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Re: Comments on Draft 2011 Qualified Allocation Plan and Multifamily Financing Guide

Dear Ms. Sylvester:

Thank you for this opportunity to submit comments on the draft revisions to Maryland's 2011 Qualified Allocation Plan and Multifamily Financing Guide. We have carefully reviewed the proposed revisions and are disappointed to see that it fails to address in a meaningful manner the civil rights problems in the operation of the LIHTC program in Maryland.

In particular, we are disappointed to see that the Department failed to follow the recommendation of Governor O'Malley and Lt. Governor Brown's transition team --- which included many representatives of local government and affordable housing developers --- that Maryland's local approval and contribution requirement be eliminated or changed.<sup>1</sup> (Hereinafter the "local approval requirement") There is no evidence in the revisions to the QAP that the Department gave meaningful consideration to this recommendation, or to the comments submitted by the Baltimore Regional Housing Campaign, Andrew Freeman Esq. (on behalf of the plaintiffs in *Thompson v. HUD*), the Lawyers Committee for Civil Rights Under Law, the Homeless Person's Representation Project, the Maryland Legal Aid Bureau and the Public Justice Center urging that this discriminatory requirement be eliminated for federal Low Income Housing Tax Credits subject to the QAP.<sup>2</sup>

**Maryland has a long history of residential racial segregation brought about by deliberate policies of government at the local, state and federal level, and reproduced in the housing market.**<sup>3</sup> The evidence is clear that Maryland's operation of the LIHTC program is not serving as a vehicle to remedy this segregation contrary to the

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<sup>1</sup> *O'Malley/Brown Transition Workgroup, Department of Housing and Community Development*, (February 2007) at 22.

<sup>2</sup> In response to the request in Notice 10-11 that comments submitted with respect to the first draft of the 2011 QAP not be repeated, we incorporate the identified comments herein by reference.

<sup>3</sup> See e.g. Pietlla, *Not in My Neighborhood: How Bigotry Shaped a Great American City*, Ivan R. Dee, 2010. *Thompson v. HUD* 348 F. Supp. 2d 398 (N. D. Maryland, 2005)

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Department's duty under the Fair Housing Act, 42 U.S.C. 3508(e)(5) as a recipient of federal funds. Instead, the Department is perpetuating and reinforcing segregation in the market and in the older assisted housing programs.

In 2005, The Kirwan Institute of Ohio State University analyzed the location of Maryland LIHTC projects placed in service in prior years for a group of local and national: Their findings are summarized in the organizations' comments on Maryland's 2005 Draft QAP.<sup>4</sup>

“As set out in the accompanying maps, the past pattern of LIHTC siting in Maryland reinforces patterns of metropolitan segregation by channeling LIHTC funds --- and the predominantly minority and low-income families who disproportionately need such subsidized housing --- into more segregated, higher poverty neighborhoods and school districts.”

**To our knowledge, the Department has never publicly released a similar analysis of the results of its QAP policies and project selection decisions.** In particular, there is no evidence that a meaningful analysis of the of LIHTC project selection and siting has been conducted as part of the state's fair housing planning responsibilities pursuant to 24 C.F.R. 570.487(b) or its adoption of the Qualified Allocation Plan.<sup>5</sup> The state's April 2010 *Analysis of Impediments to Fair Housing In Maryland's Non-Entitlement Communities* looks only at the location of LIHTC projects in relation to areas of minority concentration in the non-metro counties. Only 10% of the LIHTC units in Maryland are located in non-metro areas.<sup>6</sup> The remaining 90% of LIHTC units, as well as the bulk of the state's minority population and areas of minority concentration, are located in the Washington, D.C. and Baltimore-Towson metropolitan areas. They should have been, but were not, included in this analysis.

Had the Department conducted an appropriate analysis of the location of LIHTC units, the data would undoubtedly have supported the conclusion that Maryland is perpetuating racial segregation and discrimination through the allocation of Low Income Housing Tax Credits.

