Comments

JULIET HAYDEN*

One Piece of the Puzzle: The Role of Tax Strategies in Addressing Oregon's Housing Crisis

* J.D. Candidate, 2024, University of Oregon School of Law; B.S. in Psychology, 2018, Southern Oregon University; B.A. in New Media Communications, 2012, Oregon State University. I would like to thank Professor Roberta Mann for her support and guidance as I tried to tackle tax law, as well as the editors of *Oregon Law Review* for their attention to detail and thoughtful remarks. Additionally, I would like to extend a thank you to all those working tirelessly to address the housing crisis in Oregon and beyond.

INTRODUCTION

In 2015, U.S. Department of Housing and Urban Development Secretary Julián Castro described the United States' affordable housing climate as a "crisis."[1] Nine years later, on her first day in office, Oregon Governor Tina Kotek signed an executive order declaring homelessness a state of emergency in Oregon.[2] The United States first started addressing "housing hardships" in 1934.[3] Despite multiple programs and plans to address housing issues, almost a century has passed and instead of being resolved, the hardships have evolved—from a crisis to a state of emergency.

The housing emergency doesn't just affect certain demographics, it affects everything.[4] Annie Lowrey from the *Atlantic* writes:

> Housing costs are perverting just about every facet of American life, everywhere. What we eat, when we eat it, what music we listen to, what sports we play, how many friends we have, how often we see our extended families, where we go on vacation, how many children we bear, what kind of companies we found: All of it has gotten warped by the high cost of housing. Nowhere is immune, because big cities export their housing shortages to small cities, suburbs, and rural areas too.[5]

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1 Julián Castro, *Our National Affordable Housing Crisis*, *Opinion*, CNN (Apr. 7, 2015, 7:51 AM), https://www.cnn.com/2015/04/07/opinions/castro-affordable-housing-crisis/index.html [https://perma.cc/6Q88-QZPS] (describing the lack of affordable housing for low-income individuals).

2 OFF. OF GOVERNOR TINA KOTEK, EXEC. ORDER NO. 23-02 DECLARING STATE OF EMERGENCY DUE TO HOMELESSNESS (2023).

3 NAT'L LOW INCOME HOUS. COAL., A BRIEF HISTORICAL OVERVIEW OF AFFORDABLE RENTAL HOUSING 1 (2015).

4 Isabel Fattal, *How the Housing Shortages Warps American Life*, THE ATLANTIC (Feb. 22, 2023), https://www.theatlantic.com/newsletters/archive/2023/02/everything-is-about-the-housing-market/673183/ [https://perma.cc/M3NT-JWFH].

5 *Id.*

The solution, Lowrey theorizes, is simple: build more homes.[6] This simple endeavor, however, is burdened with political, social, and financial hurdles.

Both the federal and state governments have turned to tax strategies, specifically tax credits, to incentivize the construction of more affordable housing. These tax credits, including the Low-Income Housing Tax Credit and the Oregon Affordable Housing Tax Credit, are successful in their mission of promoting affordable housing. However, these tax credits alone are not enough to meet the demand for affordable housing. Tax strategies beyond tax credits should be used to address the housing crisis more aggressively in Oregon. While tax strategies are not the only tool used in the fight to address the housing crisis—tax strategies work in conjunction with grants, rental assistance, land use regulations, and other legislative decisions—this Comment will focus solely on the role of tax programs in addressing the housing crisis.

This Comment will begin by exploring the history and current status of the housing crisis on a national scale and the direct impacts of the housing crisis on the state of Oregon. The Comment will then describe the mechanics, challenges, and efficacy of both the federal Low-Income Housing Tax Credit (LIHTC) and the state-level Oregon Affordable Housing Tax Credit (OAHTC). Finally, the Comment will offer recommendations to improve the existing tax strategies as well as the supplemental programs that policymakers should implement to better address Oregon's affordable housing crisis.

I
THE AFFORDABLE HOUSING CRISIS

A. National Scale

The average cost of a new home in the United States rose from $76,400 in 1980 ($251,214 adjusted to 2021 inflation)[7] to over $450,000 in 2021—a 79% increase.[8] The average cost of rent in the

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6 *Id.*

7 *See Inflation Calculator*, FED. RSRV. BANK OF MINNEAPOLIS, https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator [https://perma.cc/4PV5-VUUH].

8 *Average Sales Price of New Homes Sold in the United States from 1965 to 2023*, STATISTA (Feb. 16, 2024), https://www.statista.com/statistics/240991/average-sales-prices-of-new-homes-sold-in-the-us/ [https://perma.cc/25Y3-8Q6J] (author calculation). By June 2022, median rent was over $2,000 a month. Brian J. O'Connor, *Census Bureau: 3.8 Million Renters Will Likely Be Evicted in the Next Two Months — Why the Rental Crisis Keeps*

United States also rose from $308 in 1980 ($1,013 adjusted to 2021 inflation)[9] to over $1,800 in 2021—a 78% increase.[10] Despite these dramatic increases for both home values and rent, the average household income in the United States has decreased 59%, from $53,116 in 1980 ($174,653 adjusted to 2021 inflation)[11] to $70,784 in 2021.[12] An average family in 1980 had the equivalent of $163,574 after paying an entire year's rent; an average family in 2021 had just $49,184 after paying an entire year's rent.[13]

Compounded with the lack of comparable growth in average income, the housing market has not kept up with the demand of growing households.[14] As of 2021, the Federal Home Loan Mortgage Corporation, commonly known as Freddie Mac, estimated that the United States had a "housing supply deficit of 3.8 million units."[15] This shortage can be attributed to a variety of causes, such as lack of labor, zoning restrictions, land use regulations, and increasing construction costs.[16] On top of the overall housing shortage, there are only thirty-six affordable rental homes available for every one hundred extremely low-income renter households.[17] In addition, the average age a person can afford to buy a home has reached thirty-three years, expanding the pool of renters and increasing the competition for

Getting Worse, YAHOO! FIN. (Aug. 28, 2022, 6:00 AM), https://finance.yahoo.com/news/census-bureau-3-8-million-100000978.html [https://perma.cc/H99W-HFVB].

9 *See Inflation Calculator*, *supra* note 7.

10 *Monthly Median Asking Rent for Unfurnished Apartments in the United States from 1980 to 2023*, STATISTA (Sept. 4, 2023), https://www.statista.com/statistics/200223/median-apartment-rent-in-the-us-since-1980/ [https://perma.cc/X4X8-WEPD] (author calculation).

11 *See Inflation Calculator*, *supra* note 7.

12 *Median Household Income in the United States, by Race and Ethnicity from 1967 to 2022*, STATISTA (Oct. 6, 2023), https://www.statista.com/statistics/1086359/median-household-income-race-us/ [https://perma.cc/ZG3D-9DV8] (stating that household income includes all persons living in a household) (author calculation).

13 *Id.* (author calculation).

14 *Housing Supply: A Growing Deficit*, FREDDIE MAC (May 7, 2021), https://www.freddiemac.com/research/insight/20210507-housing-supply [https://perma.cc/W3KT-M3AW].

15 *Id.* The Federal Home Loan Mortgage Corporation was created in 1970 to expand the secondary market for mortgages. *About Freddie Mac*, FREDDIE MAC, https://www.freddiemac.com/about [https://perma.cc/A4LG-PG8X].

16 FREDDIE MAC, *supra* note 14.

17 NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 2, 3 (2023). Extremely low-income households are those with incomes under 30% of their area median income. *Id.*

housing among extremely low-income households.[18] Although homeowners outnumber renters, rising housing costs are shrinking the gap, further heightening the rental competition.[19] Increased housing costs combined with decreased availability and a stagnant average income has resulted in a system that makes homelessness an increasingly easy state to enter and an increasingly difficult state to exit.

