictions, particularly once all tax credits have been claimed and are beyond the reach of recapture, does not align with those goals. Nonprofit developers, by contrast, regularly make it a part of their mission to preserve long-term affordability. Often such efforts involve applying for a new round of tax credits and “resyndicating” the project to a new investor.

A preferable institutional arrangement from a public policy perspective thus would leverage private sector underwriting and oversight, while placing long-term control in the hands of mission-driven nonprofits or other public-oriented stakeholders. Most notable about this arrangement is that nothing inherently requires the private sector stakeholder to hold an actual ownership interest in the project. Rather, if it were possible simply to contract with the private sector to provide certain technical expertise, perhaps with various performance metrics and incentives, this would avoid thorny backend issues that jeopardize the long-term public value of a project.

B. A Collision with Tax Policy

For political reasons unrelated to housing policy, however, Congress has chosen to run our primary low-income housing program through the tax code rather than fund it via direct appropriations.⁶⁴ One advantage of this choice is that, as a permanent tax credit, it is available to all states every year without the need for congressional negotiations over funding levels. Yet, the decision also brings with it a set of structural constraints that, while serving tax policy, do not serve any appreciable housing policy.

Basic tax principles require that in order to claim the tax benefits of the kind that make LIHTC investments valuable, the tax credit partnership must be a true owner of the project.⁶⁵ Furthermore, simply holding bare legal title is insufficient to claim the incidents of taxation that accompany property ownership.⁶⁶ Rather, tax law considers whether a taxpayer holds the “benefits and burdens” of ownership in determining whether, for example, tax credits and valuable

64. See, e.g., Blaine G. Saito, *Collaborative Governance and the Low-Income Housing Tax Credit*, 39 VA. TAX REV. 451, 505–07 (2020) (describing how the structure of LIHTC as a tax credit rather than a grant program appeals to both small-government conservatives and liberals who want to help the poor, streamlines the congressional committees with oversight, and eliminates the need for annual reauthorization).

65. See 2 MERTENS LAW OF FEDERAL INCOME TAXATION § 17:5 (2021).

66. *Id.*

depreciation deductions can be claimed by a given taxpayer.⁶⁷ One such benefit courts have considered in determining if a taxpayer is a true owner is whether the taxpayer holds the right to the appreciation of a property, which would weigh in favor of a finding of true ownership.⁶⁸

Congress, or at a minimum congressional staff, appears to have been sensitive to these tax principles in drafting the ROFR provision, which was included in an early amendment to the LIHTC statute in the late 1980s. A task force of housing experts convened by Senators George Mitchell and John Danforth originally recommended a stronger safe harbor — that tax credit partnerships could grant nonprofit organizations and tenant cooperatives below-market *purchase options* without jeopardizing true ownership or the ability of investors to claim tax credits.⁶⁹ This recommendation was included in a bill that was introduced in the Senate in 1989.⁷⁰ However, below-market purchase options had been viewed in other contexts as a substantial relinquishment of one of the key benefits of ownership — namely, the right to the appreciation of a property — such that in certain cases the granting of a purchase option might jeopardize true ownership and the ability to claim the associated tax benefits.⁷¹ In an effort to harmonize Section 42 as much as possible with general tax principles, Congress ultimately settled on the weaker mechanism of a ROFR in creating the Section 42(i)(7) safe harbor. Notwithstanding the shift away from a purchase option, Congress apparently still deemed it worthwhile to include the safe harbor to protect against any argument that even the granting of a ROFR with a below-market purchase price might otherwise jeopardize true ownership and the ability to claim tax credits.

In making this switch, Congress struck a compromise. The safe harbor deviated less from general tax principles, ensuring that the tax credit partnership did not too significantly relinquish one of the key indicia of property ownership. At the same time, the ROFR safe harbor theoretically provided a mechanism for keeping long-term control in the hands of public-oriented stewards. Unfortunately, the

67. *Id.*

68. See Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Tax Credit*, 38 VILL. L. REV. 871, 890 (1993).

69. See REPORT OF THE MITCHELL-DANFORTH TASK FORCE ON THE LOW-INCOME HOUSING TAX CREDIT 19 (1989) (“Non-profit organizations and tenant cooperatives should be able to negotiate below-market purchase options during a project’s initial development and financing without disqualifying investors from claiming the [c]redit while they own the project.”).