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<sup>4</sup> Maryland Legal Aid Bureau, Lawyers' Committee for Civil Rights, and Poverty Race Research Action Council to Patricia Rynn Sylvester, February 14, 2005, available at <http://www.prrac.org/pdf/MD2005LegalAid.pdf>. (last visited 12/12/10)

<sup>5</sup> It does not appear that the state has ever examined state level policies or produced a state level Analysis of Impediments to Fair Housing (AI) as required by 24 C.F.R. 570.487(b). A document identified as an AI for the rural non-entitlement jurisdictions of the state is posted on the Departments website. It is not clear whether this is a draft or final document. *Analysis of Impediments to Fair Housing Choice for Maryland Non-Entitlement Communities* (April 2010) . [http://www.dhcd.maryland.gov/Website/About/PublicInfo/Publications/documents/Fair\\_Housing\\_Choice\\_Impediments.pdf](http://www.dhcd.maryland.gov/Website/About/PublicInfo/Publications/documents/Fair_Housing_Choice_Impediments.pdf). Most recently accessed 12/12/10.

<sup>6</sup> Climaco, Finkel, Kaul, Lam and Rodger, *Updating the Low-Income Housing Tax Credit (LIHTC) Database: Projects Placed in Service Through 2006*, U.S. Department of Housing and Urban Development, Office of Policy Development and Research (2009) at Exhibit. A3.

**Maryland has a segregated LIHTC housing program according to a HUD report.**

- 48% of LIHTC units in Maryland are located in areas that are 50% or greater minority. This exceeds the percentage of all rental units in Maryland that are located in such areas (42%).<sup>7</sup>
- The targeting of LIHTC units in areas that are greater than 50% or greater minority is even more pronounced in the Baltimore metropolitan area. The HUD report says that 48% of LIHTC units Baltimore metro area are in areas that are 50% or greater minority, as compared to only 35% of rental units overall.<sup>8</sup>
- The foregoing data likely understates the segregation of projects targeted to families or the homeless because it also includes LIHTC units designated for elderly, disabled, family and special needs occupancy. LIHTC units in projects targeted to elderly and disabled are less likely to be in high minority neighborhoods compared to projects targeted to families or the homeless.<sup>9</sup>
- Only 34.4% of family LIHTC units in the Baltimore metropolitan area are located in areas where the minority population is less than the metro average minority population.<sup>10</sup>

**Maryland also targets its LIHTC projects to areas of concentrated poverty, subjecting minority tenants to slum and blighted conditions.**

- The HUD report also finds that LIHTC units in Maryland are more likely to be located in poverty concentrated areas, where 30% or more of the population is poor, as compared to rental units overall.<sup>11</sup>
- This pattern of LIHTC siting is more pronounced in the Baltimore metropolitan area where 29.5% of LIHTC units are located in poverty concentrated areas, twice the level of rental units overall, 14.7%.<sup>12</sup>

**Although it is a wealthy state, Maryland's performance in locating family LIHTC units in low poverty areas lags behind both the market and its neighboring states, especially with regard to non-elderly LIHTC housing.**

- Delaware and Virginia use LIHTC to put a *higher* percentage of family housing in the low poverty census tracts of large metropolitan areas than the percentage of all

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<sup>7</sup> *Id.*, Exhibit A6.

<sup>8</sup> *Id.*, Exhibit A13.

<sup>9</sup> *Id.* at 62-63.

<sup>10</sup> Khadduri, Buron, and Climaco, *Are States Using the Low-Income Housing Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods?* Poverty Race Research Action Council (2006), Appendix B.

<sup>11</sup> Climaco, Finkel, Kaul, Lam and Rodger (2009), Exhibit A5.

<sup>12</sup> *Id.*, Exhibit A12.

rental households in such tracts. In contrast, Maryland places only two-thirds as much (37% of LIHTC family units, compared to 55.2% of all renters).<sup>13</sup>

- Only 24.7% of family LIHTC units in the Baltimore metropolitan area are located in a low poverty census tract, despite the fact that 46.6% of rental units overall are located in low poverty areas.<sup>14</sup>
- This ratio (.53) ranks the Baltimore metropolitan area behind two-thirds of the nation's metro areas, including most of those with poor center cities, such as Milwaukee (1.11), Richmond (.93), Memphis (.80), Buffalo (.79), Hartford (.76), St. Louis (.69) and even Detroit (.58).<sup>15</sup>
- The percentage of family LIHTC units located in low poverty areas in the Washington, D.C. metropolitan area is considerably higher, 56.5% than the Baltimore metropolitan area. However, this appears to be largely due to Virginia's performance in placing family LIHTC units in low poverty areas. 42.2% of family LIHTC units in the Maryland suburbs of the Washington, D.C. metro area are located in low poverty areas as compared to 80.6% of family LIHTC units in the Virginia suburbs.<sup>16</sup>
- This disparity has lead researchers to observe that Virginia and Delaware both do better than Maryland in placing LIHTC units in low poverty neighborhoods that are most likely to provide substantial opportunities to their residents.<sup>17</sup>