While the numbers of persons experiencing homelessness is hard to accurately assess,[20] a Department of Housing and Urban Development (HUD) report estimated there were between 250,000 to 350,000 people experiencing homelessness in 1984.[21] The HUD's 2022 report found over 580,000 persons experiencing homelessness on a given night.[22]

Although affordable housing has been an issue for decades, the COVID-19 pandemic put additional strain on the problem.[23] To support homeowners and renters during the pandemic, federal and state law placed temporary moratoria on foreclosures and evictions for nonpayment.[24] By December 2020, almost one year into the pandemic, eleven million renters and homeowners were overdue on housing payments and at risk of losing their homes to foreclosure or eviction once the moratoria expired.[25] Although potentially experiencing similar financial strains, disparities existed between homeowners and renters.[26] Once the moratoria had expired, homeowners could add the deferred payments to the end of their loan and resume regular

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[18] Jamie Johnson, *What Is the Average Age of a First Time Homebuyer?*, BALANCE, https://www.thebalancemoney.com/what-is-the-average-age-of-a-first-time-homebuyer-5324070 [https://perma.cc/Z3MD-MXAP] (last updated July 17, 2022).

[19] *Homeowners vs Renters Statistics*, IPROPERTYMANAGEMENT, https://ipropertymanagement.com/research/renters-vs-homeowners-statistics [https://perma.cc/F6TA-DYC9] (last updated Nov. 22, 2023).

[20] These difficulties arose due to a "lack of a clear definition of homelessness, the mobility of the population, and the cyclical nature of homelessness." Charles D. Cowan et al., *The Methodology of Counting the Homeless*, *in* HOMELESSNESS, HEALTH, AND HUMANS NEEDS 169, 170 (Nat'l Academies Press 1988).

[21] U.S. GEN. ACCT. OFF., GAO/HRD-85-40, HOMELESSNESS: A COMPLEX PROBLEM AND THE FEDERAL RESPONSE 4 (1985) (noting that a Washington, D.C., based advocacy group estimated the number experiencing homelessness was closer to two or three million).

[22] TANYA DE SOUSA ET AL., U.S. DEP'T OF HOUS. & URB, DEV., THE 2022 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS 2 (2022).

[23] CONSUMER FIN. PROT. BUREAU, HOUSING INSECURITY AND THE COVID-19 PANDEMIC 5 (2021).

[24] *Id.* at 11.

[25] *Id.* at 3.

[26] *Id.* at 14.

payments.[27] No such policy allowed the same for renters.[28] When the federal eviction moratorium expired on July 31, 2021,[29] and federal emergency rental aid winded down in the summer of 2022,[30] 3.8 million renters in the United States said they were "somewhat or very likely to be evicted" as of August 2022.[31] Once evicted, renters are at0 risk of experiencing homelessness due to the lack of affordable housing.[32]

B. Current State of Crisis in Oregon

Similar to the national trends, Oregon has seen rising home and rent prices and a "critical shortage of housing."[33] Oregon has a housing supply deficit of 111,000 homes.[34] This deficit primarily affects low-income families.[35] Of the households that rent in Oregon, 23% are extremely low income.[36] Further, for every 100 extremely low-income

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27 *Id.* at 11–12.

28 *Id.* at 14.

29 NAT'L HOUS. L. PROJECT, FEDERAL MORATORIUM ON EVICTION FOR NONPAYMENT OF RENT 1 (2021).

30 Jennifer Ludden, *Eviction Filings Are Up Sharply as Pandemic Rental Aid Starts to Run Out*, NPR (May 4, 2022, 8:00 AM), https://www.npr.org/2022/05/04/1095559147/eviction-filings-are-up-sharply-as-pandemic-rental-aid-starts-to-run-out [https://perma.cc/9MHD-ASJH].

31 O'Connor, *supra* note 8. Up to date data on evictions is scarce; the largest eviction data tracker follows only ten states. *The Eviction Tracking System*, EVICTION LAB, https://evictionlab.org/eviction-tracking/ [https://perma.cc/K4MZ-A59D].

32 As Managing Attorney Erika Hente of Oregon Law Center's Lane County Legal Aid explains, "As the COVID protections for tenants have expired, we find that much of our work with clients facing eviction is preparing them for homelessness. With a lack of affordable housing available, even getting additional time for clients to move out does not mean they will find other housing." E-mail from Erika Hente, Managing Att'y, Or. L. Ctr., to Juliet Hayden (Mar. 21, 2023, 03:59 PM PST) (on file with author).

33 Dianne Lugo, *$200M Housing and Homelessness Package Passes Oregon House*, STATESMAN JOURNAL (Mar. 17, 2023, 11:31 AM), https://www.statesmanjournal.com/story/news/politics/2023/03/15/oregon-affordable-housing-homeless-shelters-landlord-evictions-youth-resources/70013728007/ [https://perma.cc/J4QR-U8XF].

34 Lauren Dake, *Oregon Has a Housing Crisis. Can the Next Governor Solve It?*, OPB (Aug. 3, 2022, 1:08 PM), https://www.opb.org/article/2022/08/03/oregon-governor-candidates-on-housing-land-use/ [https://perma.cc/K3FX-G4Y7].

35 *Id.*

36 *Housing Needs by State, Oregon*, NAT'L LOW INCOME HOUS. COAL., https://nlihc.org/housing-needs-by-state/oregon (last visited Mar. 22, 2023) (defining extremely low-income households (ELI) as those "whose incomes are at or below the poverty guideline of 30% of their area median income"). For a four-person family this comes to a household income of $26,500 or less. *Id.*

households, only twenty-three affordable and available homes exist in Oregon.[37]

Accompanying the nationwide issues Oregon faces, the state also experiences several unique challenges that both add to the problem and impede its ability to address the housing crisis. Wildfires have raged through Oregon communities and burned down thousands of residential structures,[38] burdensome land use regulations have limited land available for development,[39] and a "not in my backyard" attitude has prevented the development of affordable housing.[40] A discussion of these topics follows below.

1. Wildfires in Oregon Displace Thousands

In 2020, a wave of wildfires burned down more than 4,000 Oregon homes.[41] Many of the homes lost were affordable housing, simultaneously increasing demand for affordable housing while decreasing supply.[42]

Following the wildfires, the high cost of replacing homes coupled with supply and labor shortages slowed rebuilding efforts,[43] leaving many displaced Oregon residents living in temporary housing—such as RVs, hotels, and garages—more than a year after the fires.[44] The Almeda fire in southern Oregon displaced up to 8,500 people; a year later, hundreds were still living in temporary housing.[45] The Santiam

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37 *Id.*

38 Alex Hasenstab, *Lessons Learned from 2020 Helped Oregon Avoid Another Fire Disaster*, OPB (Sept. 12, 2022, 6:17 PM), https://www.opb.org/article/2022/09/12/oregon-wildfire-management-prevention-emergency-management/ [https://perma.cc/JK2K-4NG4].

39 Dake, *supra* note 34.

40 S. UNIV. NEIGHBORHOOD PLAN. GRP., BUILDING HEIGHT REGULATIONS: A SURVEY OF SELECTED OREGON CITIES 1 n.1 (2008).

41 Hasenstab, *supra* note 38.

42 Ted Sickinger, *Almeda Fire's Destruction of Mobile Home Parks Exacerbates Rogue Valley's Affordable Housing Shortage*, OREGONIAN (Feb. 22, 2023, 9:34 AM), https://www.oregonlive.com/pacific-northwest-news/2020/09/almeda-fire-ravages-mobile-home-parks-in-rogue-valley-exacerbating-affordable-housing-shortage.html [https://perma.cc/Y7BA-N6Y5] (stating that three-quarters of the homes lost in the Almeda fire were manufactured homes).

43 *Id.*; Carsyn Currier, *Rebuilding After Almeda Fire May Be Delayed Due to Lack of Contractors and Supply Shortage*, KTVL NEWS 10 (Sept. 22, 2020, 5:11 PM), https://ktvl.com/news/news-10-first-alert-fire/rebuilding-after-almeda-fire-may-be-delayed-due-to-lack-of-contractors-and-supply-shortage [https://perma.cc/Y77F-2NFB].

