Preservation

Advancing Preservation in Housing Credit Properties

2023

We face a shortfall of nearly 7 million housing units available to the lowest-income households in the United States. We can only address this crisis by both preserving existing affordable housing while also building new housing that is more affordable to lower-income households. Housing Finance Agencies (HFAs) utilize Low Income Housing Tax Credits (Housing Credits) to create new housing stock, but also have a critical role to play in both preserving existing housing and working to close loopholes that threaten the preservation of such units. Specifically, HFAs can establish set-asides and incentive points specific to preservation, while also encouraging developers to keep properties affordable for an extended period of time, and supporting the resyndication of existing housing with additional Housing Credits. HFAs also play an important role in establishing policies that combat threats to the preservation of Housing Credit properties, such as qualified contracts and the ambiguity in the nonprofit right of first refusal statute.

Preserving existing Housing Credit properties not only ensures that units remain affordable for residents, but also provide a stable home for low-income households – an essential precondition for their economic, physical, and mental well-being. Preservation of affordable housing is also an important policy objective because it is:

- Much less expensive than new construction.
- Generates fewer carbon emissions than new buildings.
- A faster way to provide affordable housing available to families in need compared to building new.
- An effective way to maintain existing homes for existing families and limit the displacement of residents.

The following analysis, which is the result of NHT's examination of 53[1] Qualified Allocation Plans (QAPs) released before March 2023, provides insight into how HFAs encourage preservation in their QAPs beyond set-asides, and the actions HFAs are taking to prevent threats to preservation.

[1] All 50 states, plus DC, New York City and Chicago

Length of Affordability

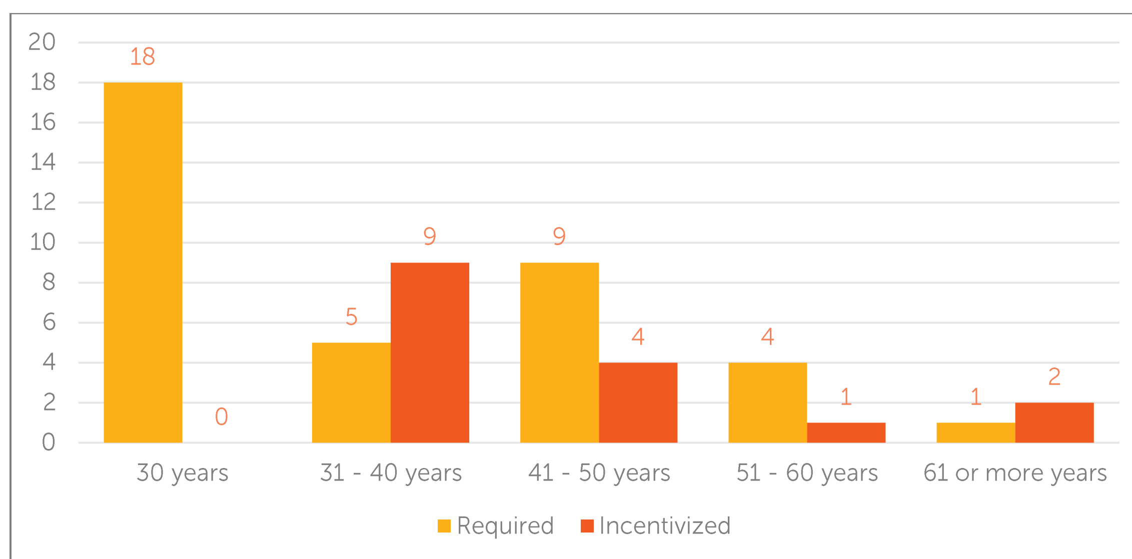
Serving the lowest income residents for the longest period of time has always been an important priority of the Housing Credit program. Since 1989, the Housing Credit program has required a minimum of 15 years of compliance and a 15 year extended use period, totaling a minimum 30 years of affordability. After those federally required 30 years, the property can be converted to another use, including market rate housing with much higher rents that are unaffordable to the current residents. Many allocating agencies, however, request longer periods of affordability. Requiring or rewarding developers for keeping properties affordable beyond Year 30 not only provides affordable housing at an individual property for longer, thus serving more low-income families and meeting current needs. It also allows for the cumulative growth of the existing stock of affordable housing in a jurisdiction.