70. See S. 980, 101st Cong. § 2(y) (1989).

71. See Kaye, *supra* note 68, at 892.

conferral of a ROFR with a below-market purchase price, rather than a pure purchase option, muddied the waters with respect to the necessary conditions required for a nonprofit to acquire the property — hence the proliferation of disputes described above. This lack of clarity, along with the failure of the IRS to issue any clarifying guidance on the ROFR issue, left the field ripe for exploitation by profit-driven entities, frustrating the congressional intent of preserving long-term affordability.

C. Theoretical Approaches to Resolving the Mismatch

At a broad conceptual level, there are several potential theoretical approaches to resolving this collision of housing policy and tax policy. The most straightforward one would be to subsidize the construction of low-income housing through a more direct mechanism than the tax code — namely, via direct appropriations. It is an odd feature of U.S. housing policy that the primary federal low-income housing construction program is administered under the auspices of the U.S. Department of Treasury and, more specifically, the IRS, rather than HUD.⁷² Notwithstanding some perception of public housing as a troubled government program, the program continues to provide critical affordable housing to approximately one million of the lowest-income households.⁷³ Many of the program's problems stemmed from the racially discriminatory manner in which the program was originally implemented.⁷⁴ With adequate federal funding and taking account of lessons learned from nearly a century of experimentation with federal efforts to subsidize low-income housing, perhaps a newly expanded public housing program, for which some are advocating,⁷⁵ could be

72. See Saito, *supra* note 64, at 484 (“But as LIHTC is currently constructed, HUD plays a limited role. HUD is not given any significant management or administration role in the Code and regulations.”).

73. See *HUD's Public Housing Program*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/topics/rental_assistance/phprog [<https://perma.cc/2TAZ-LYRY>] (last visited Aug. 23, 2021) (placing the current estimate at approximately 970,000 households).

74. See, e.g., RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 17–37 (2017) (recounting the history and effects of officially sanctioned racial segregation in public housing).

75. See, e.g., PolicyLink, *A Bolder Future for Housing Justice: 'These Times Call for Radical Actions,'* SHELTERFORCE (Jan. 15, 2021), <https://shelterforce.org/2021/01/15/imagining-a-bolder-future-for-housing-justice/> [<https://perma.cc/SU3K-MMY8>] (interviewing Tara Raghuvver, the Homes Guarantee campaign director at People's Action, about the campaign's call for “12 million new units of social housing, which is housing that's permanently off of the private market, not available for speculation”).

designed to address the perceived shortcomings that provided the original impetus for the transition to our current privatized model.

Alternatively, staying within the confines of the tax code, one could imagine a tax credit that eliminates the central role of investors in determining the long-term fate of a project. For example, were the LIHTC program converted into a refundable tax credit, nonprofit developers could dispense with investors entirely and directly invest the proceeds of the tax credits in low-income housing. This strategy has the benefit of placing long-term control of the housing squarely in the hands of entities that are more likely to preserve long-term affordability. This general sort of approach would not be unprecedented. At the height of the Great Recession, during a period of concern that investor equity for tax credits would dry up, Congress allowed state housing agencies to exchange LIHTCs for federal funds that could be used to make grants and loans directly to developers that had previously been awarded tax credits.⁷⁶

Of course, both of the above approaches face significant practical challenges. As described above, political considerations are what led to the emergence of the LIHTC model and such considerations remain forceful. In addition, these approaches would not satisfy those who view the model of leveraging investor involvement as a virtue rather than a vice. In the short term, the least disruptive and most realistic solution to the ROFR problem is through more modest amendments to the current LIHTC framework.