44 Aidan Gardiner, *Wildfire Took These Families' Homes. Here's Why They Stay.*, N.Y. TIMES (Sept. 8, 2021), https://www.nytimes.com/interactive/2021/09/07/us/oregon-wildfires.html [https://perma.cc/32G9-HD8V].

45 *Id.*

Canyon fire displaced more than 700 families; more than a year later, 87% were still living in temporary housing.[46] Wildfire events like those experienced in 2020 are expected to increase in frequency and severity due to climate change.[47]

2. Land Use Regulations Limit Oregon's Urban Growth

Oregon controls urban sprawl with controversial Urban Growth Boundaries (UGB) for each city.[48] The UGB is based on a twenty-year forecast of where the city is expected to grow and marks "where the city ends and the farms and forests begin."[49] The UGB is intended to balance needs such as protecting farm and forest lands, while providing needed housing.[50] Needed housing must adequately address "the financial capabilities of present and future area residents of all income levels during the 20-year planning period."[51] However, the approach often falls short of addressing affordable housing needs and is critiqued for being "overly burdensome . . . [,] bureaucratic, [and] discriminatory."[52]

While proponents of development argue that more land should be included in the UGB to address the housing crisis, conservation groups argue for greater household density, not more sprawl.[53] Both arguments come with unique hurdles. Urban sprawl not only depletes farm and forest lands but can also increase carbon emissions by extending time spent traveling in a vehicle.[54] On the other hand, denser

46 Molly Rosbach, *OSU Report: Post-2020 Wildfires, Santiam County Residents Burned Out by Trauma, Red Tape*, OR. STATE UNIV. (Feb. 1, 2022), https://today.oregonstate.edu/news/osu-report-post-2020-wildfires-santiam-canyon-residents-burned-out-trauma-red-tape [https://perma.cc/HP8L-F4DC].

47 *Climate Change and Wildfire in Idaho, Oregon, and Washington*, U.S. DEP'T OF AGRIC. CLIMATE HUBS, https://www.climatehubs.usda.gov/hubs/northwest/topic/climate-change-and-wildfire-idaho-oregon-and-washington [https://perma.cc/MSZ2-LBAY].

48 *UGBs and Urban/Rural Reserves*, OR. DEP'T OF LAND CONSERVATION & DEV., https://www.oregon.gov/lcd/UP/Pages/UGBs-and-UrbanRural-Reserves.aspx [https://perma.cc/58QV-RS5F].

49 *Id.*

50 *See* OR. ADMIN. R. 660-024-0040(1) (2019).

51 OR. ADMIN. R. 660-024-0010(3)(a) (2009).

52 Dake, *supra* note 34.

53 *Id.*

54 Maria Elena Scott, *Handy Map Shows in Cleveland, as Elsewhere, Suburbs and Exurbs are Driving Carbon Emissions*, CLEVELAND SCENE (Dec. 16, 2022, 12:59 PM), https://www.clevescene.com/news/handy-map-shows-in-cleveland-as-elsewhere-suburbs-and-exurbs-are-driving-carbon-emissions-41030812 [https://perma.cc/HK4X-KABV].

growth can be limited by city building height restrictions[55] as well as conflict with tree codes.[56]

3. Anti-Affordable Housing Attitudes

Another difficulty, while not necessarily Oregon-specific but instead a nationwide phenomenon, is NIMBY: "Not In My Back Yard."[57] This phenomenon describes a community-held fear that affordable housing will lower land values, congest streets, and increase the need for new infrastructure.[58] Historically, this fear resulted in regulatory barriers such as occupancy codes[59] or restrictive and exclusionary zoning.[60] Some local occupancy codes used maximum occupancy limits to restrict the types of relationships allowed in individual residential dwellings.[61] Exclusionary zoning laws restrict the types of homes that can be built in a neighborhood by limiting homes to single-family residences or imposing height restrictions.[62] Today, as Oregon and other states begin to remove some of these regulatory barriers,[63] the fear results in lengthy city council public hearings and petitions for cities to do the bare minimum.[64]

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55 S. UNIV. NEIGHBORHOOD PLAN. GRP., *supra* note 40, at 1.

56 MARY HULL CABALLERO, PORTLAND CITY AUDITOR, TREE CODE: IMPLEMENTATION PHASE SHOWS PROGRESS AND PITFALLS 13 (2017).

57 U.S. DEP'T OF HOUS. & URB. DEV., ADVISORY COMM'N ON REGUL. BARRIERS TO AFFORDABLE HOUS., HUD-5806, "NOT IN MY BACK YARD": REMOVING BARRIERS TO AFFORDABLE HOUSING 3 (1991).

58 *Id.*

59 EUGENE, OR., ORDINANCE 20667, EXHIBIT B, FINDINGS: MIDDLE HOUSING CODE AMENDMENTS, CITY FILES: CA-21-1/MA 21-1, at 1 (May 25, 2022).

60 U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 57, at 2–5.

61 EUGENE, OR. ORDINANCE 20667, EXHIBIT B, at 1.

62 Cecilia Rouse et al., *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, THE WHITE HOUSE: COUNCIL OF ECONOMIC ADVISERS BLOG (June 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/ [https://perma.cc/T32U-776D] (noting that exclusionary zoning laws have racist, discriminatory roots as a way to circumvent the Supreme Court's ban on explicitly race-based zoning).

63 ETHAN STUCKMAYER, OR. DEP'T OF LAND CONSERVATION & DEV., HOUSE BILL 2001: MORE HOUSING CHOICES FOR OREGONIANS, https://www.oregon.gov/lcd/UP/Documents/HB2001OverviewPublic.pdf [https://perma.cc/9B74-TKY5] (stating that House Bill 2001 requires cities to change single-family zoning areas to allow for middle housing).

64 Megan Banta, *Eugene's Middle Housing Proposal Drew Hours of Feedback For and Against*, REGISTER-GUARD (Apr. 20, 2022, 3:40 PM), https://www.registerguard.com/story/news/2022/04/20/eugene-oregon-middle-housing-proposal-draws-hours-of-pro-con-feedback-housing-density-diversity/65351034007/?utm_source=ground.news&utm_medium=referral [https://perma.cc/2B3Z-GYUD].

Oregon, like the rest of the United States, is suffering from a dire affordable housing crisis, with many contributing factors, both legal and natural, psychological and economic. These factors include Oregon's unique factors, such as recent wildfires and strict land use regulations, and widespread national factors, such as increasing0 housing costs, expiring COVID measures, and anti-affordable housing attitudes. As Oregon and its cities begin to address these barriers, two questions remain: who will build the affordable housing, and who will pay for it?

II
TAX INCENTIVES ADDRESSING THE HOUSING CRISIS

A. Overview

Affordable housing is not a lucrative business on its own; without incentives, low-income housing would not exist.[65] By reducing the overall cost to build affordable housing through tax incentives, legislators believe there will be increased investments in the affordable housing market.[66] To create these incentives, federal and state legislatures have created multiple tax incentive programs. This Section will focus on two such credits: the Low-Income Housing Tax Credit and the Oregon Affordable Housing Tax Credit.

B. The Low-Income Housing Tax Credit

Established over thirty years ago as a last-minute addition to the Tax Reform Act of 1986,[67] the Low-Income Housing Tax Credit Program (LIHTC) is now considered the "most important resource" for addressing the affordable housing crisis in the United States.[68] The LIHTC Program, codified in section 42 of the Internal Revenue Code and made permanent by the Omnibus Reconciliation Act of 1993, creates a partnership between the federal government and individual states to incentivize owners and developers to build affordable

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65 Sagit Leviner, *Affordable Housing and the Role of the Low Income Housing Tax Credit Program: A Contemporary Assessment*, 57 TAX LAW. 869, 870 n.7 (2004) (citing statement of Sen. Packwood).