Today, **18 agencies** continue to require only the minimum period of 30 years of affordability. However, many HFAs have gone even further, with **35 agencies** either incentivizing or requiring a longer affordability period for Housing Credit properties to ensure that this valuable housing stock remains affordable for a longer period of time. These range from 33 years of required affordability in Kentucky to perpetual affordability in Vermont, where all developers receiving 9 percent Housing Credits[2] are required to commit to permanent affordability. In Washington, D.C., developers committing to permanent affordability are given maximum preference in its 2021 QAP. Several states -- including but not limited to Hawaii, Louisiana, Nebraska and Oklahoma -- award higher points based on the number of additional years that a developer is willing to keep a property affordable. [See Table 1 for more details on these and other states.]

42 YEARS

On average, allocating agencies require or incentivize Housing Credit properties to maintain affordability for 42 years.

FIGURE 1: Number of States Incentivizing or Requiring Years of Affordability



[2] Vermont Housing Finance Agency requires developers receiving 9 percent Housing Credits keep properties affordable into perpetuity. Developers receiving 4 percent credits are only required to keep Housing Credit properties affordable for 30 years.

Resyndication

All properties – residential, commercial, market rate, luxury – require upkeep and maintenance and, at some point, will require a significant infusion of resources to rehabilitate and improve the existing property. Affordable rental housing financed with the Housing Credit is no different. After 15 years of affordability, the Housing Credit statute permits an owner the option to request additional Housing Credits. Known as resyndication, this provides the necessary resources to both preserve the physical building and undertake necessary improvements or enhancements while also extending the affordability of the property by beginning a new affordability term. Like with most elements of the Housing Credit program, allocating agencies have the authority to decide if and when to allow resyndication.

As of May 2023, **45 HFAs** explicitly allow developers to request additional Housing Credits through resyndication. Of those, **11 HFAs** actively encourage developers to resyndicate by awarding additional points. Some HFAs utilize additional criteria to assess the need for resyndication by specifying at what point in the extended use period a property is eligible for additional Housing Credits:

45 OUT OF 53 HFAs

explicitly allow developers to request additional Housing Credits through resyndication.

- New Mexico and Rhode Island require developers to demonstrate a need for a substantial rehabilitation in order to qualify for resyndication, whereas Kentucky awards points to those requesting resyndication based on the number of years since the last substantial rehab.
- Delaware, New Jersey, New York City, Pennsylvania and Washington, D.C. base the need for resyndication on how close a property is to the affordability expiration date. Arkansas, encourages developers to only consider resyndication after 20 years by deducting points for projects that request additional Housing Credits between Year 15 and 20.
- West Virginia encourages a wide window for resyndication by awarding points for Housing Credit properties that are within two years before the end of the extended use period, but also by awarding the same number of points for Housing Credit properties requesting a resyndication up to three years after the end of the extended use period.

In addition to providing a much-needed capital infusion, resyndication can be an attractive option for HFAs and mission-driven owners wishing to preserve the physical housing stock and maintain existing affordability of the rental housing reaching the end of its affordability period. [See Table 1 for more detail.]

Above are two examples of how HFAs are proactively promoting preservation. On the next page, we discuss how HFAs are combatting two threats to affordable housing preservation.

Qualified Contracts

The Qualified Contract (QC) provision of the Housing Credit program allows owners of Housing Credit properties to exit the program before fulfilling the promised length of affordability. As previously mentioned, the Housing Credit program requires a minimum of 15 years of compliance and 15 years of extended use period. After the initial 14 years of affordability, however, there is a dangerous loophole: owners are allowed to request a qualified contract, which begins a one-year period during which an HFA is required to seek a buyer for the property. However, the sale price at which a property is offered during this one-year period -- set by federal statute -- is designed to give an inflation-adjusted return to the investor. More often than not, the resulting price far exceeds the value of the property and the HFA is unable to find a willing buyer. Consequently, per the federal rules, the property owner is permitted to convert the property to market-rate housing. With an estimated 10,000 units of affordable housing lost annually as a result of the QC provision[3], many states have already recognized this as an important threat and are taking concrete steps to limit the loss of affordable housing as results of its use.