III. ADDRESSING THE ROFR PROBLEM

A. Federal Level

Particularly notable about the inclusion of a ROFR rather than a purchase option in Section 42(i)(7) is that the choice was made for no housing policy purpose. Yet, the distinction ultimately may carry significant housing policy implications with respect to long-term control of the LIHTC housing stock, depending on how the ROFR litigation unfolds. Equally notable is the fact that Congress faced no actual legal obstacle to employing a pure purchase option rather than a ROFR with a below-market market purchase price. Recall that

76. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1602, 123 Stat. 115, 362 (codified at 26 U.S.C. § 42 note); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-66, *LOW-INCOME HOUSING TAX CREDITS: AGENCIES IMPLEMENTED CHANGES ENACTED IN 2008, BUT PROJECT DATA COLLECTION COULD BE IMPROVED* 10-11 (2012), <https://www.gao.gov/assets/gao-13-66.pdf> [<https://perma.cc/H4AA-BVQ6>] (describing the mechanics of the exchange program).

42(i)(7) is a provision by which Congress provides a safe harbor to protect the ability to claim tax credits *against otherwise applicable general tax principles*. Congress creates tax law and can determine when general tax policy principles are relevant.⁷⁷ In other aspects of the LIHTC program, Congress has departed from general tax principles — for example, in acknowledging that, unlike as required in a typical real estate transaction, investors in LIHTC deals would not engage in the transaction but for the tax benefits.⁷⁸

Congress could have included a purchase option in the Section 42(i)(7) safe harbor rather than a ROFR. This might have accorded less with general tax policy principles — it would allow investors to claim tax credits even where their right to the appreciation of the property is more limited from the outset. Yet, the choice would have provided a tax credit more finely calibrated to achieving congressional intent: namely, preserving the long-term affordability of LIHTC housing.

Fortunately, it is not too late to amend the tax code and efforts are afoot to do so. Section 303 of the draft Affordable Housing Credit Improvement Act (AHCIA) of 2019 included language that would have amended Section 42(i)(7) to strike the term “a right of first refusal” and instead insert “an option” — a broader term apparently intended to cover both pure purchase options and ROFRs with below-market purchase prices.⁷⁹ The draft also included new language that would extend safe harbor protection to ROFRs that “may be exercised with or without the approval of the taxpayer” and “in response to any

77. For a similar point, see *Multiple Affordable Housing Organizations Respond to Right-of-First-Refusal Blog*, NOVOGRADAC, <https://www.novoco.com/multiple-affordable-housing-organizations-respond-right-first-refusal-blog> [<https://perma.cc/UY9Y-K279>] (last visited Aug. 23, 2021) (in which a number of national organizations, including the National Housing Law Project and the National Low Income Housing Coalition, state: “Regardless of general tax policy principles, Congress has the authority to determine what the tax law is and in section 42(i)(7), as currently existing or as amended by section 303, it can provide who receives the tax benefits notwithstanding the existence of a below-market purchase option”).

78. See Forrest David Milder, *What Does Codification of the “Economic Substance Doctrine” Mean for Tax Credit Transactions*, NIXON PEABODY (Apr. 21, 2010), <https://www.nixonpeabody.com/en/ideas/articles/2010/04/21/what-does-codification-of-the-economic-substance-doctrine-mean-for-tax-credit-transacti> [<https://perma.cc/L7PB-UQXY>] (noting an exception for tax credits like LIHTC described in a technical explanation of the Joint Committee on Taxation and concluding that “it appears that transactions that feature the typical tax credits will generally not be subjected to economic substance analysis”).

79. See Affordable Housing Credit Improvement Act of 2019, S. 1703, 116th Cong. § 303 (as introduced on June 4, 2019).

offer to purchase the property, including an offer by a related party.”⁸⁰ The Act stated explicitly that none of the amendments would supersede the terms of a preexisting option or ROFR agreement,⁸¹ though some commentators expressed concern that this was not entirely clear.⁸² While Senator Maria Cantwell introduced the bill in June of 2019, the proposed legislation never advanced out of the Senate Finance Committee.