66 *Id.* at 870.

67 Raphael Bostic, *The LIHTC Program*, PD&R EDGE, https://www.huduser.gov/portal/pdredge/pdr_edge_frm_asst_sec_022312.html [https://perma.cc/3TUZ-YYFF]; Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.

68 *Low-Income Housing Tax Credit (LIHTC)*, HUD USER, https://www.huduser.gov/portal/datasets/lihtc.html [https://perma.cc/E8YP-YPB7].

housing.[69] The LIHTC is intended "to increase the supply of decent and affordable housing in the United States" by lowering the cost of producing affordable rental units.[70]

The LIHTC Program incentivizes building and maintaining affordable rental housing by annually allocating a set amount of tax credits to state housing agencies.[71] As of 2023, the state's credit ceiling was the greater of $2.75 multiplied by the state's population or $3,185,000.[72] The state agency then distributes the tax credits annually to the owners of qualifying residential rental buildings according to federally required qualified allocation plans (QAPs) set by the state.[73] Once a project is approved and placed into service, the credits offset the federal income tax liability of the owner on a dollar-for-dollar basis over a ten-year period.[74] This ten-year period is known as the "Credit Period."[75] Once the Credit Period has started, the "Compliance Period" begins.[76] During the fifteen-year Compliance Period, the LIHTCs are subject to recapture by the IRS.[77] If the IRS recaptures the credits, the owner must pay back the amount of credits that were claimed but unearned.[78] The LIHTC requires building owners to keep units affordable to low-income renters following the expiration of the Compliance Period for a minimum of fifteen years.[79]

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69 26 U.S.C. § 42(h); Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, § 13142, 107 Stat. 416, 437–40 (codified as 26 U.S.C. § 42).

70 David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL'Y 537, 537, 542 (1998).

71 *Id.* at 542.

72 MARK P. KEIGHTLEY, CONG. RSCH. SERV., RS22389, AN INTRODUCTION TO THE LOW-INCOME HOUSING TAX CREDIT 4 (2023).

73 *Id.*

74 *Id.* at 1; Lance Bocarsly & Rachel Rosner, *The Low Income Housing Tax Credit: A Valuable Tool for Financing the Development of Affordable Housing*, 33 PRAC. REAL EST. LAW. 29, 31 (2017). Unlike a tax deduction, which reduces the amount of taxable income, tax credits reduce the actual amount of tax owed. *Credits and Deductions for Individuals*, IRS, https://www.irs.gov/credits-deductions-for-individuals [https://perma.cc/2EYW-PFBB] (Feb. 28, 2024).

75 Bocarsly & Rosner, *supra* note 74, at 31.

76 *Id.* at 32.

77 *Id.*

78 Amanda Talbot, *Recapture Exposed*, NOVOGRADAC J. TAX CREDITS, Oct. 2010, at 1, https://www.novoco.com/public-media/documents/novogradac_jtc_2010-10_pc_pg37.pdf [https://perma.cc/87P7-Q9JK].

79 Bocarsly & Rosner, *supra* note 74, at 32.

1. Qualifying for the LIHTC

To receive LIHTCs, a developer must apply for an allocation of tax credits to the state agency.[80] The individual states use their own state-created QAP, which sets allocation priorities and other requirements, to decide which qualified projects will receive the credits.[81] The LIHTC program requires that states make at least 10% of the credits available to qualified nonprofit organizations with the organizational purpose of providing low-income housing.[82]

To qualify for LIHTCs, a building must be qualified as a low-income building.[83] Both new and existing construction may qualify as low-income buildings.[84] To qualify as a low-income building, an owner of a residential rental property must set aside and restrict the rent of a minimum number of residential units.[85] The owner can elect to set aside and restrict the rent of either (1) 20% or more of the units to be occupied by renters whose income is 50% or less of the area median income or (2) 40% or more of the units to be occupied by renters whose income is 60% or less of the area median income.[86] Once an owner has elected an option, that election cannot be reversed.[87] The LIHTC program restricts the amount of rent owners can charge—including utilities but excluding Section 8 payments—to 30% of the tenants' qualifying income.[88] The program bases the qualifying income on the

80 KEIGHTLEY, *supra* note 72, at 4.

81 *Id.*

82 OR. HOUS. & CMTY. SERVS., LOW INCOME HOUSING TAX CREDITS (LIHTC) PROGRAM FACTSHEET 3, https://www.oregon.gov/ohcs/development/Documents/factsheets/factsheet-lihtc.pdf [https://perma.cc/AHY5-65CG] [hereinafter LIHTC FACTSHEET]. To qualify, the nonprofit organization must be tax-exempt under IRS §§ 501(c)(3) or 501(c)(4). *Id.*

83 I.R.C. § 42(c)(2).

84 Bocarsly & Rosner, *supra* note 74, at 32; 26 U.S.C. §§ 42(d)–(e) (establishing that existing construction requires either rehabilitated properties or properties that have been acquired by purchase to operate as an affordable property, so long as the previous owners did not receive LIHTCs and there is a period of ten years between date of acquisition and the date the property was last placed in service).

85 I.R.C. § 42(g). "Residential rental property" is any building or structure where 80% or more of the gross rental income in a taxable year is rental income from dwelling units. I.R.C. § 168(e)(2)(A).

86 26 U.S.C. §§ 42(g)(1)(A)–(B) (known as the 20-50 test and the 40-60 test).

87 Cohen, *supra* note 70, at 542.

88 Qualifying income is different than actual income. *Id.*; Bocarsly & Rosner, *supra* note 74, at 32 ("[I]f a tenant with annual income equal to 50 percent of area median income occupies a unit designated for a tenant with income at or below 60 percent of area median, such tenant may be required to pay rent equal to 30 percent of 60 percent of area median income."); I.R.C. § 42(g)(2).

family size of the unit, measured by multiplying the number of bedrooms in the unit by 1.5.[89] The gross rent includes utilities but excludes any Section 8 payments.[90]

2. Measuring the Credit Amount

The amount of LIHTCs available to the taxpayer is determined by multiplying the "qualified basis" of the low-income building by the "applicable percentage."[91] Each concept is explored, in reverse order, below.

The applicable percentage depends on the nature of the project and is generally fixed once the project is placed into service or at the election of the taxpayer.[92] Owners can receive either a 30% subsidy, resulting in a 4% annual tax credit for buildings that are federally subsidized, or a 70% subsidy, resulting in a 9% annual tax credit for buildings that are not federally subsidized.[93] The 9% credit is usually reserved for new construction, and the 4% credit is usually reserved for rehabilitation projects using 50% in federally tax-exempt bond financing.[94] Substantial rehabilitation projects may be eligible for 9% LIHTCs if the rehabilitation expenditures are not less than $6,000 of the qualified basis per low-income unit or 20% of the adjusted basis of the building, whichever is greater.[95] The Treasury Department prescribes the monthly percentage so that the 4% or 9% credit will yield over a ten-year period.[96]

A building's qualified basis—the percentage of the property that is qualified as affordable—is determined by multiplying the eligible basis of the building by the applicable fraction.[97] The eligible basis of a building generally includes the costs associated with the construction of the new building, the acquisition cost of an existing building as well

89 Cohen, *supra* note 70, at 542.

90 *Id.*

91 I.R.C. § 42(a).

92 Cohen, *supra* note 70, at 544; I.R.C. § 42(b)(1)(A).

93 Cohen, *supra* note 70, at 544; Janover, *What Are 4% and 9% LIHTC Credits?*, Janover HUD 223(F) LOANS (Feb. 19, 2023), https://www.hud223f.loans/glossary/4-and-9-percent-lihtcs/ [https://perma.cc/NU8E-BQ34].

94 KEIGHTLEY, *supra* note 72, at 1–2. Historically, tax credits often fell below 4% and 9%, but changes in legislation now treat 4% and 9% to be the minimum tax credit rates.