**The local approval requirement is intended, and has had the effect of suppressing development of affordable housing in the predominantly white Baltimore suburbs, while targeting it to minority areas and the majority black Baltimore City.**

- LIHTC units in the Baltimore metropolitan area are significantly more likely to be in central-city areas and less likely to be in suburban areas, as compared to rental units overall. HUD reports that 53% of LIHTC units in the Baltimore metro are in central city locations, as compared to only 42% of all rental units.<sup>18</sup>
- HUD data also provides evidence that the local approval barrier is suppressing development of LIHTC units in the Baltimore metropolitan area.
  - Only 41% of Maryland's LIHTC units are located in the Baltimore metropolitan area, less than its share (50%) of the state's rental units.
  - Only 3% of the rental units in the Baltimore metropolitan area are LIHTC units, as compared to 6% in the Washington, D.C. metro, 9% in the Richmond metro, and 5% in the Wilmington, DE metro.

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<sup>13</sup> Khadduri, Buron, and Climaco, at 14.

<sup>14</sup> Khadduri, Buron, and Climaco, Appendix A.

<sup>15</sup> *Id.*

<sup>16</sup> Khadduri, Buron, and Climaco, Appendix A.

<sup>17</sup> *Id.* at 22.

<sup>18</sup> Climaco, Finkel, Kaul, Lam and Rodger (2009), Exhibit A9.

- Our review of recent LIHTC awards (2007-2010) to projects located in the Baltimore metropolitan area<sup>19</sup> is consistent with the above analysis of HUD data.
  - We found 44 projects that were awarded LIHTC during the period 2007-2010, of which only 19 (43%) were family (non-elderly). The remainder (23 or 57% are restricted to the elderly.
  - More than half of the projects (23), were in Baltimore City with only 21 in all other Baltimore metropolitan jurisdictions combined.
  - Of the 21 suburban projects, 13 (62%) are restricted to the elderly.
  - Of the 8 suburban family projects, all but one involved rehabilitation or replacement of an existing affordable housing project on its original site.<sup>20</sup>
  - The single exception, and only “new” LIHTC project located in a Baltimore suburb, was Ellicott Gardens in Howard County. This is described as an affordable housing community that will be marketed to working households at (50-60% of AMI), the top of the LIHTC income scale.<sup>21</sup>
  - We found no LIHTC awards to family projects involving new construction (or acquisition and rehabilitation of a site that was not already public or subsidized housing) in Anne Arundel, Baltimore, or Harford County.
  - We found no LIHTC awards to family projects located in Anne Arundel County outside of Annapolis. Annapolis has a substantial African American population that dates back to antebellum times, and is the only area in the region (outside of Baltimore City) with a concentration of public and subsidized housing. (Although there was an award of LIHTC for an elderly project in Severna Park served by transit, but no similar development of family LIHTC in this high-opportunity area).
  - The pattern in Baltimore County is distinctive. In recent years, Baltimore County has made extensive use of the LIHTC program, but for elderly housing. We found 7 elderly projects, but only 3 family LIHTC awards to projects in Baltimore County. All 3 family projects involved rehabilitation of an existing affordable project, and all were located in a high-minority and/or high-poverty area.<sup>22</sup> We also found three (3) early LIHTC family projects listed in the HUD database (York Park, Kingsley Park and Tall Trees) that have since been demolished, but without any

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<sup>19</sup> We reviewed the recipient lists for 2007-2010 posted on the Department’s website at <http://www.mdhousing.org/website/programs/lihtc/Default.aspx>

<sup>20</sup> At least one of the suburban rehabilitation projects, Annapolis Gardens/Bowman in Annapolis, involves a planned reduction of public housing units from 150 to 75, without any planned replacement, and thus will actually *reduce* the amount of housing in Anne Arundel County affordable to families with incomes below 30% of AMI.