Advocates continue to lobby for a legislative fix to the ROFR problem. Senator Cantwell recently reintroduced a modified version of the Act as the Affordable Housing Credit Improvement Act of 2021.⁸³ Unfortunately, former Section 303 that included the provisions relevant to the ROFR problem was not included in this version, likely given intense lobbying by interests sympathetic to investors. Conversations continue about introducing a separate bill that would address the ROFR problem.⁸⁴

Such a bill should improve upon what was contained in the AHCIA of 2019. Prospectively, for future LIHTC deals, Congress should strengthen the language to make clear that safe harbor protection would be extended only where a nonprofit is granted a pure purchase option at a below-market “debt plus taxes” price.⁸⁵ While it is theoretically conceivable that this could make some investors hesitant to negotiate for any purchase rights in future deals, the investor market for tax credits is highly competitive.⁸⁶ This amendment would function

80. *Id.* § 303(b)(3).

81. *Id.* § 303(c)(3).

82. See Dirk Wallace & Michael Novogradac, *Congress Considering Retroactive Changes Affecting Low-Income Housing Tax Credit Property Owners, Part I*, NOVogradac (July 24, 2019, 12:00 AM), <https://www.novoco.com/notes-from-novogradac/congress-considering-retroactive-changes-affecting-low-income-housing-tax-credit-property-owners> [<https://perma.cc/TA34-DQJB>].

83. See Press Release, U.S. Sen. Maria Cantwell, New Cantwell, DelBene Legislation Would Build Millions of New Affordable Housing Units Nationwide, Tens of Thousands in Washington (Apr. 15, 2021), <https://www.cantwell.senate.gov/news/press-releases/new-cantwell-delbene-legislation-would-build-millions-of-new-affordable-housing-units-nationwide-tens-of-thousands-in-washington> [<https://perma.cc/48GW-C8V9>].

84. Adam Carasso, Senior Tax and Econ. Adviser at Senate Fin. Comm., Comments to the National Preservation Working Group (July 19, 2021) (discussing efforts by Senator Ron Wyden to draft a new bill that, among other provisions, would address the ROFR problem).

85. The preservation ends of Congress would be even further served by changing this minimum purchase price simply to the assumption of project debt, with the investor being responsible for any exit taxes. Senator Wyden’s draft legislation referenced *supra* note 84 reportedly takes this approach.

86. Research has found that the demand for LIHTCs outpaces supply in all 50 states, with some states seeing ratios as high as 5:1 comparing applications for total

upfront to filter out investors unwilling to clearly agree to transfer control after the expiration of the initial use restriction period.⁸⁷ Such an amendment would channel the industry toward using a mechanism: 1) for which the requirements of execution are clear and 2) that would much more effectively serve the congressional goal of transferring long-term control to nonprofits.

Ideally, Congress would go even further than merely strengthening the terms of the safe harbor — for example, making it mandatory that in nonprofit-developed LIHTC projects, nonprofit general partners *shall* be given a purchase option at the end of the initial compliance period. The notion that nonprofit developers should hold backend purchase rights in all such deals is not unprecedented. An IRS memo describing the standards for obtaining 501(c)(3) tax-exempt status for entities intending to further their charitable purposes by serving as nonprofit general partners in LIHTC transactions included in its approval requirements that “[t]he applicant must secure a right of first refusal to acquire the project at the end of the LIHTC compliance period.”⁸⁸ Amending Section 42 to make the provision of a purchase option a mandatory requirement in nonprofit-sponsored developments would ensure that this term would be included in all such LIHTC deals. This rule might marginally affect investor pricing of deals — but the LIHTC industry has enjoyed a robust market for tax credits for decades, even when investor prospectus documents assumed limited backend profits.⁸⁹ Again, this amendment would serve to filter out those investors not interested in furthering the congressional goal of