NHT's QAP analysis identified that at least **32 HFAs** explicitly *require* an owner receiving Housing Credits to waive their right to a QC, effectively eliminating this option for Housing Credit properties receiving a new allocation. An additional **12 allocating agencies** explicitly *incentivize* such a waiver by making it more likely that an applicant will receive competitive Housing Credits if they agree to waive their right to a QC.[4]

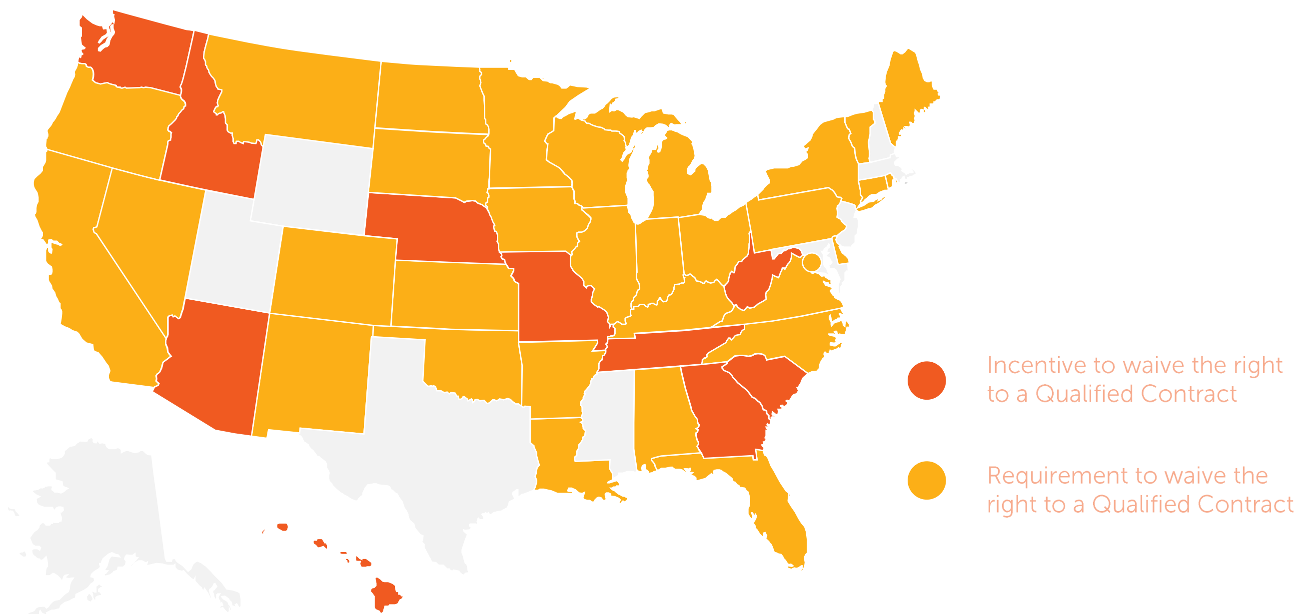
32 OUT OF 53 HFAs

explicitly *require* an owner receiving Housing Credits to waive their right to a QC.

12 OUT OF 53 HFAs

explicitly *incentivize* such a waiver by making it more likely that an applicant will receive competitive Housing Credits if they agree to waive their right to a QC.

FIGURE 2: HFAS that Require or Incentivize a Qualified Contract Waiver



[3] Data from the National Council of State Housing Agencies (2023)
[4] At least two HFAs, Texas and Utah, include a waiver of the QC in a document outside of this analysis, such as a Land Use Record Agreement or State Administrative Code. Those states are not included in this analysis, which is specific to the QAP and accompanying documents.