95 I.R.C. § 42(c).

96 I.R.C. § 42(b)(1)(B); Bocarsly & Rosner, *supra* note 74, at 30.

97 I.R.C. §§ 42(c)(1)(A)(i)–(ii). In tax law, the "[b]asis is generally the amount of your capital investment in property for tax purposes." *Topic No. 703, Basis of Assets*, IRS (Jan. 12, 2024), https://www.irs.gov/taxtopics/tc703 [https://perma.cc/4RWQ-Q466].

as any costs associated with improving the building, and may include the costs of common areas and amenities available to all residents.[98] The eligible basis excludes the cost of the land itself[99] as well as any costs financed by federally funded grants.[100] The eligible basis of projects located in a qualified census tract or a difficult to develop area are increased by 30%.[101]

The applicable fraction is measured either by the unit fraction or the floor space fraction, whichever is less.[102] The unit fraction is the number of low-income units divided by the total number of residential units in the building, while the floor space fraction is the total floor space of low-income units in a building divided by the total floor space of all residential rental units in the building.[103]

For example, if a developer spent $2 million building a residential rental property where one-half of the units would be set aside for low-income housing, the applicable fraction would be one-half, and the eligible basis would be $2 million. The qualified basis—determined by multiplying the eligible basis by the applicable fraction—would thus equal $1 million. Assuming the property did not receive any federal subsidies, the applicable percentage would be 9%. To find the LIHTC amount available, multiply the qualified basis of $1 million by the applicable percentage of 9%, which equals an annual tax credit of $90,000.[104]

3. The LIHTCs Developer and Investor Relationship

The LIHTC does not just create a relationship between the federal government and the individual states; it can also create a legal relationship between developers and investors. In forming such a relationship, a developer intending to build residential rental property but lacking the capital may turn to an outside investor to help fund the affordable housing project.[105] Developers may "sell" the LIHTCs to

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98 Bocarsly & Rosner, *supra* note 74, at 34.

99 *Id.*

100 I.R.C. § 42(d)(5)(A).

101 Bocarsly & Rosner, *supra* note 74, at 35; I.R.C. § 42(d)(5)(B). A qualified census tract is an area where either 50% or more of households have an income less than 60% of the area's median gross income or has a poverty rate of at least 25%; a difficult development area is an area with high construction, land, and utility costs relative to the area's gross median income. I.R.C. §§ 42(d)(5)(B)(ii)–(iii).

102 I.R.C. § 42(c)(1)(B).

103 I.R.C. §§ 42(c)(1)(C)–(D).

104 Author calculation.

105 KEIGHTLEY, *supra* note 72, at 1.

investors through the formation of a limited partnership in exchange for upfront financing of the construction.[106] This partnership binds the parties, giving the tax credit claimant an ownership interest in the property.[107] Once the partnership is formed, the developer acts as the general partner, maintaining control over the development and its day-to-day management while retaining only a small ownership interest.[108] The investor acts as the limited partner, maintaining a majority ownership interest but having little-to-no say in the development or management.[109] This partnership allows the developer to build the housing with the investor's capital investment and the investor to claim the tax benefits on their[110] federal income tax return, lowering their tax liability.

4. Challenges of the LIHTC Program

Between 1987 and 2021, 3.55 million new or rehabilitated housing units benefited from the LIHTC program.[111] But despite that impressive number, there are still only thirty-three available affordable rental homes for every one hundred low-income renter household seeking shelter.[112] On top of the persisting deficit of rental homes, commentators have observed several additional deficiencies with the program, described below.

First, LIHTC units are only temporarily rent restricted.[113] Once the thirty-year compliance period has passed, the units revert and owners can rent the units at the market rate.[114] Because the LIHTC program was created in 1986, every year more units revert to market rate.[115] By 2025, an estimated 138,300 LIHTC units will reach the end of the affordability period and will be available to rent at the market rate.[116]

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106 *Id.* at 1, 5.

107 *Id.* at 5.

108 *Id.*

109 *Id.*

110 "Their" is used in the singular to promote gender inclusivity.

111 *Low-Income Housing Tax Credit (LIHTC): Property Level Data*, HUD USER (revised May 4, 2023), https://www.huduser.gov/portal/datasets/lihtc/property.html [https://perma.cc/FYM8-7F2Q].

112 NAT'L LOW INCOME HOUS. COAL., *supra* note 17, at 1.

113 JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., THE STATE OF THE NATION'S HOUSING 2022, at 41 (2022), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2022.pdf [https://perma.cc/C37Y-BGHZ].

114 *Id.*

115 *Id.*

116 *Id.*

Second, LIHTC projects primarily house the working poor, not the nation's lowest-income households.[117] Although targeting the lowest-income households is one of the LIHTC program's stated objectives, the program does not penalize owners or investors for failing to rent to the lowest-income tenants.[118] Instead, the LIHTC program effectively rewards and incentivizes owners for renting to those with the highest qualifying income because the owners can generate greater revenues.[119] Likely due to this incentive, research shows that only a moderate-income household can afford a typical LIHTC unit's rent.[120] If households making the highest wages from the pool of eligible renters are renting the LIHTC units and the lowest-income families are still priced out, the program addresses only a fraction of the current housing crisis.[121]

Third, the LIHTC program can promote segregation. As discussed above, the program incentivizes developers to build in qualified census tracts or difficult development areas.[122] These incentives encourage LIHTC developments in the highest poverty areas.[123] By promoting the construction of low-income housing in high-poverty areas, the LIHTC keeps low-income tenants in the high-poverty areas, reinforcing a system of economic and racial segregation.[124]

Fourth, the laws surrounding the LIHTC are not consistently enforced.[125] Compliance is monitored through multiple actors, including state Housing Finance Agencies (HFAs), owner self-monitoring, investor policing, and tenant reporting. Although HFAs are tasked with inspecting LIHTC properties for compliance, these inspections take place only once every three years in only 20% of the low-income units.[126] More often, owners are left to self-monitor the property's compliance, making it easy to underreport—or even

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117 Bocarsly & Rosner, *supra* note 74, at 30.

118 Shilesh Muralidhara, *Deficiencies of the Low-Income Housing Tax Credit in Targeting the Lowest-Income Households and in Promoting Concentrated Poverty and Segregation*, 24 MINN. J.L. & INEQ. 353, 364 (2006).

119 *Id.*

120 *Id.* at 363.

121 *Id.*

122 I.R.C. § 42(d)(5)(B).

123 Michelle D. Layser, *How Federal Tax Law Rewards Housing Segregation*, 93 IND. L.J. 915, 949 (2018).

124 *Id.* at 949–50.

125 Desiree C. Hensley, *Out in the Cold: The Failure of Tenant Enforcement of the Low-Income Housing Tax Credit*, 82 U. CIN. L. REV. 1079, 1097 (2014).

126 *Id.* at 1098–99.

conceal—noncompliance.[127] Investors, who are at risk of having the IRS recapture tax credits for noncompliance, have an interest in ensuring compliance.[128] However, this method is only effective if the IRS knows of the noncompliance.[129] To that end, tenants can report an owner's failure to fulfill the duties required by the LIHTC program. Unfortunately, however, the LIHTC program does not require owners inform tenants of the property's LIHTC status.[130] Accordingly, many tenants are not aware of the rights the LIHTC confers upon them, affecting their ability to enforce those rights.[131] Even if armed with the knowledge of their rights, LIHTC residents generally cannot afford legal counsel to bring a suit enforcing those rights.[132] The scale of the noncompliance problem is unclear because the LIHTC does not require HFAs or the IRS to collect data on noncompliance.[133]

Fifth, the incentive to invest in affordable housing for tax benefits is inextricably linked to the corporate tax rate. Although LIHTCs are not exclusively available to corporations, the vast majority of investors in LIHTC projects are corporations.[134] Investors benefit from LIHTCs through both the tax credit as well as through deduction of losses.[135] The higher the corporate tax rate, the more the LIHTC's losses can save the investor on their taxes.[136] Conversely, the lower the corporate tax rate, the less tax liability that the LIHTC's losses can offset.[137] In 2018 the corporate tax rate fell from 35% to just 21%, where it remains today.[138] Because the vast majority of LIHTC investors are corporations, this low corporate tax rate could prevent the production of over 200,000 homes over the ten years following the tax rate's implementation.[139]

Finally, though not the last deficiency to exist, there is the complexity in funding an LIHTC project. Developers often have to turn

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127 *Id.* at 1099.