LIHTCs to available LIHTCs. See Michael Novogradac, *In Demand: Allocation Ratios Show Strong Interest in LIHTCs*, NOVogradac (Mar. 3, 2014, 12:00 AM), <https://www.novoco.com/notes-from-novogradac/demand-allocation-ratios-show-strong-interest-lihtcs> [<https://perma.cc/6WAB-W94Q>] (noting that the data may undercount true demand given that some developers may not submit an application for LIHTCs given high levels of perceived competition). Regarding investor pricing, investors currently pay from the high \$.90s to \$1.00 per \$1.00 of tax credit. See H. Blair Kincer & Mark O’Meara, *A Look at the LIHTC: Past Pricing Trends, the Current Market and Future Concerns*, 11 NOVogradac J. TAX CREDITS, no. 3, Mar. 2020, at 3. As recently as 2016, investors were paying more than \$1.05 per \$1.00 of tax credit given the other benefits, including Community Reinvestment Act credit, an attendant to LIHTC investments. *Id.* at 2. See also *supra* note 21 regarding the financial benefits of LIHTCs to investors and the relevance of the Community Reinvestment Act.

87. Under current law, investors can shield themselves behind the argument that granting a purchase option might jeopardize their ability to claim the tax credits.

88. See Memorandum from Robert S. Choi, Dir. of EO Rulings and Agreements to Internal Revenue Serv., Dep’t of Treasury 3 (July 30, 2007), https://www.novoco.com/sites/default/files/atoms/files/choi_memo_073007.pdf [<https://perma.cc/ZF8R-2FMB>].

89. See *supra* note 86.

transferring control of the project to nonprofits at the end of the initial use restriction period.

Retrospectively, attempting to address the ROFR problem in preexisting partnerships — where a tax credit partnership has already granted a ROFR with a below-market purchase price to the nonprofit general partner — is a more delicate issue. At a minimum, Congress could provide rules of interpretation for use where the agreement between the parties is silent as to the key terms regularly in dispute — for example, whether owner/investor willingness to sell is required and whether a triggering offer must be from an unrelated third-party. Investors have attempted to cast such clarifying efforts as retroactive changes to program rules, claiming they constitute an uncompensated taking of private property rights in violation of the Fifth Amendment Takings Clause.⁹⁰ Query, however, whether a takings challenge under a *Penn Central Transportation Co. v. City of New York* style analysis would succeed.⁹¹ Certainly, for the many partnerships that have not yet been taken over by an aggregator, it would seem difficult for original investors whose projections forecast little to no backend gain to now claim that such rules of interpretation would interfere with their “distinct investment-backed expectations.”⁹²

B. State Level

In conjunction with such federal efforts, states can also play an important role in addressing the ROFR problem. This is particularly true prior to the enactment of any federal legislation or if Congress enacts a fix that is limited to clarifying the safe harbor rather than making a purchase option mandatory. State governments create the rules used to determine which LIHTC applications receive an award of

90. See Jeffrey M. Harris, *An Unconstitutional Attempt to Address Affordable Housing*, 20 FEDERALIST SOC'Y REV. 168, 177 (2019) (arguing that Section 303 of the Affordable Housing Credit Improvement Act of 2019 would have worked a taking of limited partner investor interests in LIHTC partnerships).

91. See 438 U.S. 104, 105 (1978) (noting, among other factors relevant to takings analysis, whether government action sufficiently frustrates “distinct investment-backed expectations”).

92. *Id.* For those interests that have been taken over by an aggregator, courts may need to determine the degree to which all investment-backed expectations — even those that run clearly counter to public policy — are treated as of equal weight. More generally, original investors and aggregators would carry the burden of trying to convince a court that a property right is infringed upon where Congress simply clarifies rules of interpretation to be used in the absence of explicit contract terms to the contrary.

tax credits.⁹³ Section 42 requires that these rules be set forth in a “qualified allocation plan” (QAP) adopted by the state.⁹⁴

States should amend their QAPs to help address the ROFR problem. In nonprofit-sponsored deals, states should require that nonprofit general partners be given backend purchase rights as a prerequisite for receiving an award of tax credits.⁹⁵ Cautious states may start with a ROFR requirement and consider making a pure purchase option requirement contingent upon a change to Section 42 that ensures safe harbor protection for such options.⁹⁶ Jurisdictions that adopt this approach should clearly define the requisite conditions precedent for the nonprofit to exercise its ROFR.⁹⁷

The Washington State Housing Finance Commission has gone even further, proposing a change to its compliance manual that would require agency consent to certain limited partner interest transfers.⁹⁸ Other best practices might include limiting future program participation by investors who dispute nonprofit purchase rights. The National Preservation Working Group, an association with the purpose of preserving the affordability of low-income housing, is working with certain state housing finance agencies to incorporate such best practices into their QAPs.⁹⁹ Because the ROFR problem can arise in

93. 26 U.S.C. § 42(m)(1).