<sup>21</sup> [http://www.co.ho.md.us/DH/DH\\_Communities.htm](http://www.co.ho.md.us/DH/DH_Communities.htm)

<sup>22</sup> One project was located in Baltimore County’s predominantly African American northwest corridor. The other two were located in high poverty, low opportunity areas (Dundalk and Landsdowne).

- family unit replacement, resulting in a substantial diminution of housing for very low and extremely low income families in Baltimore County.<sup>23</sup>
- We found no LIHTC awards at all in Harford or Carroll counties during this period.

**Maryland’s local approval/contribution threshold requirement institutionalizes Not-in-My-Backyard (NIMBY) opposition to affordable housing, including LIHTC, and is on its face an impediment to fair housing.**

HUD’s Fair Housing Planning Guide defines an “impediment to fair housing” to include actions or omissions in the state that [a]re counterproductive to fair housing choice, such as NIMBYism.<sup>24</sup> HUD’s Fair Housing Planning Guide specifically requires states to undertake state-level fair housing planning to identify impediments to fair housing in the state’s own policies, including “state policies and actions affecting the approval of sites and other building requirements used in the approval process for public and private housing.”<sup>25</sup>

Like all professionals in the affordable housing industry, the Department and its staff are very much aware of the reality of NIMBYism and its discriminatory effects. The Department is obligated to eliminate or minimize its impact on groups protected by the Fair Housing Act. As HUD’s Fair Housing Planning Guide further explains, “If fair housing objectives are to be achieved, the goal must be to avoid high concentrations of low-income housing. Whether the persons to be served are families with children, persons with disabilities, homeless persons, or lower-income minorities, many communities feel strongly that housing for such persons should be provided but ‘not in my back yard’ (NIMBY). This attitude seriously affects the availability of housing for people in these groups and is on of the most difficult challenges jurisdictions encounter in promoting fair housing objectives.”<sup>26</sup>

Similarly, the Department is also aware that NIMBY opposition is, at its root, often based in racial prejudice.<sup>27</sup> The Department’s local approval requirement is an especially insidious institutionalized vehicle for NIMBYism because it does not require a local government to state that it is withholding support for a project in written form, and does not require the locality to offer any non-discriminatory reasons for doing so.

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<sup>23</sup> Kingsley Park was a non-elderly HUD subsidized development, serving disabled persons, female-headed households, and/or people of color. One of the LIHTC awards made by the state during this period was for the construction of housing restricted to elderly occupancy on the Kingsley Park site. The former residents are excluded from occupancy.

<sup>24</sup> U.S. Department of Housing and Urban Development, *Fair Housing Planning Guide*, Vol. 1, Section 3.5 (The State Level AI)

<sup>25</sup> *Id.*, Section 3.6(2)-(4)) (“Areas for Review – State Level”)

<sup>26</sup> *Id.* Section 5.2 (Public Sector – Zoning and Site Selection).

<sup>27</sup> “*Not in My Backyard: Removing Barriers to Affordable Housing*, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing, (1991) at 1-7.

As we have heard from numerous developers, this pocket veto deters them from expending resources in areas where they know it will be futile to seek local approval based on their own past experience, and the experience of others in the industry. In addition, while the local approval requirement gives some citizens a veto, as the Presidential Commission on Regulatory Barriers to Affordable Housing pointed out, supporters of affordable housing, and families who might benefit from it, have no similar mechanism to express their support.

“Those advocating more affordable housing in a community cannot, in the same way, point to a precise location on the map where benefits of affordable housing are being deliberately withheld and particular households are being disadvantaged.”<sup>28</sup>

The Department is aware that its local approval/contribution requirement serves largely to exclude LIHTC and other affordable housing from suburban and high opportunity areas. As the Presidential Commission noted, regulatory barriers “are a particular concern in suburban areas because they lie in the natural path of development.”<sup>29</sup> The draft Analysis of Impediments to Fair Housing Choice being developed for Baltimore County explains how the Department’s local approval requirement operates as an impediment to fair housing in that county, but the story is much the same in other counties within the Baltimore region and the state:

“The State of Maryland requires local consent for development projects funded through the Low-Income Housing Tax Credit (LIHTC) program, an indirect subsidy used to finance the development of affordable rental housing for low-income households. Therefore, any LIHTC project in Baltimore County must receive County endorsement. According to the current system, developers must present LIHTC proposals to the County Council member in whose district the project is to be located before they can meet with County staff regarding the proposal. Only two family tax credit projects have been developed to date, both of which involved the rehabilitation of existing buildings. According to County staff members, this is due to neighborhood opposition to projects that exclusively serve lower-income families. Communities in Baltimore County would be more likely to support mixed-income development, staff members believe, but state funding for that type of project is unavailable.”<sup>30</sup>

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<sup>28</sup> *Id.* at 1-9.