128 *Id.* at 1098.

129 *Id.*

130 *Id.* at 1108.

131 *Id.*

132 *Id.* at 1110.

133 *Id.* at 1107.

134 KEIGHTLEY, *supra* note 72, at 6.

135 Michael Novogradac et al., *Tax Reform and Its Consequences for Affordable Rental Housing*, 27 J. AFFORDABLE HOUS. & CMTY. DEV. L. 107, 115 (2018).

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

to multiple funding sources to fully fund an LIHTC project.[140] Each additional layer of funding adds costs to the project, such as legal fees and increased staff time.[141] Requiring five or more funding sources can add hundreds of thousands of dollars in transactional costs to the project.[142] In addition, obtaining multiple funding sources takes time, thereby extending the development timeline and leading to further development costs.[143] Funding complexities can be especially problematic for LIHTC projects intended to serve the lowest-income populations because these projects often require multiple layers of funding.[144]

5. The LIHTC in Oregon

Although the LIHTC is a federal tax incentive, individual states carry out the program, and the particular state's program management can influence its success. In Oregon, over seven hundred LIHTC projects making up 37,780 low-income units were in service in 2020.[145] Oregon's QAP currently distributes the LIHTCs through a competitive process for the 9% credits and a noncompetitive process for the 4% credits.[146]

Oregon Housing and Community Services (OHCS) issues the competitive credits through the department's Notice of Funding Availability (NOFA) application. The competitive credits issued through the NOFA application cannot exceed the state cap.[147] Individual applicants of the 9% LIHTCs cannot receive more than 20% of any annual tax credit allocation and may not receive more than an average of 15% of annual tax credit allocations over any two-year period.

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140 ELIZABETH KNEEBONE & CAROLINA K. REID, TERNER CTR. FOR HOUS. INNOVATION, THE COMPLEXITY OF FINANCING LOW-INCOME HOUSING TAX CREDIT HOUSING IN THE UNITED STATES 1, 2 (2021).

141 *Id.* at 11.

142 *Id.*

143 *Id.* at 15 (noting that developers can have outstanding land acquisition or predevelopment loans).

144 *Id.* at 10.

145 NOVOGRADAC, LIHTC PROPERTIES IN OREGON THROUGH 2020, at 60, https://www.novoco.com/sites/default/files/atoms/files/oregon-lihtc-properties-to-2020-072022.pdf [https://perma.cc/P63P-5EP5].

146 LIHTC FACTSHEET, *supra* note 82, at 2; *LIHTC 4 Percent Application and Conduit Bond Financing*, OR. HOUS. & CMTY. SERVS., https://www.oregon.gov/ohcs/development/Pages/nofa-four-percent-lihtc.aspx [https://perma.cc/T8Q7-PBAH].

147 LIHTC FACTSHEET, *supra* note 82, at 3.

OHCS issues the noncompetitive credits to developments that meet strict requirements.[148] To qualify for the noncompetitive credits, at least 50% of the development must be funded by tax-exempt bonds and the development must meet program regulations and Oregon's QAP requirements.[149] Unlike competitive credits, noncompetitive credits are not subject to the state allocation cap.[150] Instead, the bond limits cap the noncompetitive credits.[151] However, the noncompetitive process for the 4% credit is currently transitioning to a competitive structure due to depleted state resources.[152]

In addition to those credits, Oregon strives to "provide lower rents to lower income Oregonians" through deeper income and rent targeting set-aside restrictions.[153] These restrictions, which are in addition to the federal requirements, set aside either 20% or 40% of the units for tenants whose income is below 50% or 60% of the average median income, respectively.[154] If an owner has elected for a deeper set-aside, OHCS monitors compliance.[155] Because the restriction is not federally required, noncompliance is not reported to the IRS and therefore the credits are not subject to recapture.[156] However, OHCS requires the owner to reimburse tenants who overpaid their rent.[157] If a tenant who once met the deeper set-aside requirements has an increase in annual income and no longer meets the threshold, the owner is encouraged to either pass the lower rent to a tenant who qualifies or offer the unit to the next qualifying person on the waiting list.[158]

Although the LIHTC is considered the most important tool to address the housing crisis, the LIHTC alone is insufficient to address

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148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *OHCS Survey to Help Plan Future Changes to 4% LIHTC Program*, HOUSING OREGON, https://housingoregon.org/ohcs-survey-to-help-plan-future-changes-to-4-lihtc-program/ [https://perma.cc/L4HS-3L98].

153 OR. HOUS. & CMTY. SERVS., LIHTC PROGRAM COMPLIANCE MANUAL 9 (2016), https://www.oregon.gov/ohcs/compliance-monitoring/Documents/compliance/lihtc/LIHTC-Compliance-Manual-2016.pdf [https://perma.cc/DBM8-MS2L] [hereinafter LIHTC MANUAL].

154 *Id.*

155 *Id.*

156 OR. HOUS. & CMTY. SERVS., LIHTC PROGRAM COMPLIANCE FREQUENTLY ASKED QUESTIONS 1 (2017), https://www.oregon.gov/ohcs/compliance-monitoring/Documents/compliance/lihtc/LIHTC-Compliance-FAQs.pdf [https://perma.cc/J6ES-7PRU].

157 *Id.*

158 LIHTC MANUAL, *supra* note 153, at 9.

every problem posed by the crisis. In addition to LIHTCs, developers in Oregon also have access to state-specific tax credit programs to encourage the development and existence of affordable housing.

C. Oregon Affordable Housing Tax Credit

Like the LIHTC, the Oregon Affordable Housing Tax Credit (OAHTC) is a state program intended to "create and protect affordable housing" by incentivizing investments in affordable housing.[159] The OAHTC does so by allowing financial institutions to lower interest rates on affordable housing projects by giving the financial institution a tax credit in the amount equal to the lost interest.[160] The owner passes through the reduction in interest rates to the tenants in lower rents, with some exceptions that will be discussed below.[161]

Through the OAHTC, financial institutions may reduce the interest rates on loans to qualified borrowers for affordable housing projects by up to 4%, even if that means the interest rate is less than 1%.[162] Because of the lower interest rate, qualified borrowers can take out larger loans or accrue less debt. Qualified borrowers include for-profit or nonprofit corporations, state or local government entities, or a controlling partner in a limited partnership.[163]

Unlike the LIHTCs, the OAHTCs cannot be discounted or sold.[164] The OAHTCs can be used as a single source of funding but is most often used in conjunction with other low-income funding sources such as the LIHTC.[165] Oregon legislature has set the OAHTC cap at $35 million in tax credits issuable per year.[166]

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159 OR. HOUS. & CMTY. SERVS., OAHTC PROGRAM MANUAL 3 (2022), https://www.oregon.gov/ohcs/development/Documents/OAHTC%20Program%20Manual%20Revised%2008012022.pdf [https://perma.cc/5PBR-XXZH] [hereinafter OAHTC MANUAL].

160 *Id.* at 4; *Oregon Affordable Housing Tax Credit*, OR. HOUS. & CMTY. SERVS., https://www.oregon.gov/ohcs/development/Pages/oregon-affordable-housing-tax-credit.aspx [https://perma.cc/C8HC-RZR3].

161 OAHTC MANUAL, *supra* note 159, at 4.

162 *Id.* at 3.