94. *Id.*

95. See Lauren Loney & Heather Way, *Strategies and Tools for Preserving Low Income Housing Tax Credit Properties*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 255, 276–77 (2019) (suggesting that “[s]tates and cities can improve preservation-oriented organizations’ ability to preserve LIHTC properties by adopting stronger ROFR and purchase-option polices for qualified nonprofit entities”).

96. The New York City Department of Housing Preservation & Development, which is a unique local jurisdiction that allocates a portion of New York State’s LIHTC allotment, has incorporated this contingency approach in its 2021 draft QAP. See 2021 Draft Qualified Allocation Plan, N.Y.C. (N.Y.C. Dep’t of Hous. Pres. & Dev., Draft, 2021), <https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/2021-draft-qualified-allocation-plan.pdf> [<https://perma.cc/WJK5-G3S7>].

97. For example, New York City has required in its draft QAP that nonprofit applicants for tax credits must submit a letter of intent between the LIHTC partners demonstrating that a qualified nonprofit shall be given a ROFR that can be exercised *without limited partner consent* “following the General Partner’s receipt of a bona fide third party offer to purchase the project.” *Id.*

98. See *Proposed Revisions to the Chapter 9 Property Transfers Policy for the 2020 Program Year*, WASH. ST. HOUS. FIN. COMM’N, <http://wshfc.org/managers/policy.htm> [<https://perma.cc/JHS9-KJ7D>] (last visited Sept. 3, 2021).

99. Massachusetts, Washington, Virginia, Washington D.C., and New York City are among the jurisdictions already considering policy fixes to the ROFR problem. Robert Rozen, Comments to the National Preservation Working Group (July 19, 2021); see also NAT’L HOUS. TR., LOW-INCOME HOUSING TAX CREDIT (LIHTC) RIGHT OF FIRST REFUSAL (ROFR) TACTICAL TOOLKIT FOR STATE AND LOCAL

any state, all 50 state housing finance agencies would be wise to join such efforts to help secure long-term affordability of their LIHTC housing stock. Given the growing nature of this problem, states must be proactive to stem the tide.

CONCLUSION

Unlike Opportunity Zones, a tax break designed to benefit wealthy investors based on fundamentally flawed theoretical grounds, the LIHTC program plays an important role in improving the lives of millions of low-income U.S. households through the provision of decent, affordable housing. LIHTC housing developed by nonprofit developers is of particular value given, among other benefits, their much greater likelihood of preserving long-term affordability.

Investor efforts to thwart the ability of nonprofit developers to acquire LIHTC properties upon the expiration of use restrictions threaten the ongoing viability of this stock of housing as an important resource for low-income families. This vulnerability of the program arises as an artifact of an attempt to harmonize Section 42 with general tax policy principles that are ill suited in the context of a LIHTC real estate transaction. Broader theoretical fixes that more clearly place long-term project control in the hands of public-oriented stakeholders are conceivable but, at least at the moment, not politically viable.

As such, the Biden Administration should prioritize working with Congress to enact a legislative fix to Section 42 that not only clarifies the safe harbor, but also ensures that nonprofits are given a purchase option in all nonprofit-sponsored LIHTC deals. States meanwhile should amend their credit allocation rules to award credits more selectively to projects with clear mechanisms for preserving long-term control. Unlike the Opportunity Zone program, such interventions at the federal and state levels would be certain to have an immediate and positive impact on the lives of low-income U.S. households.

ALLOCATING AGENCIES 1 (2021) (recommending other best practices for states, including conducting early outreach to nonprofit to prepare for Year 15, educating general partners early about their ROFR rights, and helping to create an entity that could make ROFR-triggering offers).