A growing number of HFAs also adopt policies to discourage existing owners – those who were not previously required to waive their right to a qualified contract -- from making QC requests by penalizing them in new Housing Credit requests for past actions. The following states have adopted policy to help preserve both new and existing Housing Credit properties:

- Indiana, Kansas, and New Hampshire each award negative points to applicants in their Qualified Allocation Plan who have previously requested a QC after a specified date;
- Maine and North Carolina disqualify applicants for new Housing Credit awards who have previously requested a QC after a specific date;
- Virginia both disqualifies applications from anyone participating in an active QC request and also holds the right to disqualify an applicant who, prior to a specified date, has previously made a QC request;
- Montana and Vermont maintain the right to disqualify applicants who have previously requested a QC; and
- South Carolina awards additional points to project teams that have not previously requested a qualified contract.

Nonprofit Right of First Refusal

The nonprofit right of first refusal (ROFR) is a lever in the federal Housing Credit program that allows nonprofit partners to gain full ownership of a property after 15 years of affordability. Nonprofit owners are often better positioned to provide long term affordability and services to low-income renters, making the nonprofit ROFR an important tool for preserving affordable housing and promoting housing stability. In recent years, however, certain profit-motivated investors have begun to challenge the ROFR, making it litigious, expensive, and sometimes even impossible for a nonprofit to exercise their federally granted right to the ROFR. These profit-motivated investors take advantage of the ambiguity that exists in the federal Housing Credit statute pertaining to the nonprofit ROFR.[5] As a result of the ROFR, low-income renters bear the impact when property and staff resources are diverted to combat these disputes rather than providing housing services. A still greater result of ROFR is that these properties are at greater risk of permanently exiting the affordable housing stock if nonprofit ownership has been removed from the property.

In response to the ROFR challenges, at least 32 HFAs – representing over $500 million of Housing Credit allocations in 2022 alone -- have implemented policies and/or updated existing language to strengthen the nonprofit ROFR and preserve the long-term affordability of Housing Credit properties. Many of these solutions -- which protect a nonprofit's right to exercise the ROFR in both new and existing properties in order to protect both the properties and the residents who call them home -- have come directly from the HFA ROFR toolkit that NHT developed in partnership with state and local HFAs.

32 OUT OF 53 HFAs

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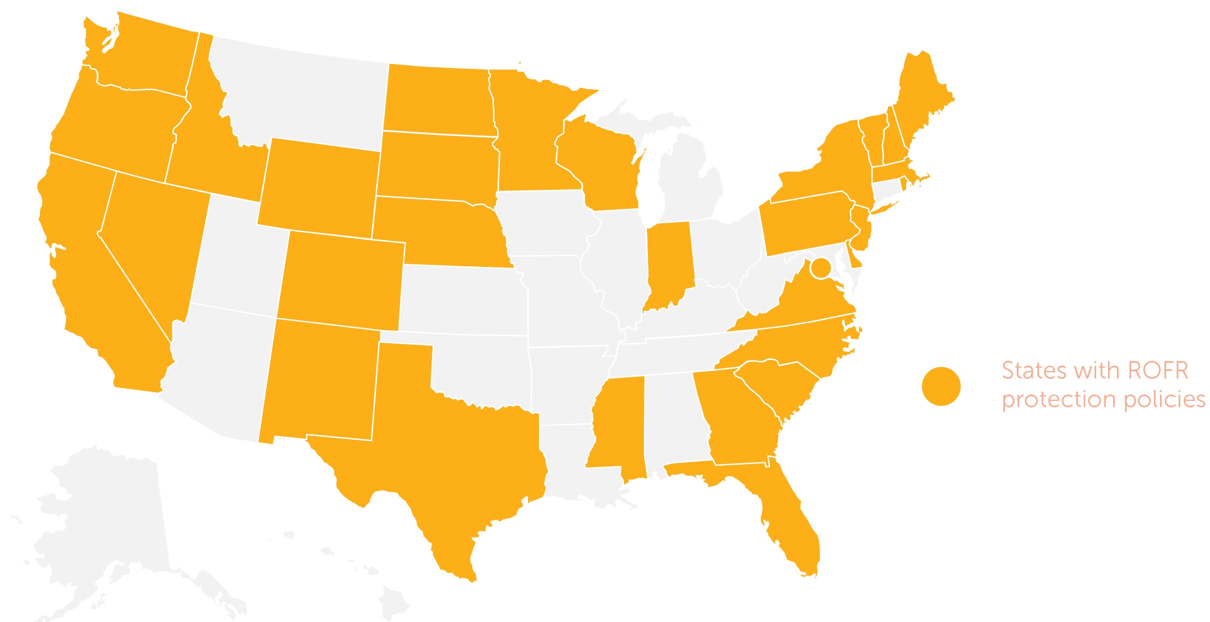
[5] The nonprofit ROFR, in Section 42(i)(7) of the Internal Revenue Code specifies ***how*** the contractual mechanism operates by clearly identifying who may hold and exercise the ROFR, when the ROFR may be exercised and the minimum price. Profit-motivated investors seeking to undermine the nonprofit ROFR often dispute how the ROFR is triggered, the valuation of the minimum price, and who can consent to the ROFR and subsequent transfer of ownership of a Housing Credit property.