163 OR. HOUS. & CMTY. SERVS., OREGON AFFORDABLE HOUSING TAX CREDIT PROGRAM FACTSHEET, https://www.oregon.gov/ohcs/development/Documents/factsheets/factsheet-oahtc.pdf [https://perma.cc/K2T6-QQZH] [hereinafter OAHTC FACTSHEET].

164 NETWORK FOR OR. AFFORDABLE HOUS., OREGON AFFORDABLE HOUSING TAX CREDIT (OAHTC) INFORMATION, https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/349 [https://perma.cc/A2PD-UAK6].

165 OAHTC MANUAL, *supra* note 159, at 3–4.

166 *Id.* at 3.

For a financial institution to qualify for an OAHTC, the reduced interest loan must be for an affordable housing project.[167] Affordable housing projects include new construction, preservation projects, and manufactured dwelling parks.[168] For both new construction and preservation projects to qualify as an affordable housing project, affordability restrictions are set at less than 80% of the Area Median Income (AMI).[169] Preservation projects are rent restricted for up to thirty years; all other projects are rent restricted for up to twenty years.[170]

1. Rent Reduction and Transactional Incentives

To incentivize constructing new affordable housing projects, owners can acquire loans at substantially lower interest rates that allow for either less debt or the ability to acquire larger loans.[171] However, the owner of the building must pass the entirety of savings from the reduced interest rate to the tenants through reduced rent.[172] The owner calculates the reduction "as the difference between the total loan amount at the original interest rate and the total loan amount at the reduced interest rate."[173] Owners may pass the interest rate savings either to all the tenants equally (resulting in a larger number of moderately reduced rent units) or to a fraction of units—resulting in a fewer number of more drastically reduced rent units.[174] The reduction lasts for the lesser of the term of the loan or twenty years.[175] Additionally, restrictive covenants ensure long term affordability.[176]

If owners use the OAHTC alone, the 80% affordability restrictions discussed above apply.[177] However, if owners use the OAHTC in conjunction with other funding sources, the interest rate savings must

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167 *Id.*

168 *Id.* at 4.

169 *Id.* at 5 (stating this restriction does not apply to manufactured dwelling park projects).

170 *Id.*

171 Email from Martin Jarvis, State Tax Credits Program Analyst, Or. Hous. & Cmty. Servs., to Juliet Hayden (Mar. 7, 2023, 3:15 PM PST) (on file with author).

172 OAHTC MANUAL, *supra* note 159, at 4.

173 *Id.*

174 *Id.*

175 *Id.*

176 OAHTC FACTSHEET, *supra* note 163.

177 OAHTC MANUAL, *supra* note 159, at 5.

be passed through as greater savings on the rent restrictions put in place by the other programs:[178]

> For example, if an applicant applies for LIHTC and indicates they are choosing rent restrictions at 60% of Area Median Income (AMI), the Application must demonstrate the required pass-through is being used to reduce rents below the 60% AMI LIHTC restrictions in 10% AMI increments.[179]

Although a tenant can benefit the most from new construction affordable housing projects that use a variety of funding sources, the OAHTC does not consider units funded by any project-based voucher assistance as passing through to the tenant.[180]

An owner is not required to pass through the interest rate savings to the tenants as an incentive to preserve affordable housing projects.[181] A preservation project is "housing that was previously developed as affordable housing with a contract for rent assistance from the United States Department of Housing and Urban Development (HUD) or the United States Department of Agriculture (USDA) and that is being acquired by a sponsoring entity."[182] For a preservation project to qualify for OAHTCs, the contract with the HUD or USDA must have covered 25% of the units and be at risk of expiring in seven years.[183]

Similar to a preservation project, if the borrower for a manufactured dwelling park project is a nonprofit corporation, a state or local government agency, a housing authority, or a manufactured dwelling nonprofit cooperative, the borrower is not required to pass through interest rate savings to the tenants.[184]

All owners must adhere to compliance requirements by submitting a Certification of Continuing Program Compliance (CCPC) once a year; owners of new construction must also submit a demonstration of rent pass-through every three years.[185] Owners are allowed to remedy

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178 *Id.*

179 *Id.*

180 *Id.* at 4.

181 *Id.* at 5.

182 OR. HOUS. & CMTY. SERVS., AFFORDABLE HOUSING FUNDING NOTICE 3 (2021), https://www.oregon.gov/ohcs/development/Documents/nofa/2021/OAHTC-21/2021-OAHTC-Pool-Announcement-and-Instructions.pdf [https://perma.cc/B98T-BPTZ].

183 OAHTC MANUAL, *supra* note 159, at 5

184 *Id.*

185 TERESA PUMALA ET AL., OAHTC-NEW RULES AND PROCESSES (2017), https://www.oregon.gov/ohcs/compliance-monitoring/Documents/training/Rules-and-Processes-OAHTC.pptx [https://perma.cc/T9V8-JQFP].

noncompliance, but willful refusal could lead to increased interest rates or lender action.[186]

2. Challenges of the OAHTC Program

The OAHTC is a policy-driven program intended to strengthen Oregon communities and finance affordable housing in Oregon.[187] Despite the program's importance, as of the writing of this paper, there is little to no academic discussion or critique on the OAHTC. As such, the following challenges of the OAHTC are those observed by the author.

First, it is difficult for potential users to find information about the OATHC. This Author did not easily find comprehensive data and up to date information on the OATHCs on the Oregon.gov website.[188] Additionally, the Oregon.gov website lacks a single page dedicated to the program. Instead, the website spreads the informative materials about the OAHTC across multiple pages. Although a potentially minor program flaw, the design makes navigating the program difficult for those not well-versed.

As a second challenge, the compliance burden could motivate developers to seek out alternative forms of funding, especially if the project already has compliance requirements from other programs.

Taken together, the lack of a timely, updated, and simple way to disseminate program information combined with the compliance requirements could deter some developers from participation in the OAHTC program.

Finally, although not necessarily a challenge, it is worth noting that the OAHTCs offer greater incentives for rehabilitation and manufactured park projects than it offers for new construction. Unlike with new construction, owners of rehabilitation or manufactured dwelling projects are not required to pass through the interest rate savings. Since the owner can hold onto more of the benefit, the OAHTC could be more desirable in these projects than in the construction of new housing. That being said, rehabilitation projects and manufactured park projects are extremely important in addressing the housing crisis.

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186 *Id.*

187 NETWORK FOR OR. AFFORDABLE HOUS., *supra* note 164.

188 *See Oregon Affordable Housing Tax Credit*, *supra* note 159 (showing that as of February 2023, the listed opening date for the OAHTC pool had not been updated since 2021).

III
RECOMMENDATIONS

The road to addressing and eliminating the housing crisis is challenging and complicated. Many brilliant minds have worked on the issue for many years, yet the problem persists. The LIHTC encourages investments in and the development of affordable housing, but the program is complex and competitive. Conversely, the OAHTC is simpler and has the added benefit of further lowering rents, but it is difficult to know the effectiveness of the program due to a lack of easily available data. Despite any weaknesses of the LIHTC or OAHTC, both programs are important elements in the fight against the housing crisis. Still, taxes could be further utilized to address the housing crisis through additional tax credit programs targeting middle housing, instituting tax penalties, and utilizing local solutions at a state level.

A. Middle Housing

To fully address the housing crisis, all demographics must have access to housing. Like low-income renters, middle-income renters—a demographic that makes up over half of all adults in the United States—also struggle to find adequate housing.[189] Rather than expand the LIHTC to include middle-income housing, Oregon Senator Ron Wyden has proposed a Middle Income Housing Tax Credit (MIHTC).[190] The MIHTC would borrow the LIHTC's framework to encourage developers to build affordable rental housing for middle-income households.[191] The MIHTC would require that at least 60% of units be set aside for renters with incomes of 100% or less than the area median gross income rate. Additionally, the credit would restrict rent costs of such units to 30% of 100% of the area median gross income rate.[192]

Like the LIHTC, however, the MIHTC could be subject to similar challenges, such as the temporary creation of affordable middle housing. Further, focusing on middle-income households fails to

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189 Jesse Bennett et al., *Are You in the American Middle Class? Find Out with Our Income Calculator*, PEW RSCH. CTR. (July 23, 2020), https://www.pewresearch.org/fact-tank/2020/07/23/are-you-in-the-american-middle-class/ [https://perma.cc/4Z5Y-2L33].