<sup>29</sup> *Id.* at 2-1.

<sup>30</sup> It bears noting that even 100% LIHTC projects serve households with a broad range of incomes from 0% of median to 60%, with most households at the upper level of 40-60% of AMI. The 60% of AMI strata is roughly equivalent to the median income of renters in market rate housing in the region. To the extent that community opposition is in fact based on this misperception of the income levels of the occupants of LIHTC projects, a better response would be to provide information about the LIHTC program and fair housing laws, rather than capitulation to the opposition.

OBSERVATION: LIHTC projects in Baltimore County can be politically defeated before an application is even submitted, due to the County's requirement that developers gain approval from a County Council member prior to consulting County staff. Not-in-my-backyard attitudes have created political pressure to exclude affordable family housing from many communities, which explains why the County has approved only two family tax credit projects, both rehabilitations of existing buildings."<sup>31</sup>

According to Notice 10-11, the Department refused to eliminate the local approval requirement based on past practice and "the Office of the Attorney General's interpretation of state law." However, as Mr. Freeman explained in his comments, federal law specifies that local officials be given notice and opportunity to comment on an LIHTC application, not given opportunity for a local veto.<sup>32</sup> At the state level, there is no state statute or regulation that expressly imposes a local approval or contribution requirement on the state's allocation of federal subsidies or LIHTC tax credits, and the QAP itself does not contain such a requirement. To our knowledge, there is no formal or informal opinion of the Attorney General on this subject. Moreover, we have received no response to Mr. Freeman's comments explaining that the local "cooperation" requirement in the Community Development Administration enabling act, verbally cited by the Department's counsel as the basis for superimposing a local veto provision on the QAP, is inapplicable to federal Low Income Housing Tax Credits.<sup>33</sup>

Moreover, the Department's contention that local approval is a longstanding practice is misleading. The Department allocated federal LIHTC credits for many years from the inception of the LIHTC program in 1986 until sometime in the mid-1990's, when the Department administratively superimposed the local approval/contribution requirement on the LIHTC program, through the "Multifamily Financing Guide" which is now incorporated by reference in the QAP.

When Secretary Ray Skinner met with the BRHC on May 20, 2010, the Secretary agreed that a serious examination of the local approval threshold requirement, and its civil rights implications, was warranted. The summary dismissal of Mr. Freeman's legal analysis and of the comments received from a variety of stakeholder groups does not appear to be the serious examination that Secretary Skinner promised.

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<sup>31</sup> *Analysis of Impediments to Fair Housing Choice – Baltimore Metro Area, Baltimore County*, Interim Draft #2 prepared by Mullin & Lonergan Associates (September 2010) at 52..

<sup>32</sup> Andrew F. Freeman, *Comments on Draft 2011 Qualified Allocation Plan and Multifamily Financing Guide*, (September 13, 2010).

<sup>33</sup> The provision of the CDA enabling act that the Department appears to rely upon to justify the local approval/contribution requirement was enacted for discriminatory purposes. The provision was added to the law to placate suburban opponents, specifically Baltimore County officials and a group known as the "Maryland Lobby." The Maryland Lobby opposed public and subsidized housing, which were perceived to serve a primarily African American constituency. In 1969 and 1970, the Maryland Lobby successfully petitioned a previous version of the bill to referendum.

We acknowledge that the final draft of the QAP contains some of the changes we suggested to encourage the development of non-elderly housing in areas of opportunity. However, without elimination of the local approval requirement, these changes will not make a meaningful difference. It remains a reality that meritorious projects will never be submitted or advance to the ranking and rating stage if they have been vetoed at the local level, or if developers have been deterred from investing resources where they have reason to believe there is no realistic chance to meet the state's local approval threshold requirement.

Thank you in advance for your consideration of these comments.

Yours very truly,

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