- Seven HFAs are protecting existing Housing Credit homes by prohibiting certain investors who have previously interfered with ROFR from participating in the Housing Credit program. Additionally, 14 HFAs directly target potential profit-motivated investor parties by requiring HFA approval of the transfer of investor interests and/or requiring a Letter of Intent to vet investor eligibility.
- 15 HFAs are protecting new Housing Credit homes by updating their policy and program documentation to clarify how the ROFR is interpreted, how the ROFR purchase price is calculated, and how the ROFR can be triggered.
- 10 HFAs explicitly state the uses for property reserves and/or require reserves to remain with the property for the full affordability period.

NHT also encourages HFAs to provide early intervention and technical assistance for properties approaching Year 15 who may not be fully aware of their ROFR rights.

FIGURE 3: HFAs That Have Implemented ROFR Protection Policies



Conclusion

HFAs play an integral role in implementing the Housing Credit program in their state or locality, which is best illustrated by the policy priorities articulated in their QAP. By bolstering tools that support long-term affordability and resyndication, and combating the threats to affordable housing posed by the qualified contract and disputes related to the nonprofit ROFR, HFAs are critical players in promoting and supporting the preservation of valuable Housing Credit properties. These actions not only ensure that prior investments in affordable housing are leveraged to their maximum benefit for communities, but also preserve an affordable, stable housing stock for low-income residents across the country.

Learn more about how QAPs can accelerate the affordability, opportunities, and sustainability of affordable housing on our QAP analysis home page.

TABLE 1: Length of Affordability and Resyndication

STATE	LENGTH OF AFFORDABILITY			RESYNDICATION	
	# OF YEARS	INCENTIVIZED	REQUIRED	ENDORSED	INCENTIVIZED
AK	30		X		
AL	30		X	X	
AR	35+	X		X	
AZ	30+	X		X	X
CA	55		X	X	
Chicago	99	X		X	
CO	40	X		X	X
CT	50	X		X	
DC	40		X	X	
DE	45	X		X	
FL	50		X	X	
GA	30		X	X	X
HI	61+	X			
IA	30		X	X	
ID	40		X		
IL	30		X		
IN	40	X		X	
KS	30		X	X	
KY	22		X	X	X
LA	45	X		X	
MA	50+	X			
MD	40		X		
ME	45		X		
MI	45	X		X	
MN	50	X		X	
MO	30		X	X	
MS	30		X	X	X
MT	50		X	X	
NC	30		X	X	
ND	30		X	X	X
NE	45	X		X	
NH	60		X	X	
NJ	45	X		X	
NM	35	X		X	
NV	50	X		X	
NY	30		X		
NYC	60		X	X	
OH	30		X	X	
OK	40	X		X	
OR	60		X	X	
PA	40		X	X	X
RI	30		X	X	
SC	30		X	X	X
SD	40	X		X	
TN	30		X	X	X
TX	40	X		X	
UT	50		X	X	X
VA	50	X		X	
VT	∞		X	X	
WA	37	X		X	
WI	30		X	X	
WV	30		X	X	X
WY	30		X	X	