190 RON WYDEN, MIDDLE INCOME HOUSING TAX CREDIT, https://www.wyden.senate.gov/imo/media/doc/MIHTC%20One-Pager_FINAL.pdf [https://perma.cc/U7PL-Q76W].

191 *Id.*

192 *Id.*

directly address the LIHTC's issue of not meeting the needs of the lowest-income rents.

However, with two separate programs, the LIHTC may be able to focus on creating rental housing for the lowest-income renters while the MIHTC could focus on creating rental housing for those who make too much to qualify for low-income housing but still struggle. To address concerns that MIHTC impedes low-income housing development, Senator Wyden has proposed that all unused MIHTC allocation will be added to the state's LIHTC allocation.[193] If enacted, the two separate systems could allow for the same developer to access more credits and thus develop more affordable housing if they[194] are not subject to the other program's applicant cap.

B. Instituting Tax Penalties Alongside Tax Credits

Although this Paper focused on tax credits, tax penalties could also be of use to address the housing crisis.

On a national level, Senator Jeff Merkley has proposed a tax penalty on investors who own large numbers of single-family homes.[195] The tax penalty would apply to any hedge fund, private equity investor, Real Estate Investment Trust (REIT), individual, or business entity that owns more than one hundred single-family homes.[196] Qualified investors would be subject to a $20,000 tax penalty for each single-family home in excess of one hundred.[197] Although Senator Merkley's proposed tax penalty legislation could be extremely effective in certain metro areas across the United States, this tax penalty may be less powerful in Oregon, where one report suggests that investors bought 7% of the homes purchased in 2021.[198]

On a state level, Oregon could more efficiently combat the problem by implementing different tax penalties. One example of a potential Oregon tax penalty is a tax on institutional owners—defined as companies, corporations, and limited liability companies—of

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193 *Id.*

194 Author uses "they" in the singular to promote gender inclusivity.

195 OREGON'S SENATOR JEFF MERKLEY, END HEDGE FUND CONTROL OF AMERICAN HOMES ACT, https://www.merkley.senate.gov/imo/media/doc/end_hedge_fund_control_of_american_homes_act_bill_summary.pdf [https://perma.cc/C737-VXHE].

196 This penalty excludes nonprofit organizations, public housing agencies, and government entities. *Id.*

197 *Id.*

198 Kevin Schaul & Jonathan O'Connell, *Investors Bought a Record Share of Homes in 2021. See Where.*, WASH. POST (Feb. 16, 2022), https://www.washingtonpost.com/business/interactive/2022/housing-market-investors/ [https://perma.cc/LFM8-FLH5].

multifamily housing properties of ten or more units if 10% of the units are not set aside for low-income tenants at a reduced rent. The penalty could be calculated by setting a fixed penalty of X amount, multiplied by the whole number of the percentage point's difference from 10%, with the total then multiplied by the number of rented units. If X were to equal $20, a ten-unit property without at least one affordable unit would pay a yearly tax penalty of $2,000; a fifty-unit property without at least five affordable units would pay a yearly tax penalty of $10,000. Although the intent would be for the institutional owner to meet the set-aside requirements, any revenue raised from the tax penalty would go to OHCS to fund affordable housing programs.

This potential state plan could alleviate some of the challenges of the LIHTC and OAHTC programs. First, the tax penalty plan would not rely on incentivizing developers to build affordable housing but would instead create more affordable housing out of existing housing. Second, the tax penalty plan could alleviate some of the effects of segregation by applying to all existing qualified housing rather than promoting the building of affordable housing in the lowest-income areas. Third, the tax penalty plan would not expire, thereby creating a more permanent resolution to the housing problem. Before implementing, the legislation should address concerns regarding compliance costs and difficulties as well as the potential negative impacts on other units' rental rates. However, current Oregon laws limiting the yearly allowable increase in rent would be a safeguard for existing renters.

Another potential state tax penalty would be taxing owners of five[199] or more vacation rentals in addition to the standard Oregon state lodging tax of 1.5%.[200] A vacation rental tax could generate revenue for OHCS affordable housing programs by taxing professional rental owners and potentially deter institutional investors from purchasing homes for the sole purpose of maintaining a vacation rental. Small-scale vacation rental owners who use websites like Airbnb and VRBO to earn extra income would not be affected. Further, legislation could address ensuing concerns that vacation rental prices would increase by prohibiting the tax from being passed on to consumers or left to be regulated by the market. Because vacation rentals are not a necessity, a vacation rental tax could be considered akin to a luxury tax.

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199 This number is merely a suggestion. Additional research by legislators on the most beneficial number would be required.

200 *Transient Lodging Tax*, OR. DEP'T OF REVENUE, https://www.oregon.gov/dor/programs/businesses/Pages/lodging.aspx [https://perma.cc/27NQ-TXUQ].

C. Looking to Local Solutions—an Ashland, Oregon, Case Study

A closer look at an affordable housing program in the small southern town of Ashland, Oregon, provides a potential road map for expanding tax credits beyond developing affordable rentals and into developing affordable owner-occupied units. Ashland's local government has incentivized the building of deed-restricted homes,[201] allowing low-income families the chance to own their own home in a market with an average home price of $670,000.[202] To purchase a deed-restricted home, the City must verify the purchaser's income.[203] To sell a deed-restricted home, the seller must follow a formula set by the City to determine the maximum sale price.[204]

Amplifying Ashland's model, federal or state legislators could use the LIHTC and the OAHTC tax credit formulas to incentivize deed-restricted units offered for sale to low-income purchasers. Although such a program would be hard to monitor at the federal level, the federal government could delegate the program to the individual states to implement, such as with the LIHTC, or it could be an entirely state-run program, like the OAHTC. The State of Oregon could task the OHCS with monitoring the deeds or set up additional agencies for the individual counties. Additionally, Congress or the Oregon state legislature could apply the OAHTC framework for loans to low-income purchasers. Financial institutions could receive a tax credit for lowering the interest rate on loans to low-income purchasers of deed-restricted homes. Like both the LIHTC and the OAHTC, Congress or the Oregon state legislature could apply these deed restrictions to both new and existing construction.

CONCLUSION

Government programs often take time for their effects to be truly felt. It's been ninety years since the government first started addressing housing hardships. Although the numbers of units built using tax credits like the LIHTC's sound impressive, the housing crisis has worsened in recent years. Federal tax credits, such as the LIHTC, and

201 CITY OF ASHLAND, ASHLAND HOUSING PROGRAM 2, https://www.ashland.or.us/SIB/files/Housing_Program_Brochure.pdf [https://perma.cc/K429-FJLG].

202 *Ashland, OR Housing Market*, REDFIN, https://www.redfin.com/city/803/OR/Ashland/housing-market [https://perma.cc/WX2H-H3AV] (stating average home price as of January 2023).

203 CITY OF ASHLAND, *supra* note 201, at 2.

204 *Id.*

state supplements, like the OAHTC, are important pieces of a bigger puzzle, but neither program alone can solve the crisis. The framework created by these programs can, however, be utilized to create further-reaching programs that extend to middle-income housing and increase low-income persons' home ownership. Additionally, tax strategies can extend beyond tax credits that incentivize the creation of affordable housing to tax penalties that disincentivize practices that contribute to the housing crisis. Even with these additional tax programs, it will take widespread support and cooperation between the social, governmental, and financial sectors to finally resolve the housing crisis.