

June 10, 2005

The Honorable Robert Talton  
Chairman, Urban Affairs Committee  
Room CAP GW.06  
P.O. Box 2910  
Austin, TX 78768

Ms. Edwina Carrington  
Texas Department of Housing &  
Community Affairs  
Waller Creek Office Building  
507 Sabine Street  
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Robert C. Kline  
Executive Director  
Texas Bond Review Board  
P.O. Box 13292, Austin, TX 78711-3292

Re: Proposed 2006 Low Income Housing Tax Credit Qualified Allocation Plan  
& Section 1372 of the Texas Government Code

Dear Representative Talton, Ms. Carrington and Mr.Kline:

As a former developer of affordable housing, and as an attorney who has worked in this field since the inception of the tax credit program, I write to comment on the yet-to-be proposed 2006 Low Income Housing Tax Credit Qualified Allocation Plan (herein called the "**QAP**") and the rules and regulations (the "**Bond Rules**") with respect to the operation of the multifamily tax-exempt bond program (the "**Bond Program**") by the Texas Bond Review Board ("**BRB**"), as set forth in Section 1372 of the Texas Government Code. Our comments to the future 2006 QAP are based on the 2005 QAP. We are assuming for this purpose that the funding priorities of the QAP and the Bond Rules will not, in the absence of attention to issues raised herein, be substantially different from recent years.

These comments discuss in detail how the 2006 QAP and the Bond Rules will contravene federal legislation and federal court law, which requires that the Texas Department of Housing & Community Affairs (**TDCHA**) administer the Low Income Housing Tax Credits (**LIHTCs**) and the BRB operate the Bond Program "in a manner consistent with [federal] housing policy governing non-discrimination." The 2006 QAP's funding allocations and point preferences and the Bond Rules will perpetuate racial segregation and poverty concentrations in Texas' inner cities while limiting the creation of housing opportunities that would result in economic and racial segregation in Texas cities, neighborhoods and schools. TDHCA's funding allocations, as well as the funding allocations of the BRB under the Bond Program. must promote racial integration, but

TDHCA's and the BRB's continued failure to evaluate the racially-segregative implications of prior and current funding decisions permits TDHCA and the BRB to disproportionately allocate federal LIHTCs and tax-exempt bond funds (the "**Bonds**") to projects located in racially- and economically-segregated areas ("**Impacted Areas**"). Furthermore, the QAP provisions requiring multiple notifications to state and local political officials and numerous homeowner groups proscribe notifications not required of any other type of housing, resulting in disparate treatment for low income people who are disproportionately minority and these notification provisions, along with scoring rules for political and neighborhood organization support or opposition, enable "not-in-my-backyard" (**NIMBY**) opposition to developments proposed in non-Impacted, higher income, lower minority areas ("**Non-Impacted Areas**"), in direct contravention to the federal policy to promote non-discrimination.

**The Problem**  
**Racial and Socio-Economic Segregation of LIHTC**  
**and LIHTC/Bond Financed Housing in Texas**

The following chart shows that the vast majority of LIHTC and LIHTC/Bond funded developments in the Dallas, Fort Worth, Austin and Houston metropolitan areas have been placed in Impacted Areas.

	<b>% of Units in above Average Minority Areas</b>	<b>% of Units in Below Average Income Areas</b>
Dallas	77%	88%
Fort Worth	56%	72%
Austin	86%	76%
Houston	72%	78%

It is helpful to look at these statistics in the inverse as well – what percentage of the LIHTC units have been in Non-Impacted Areas?

	<b>% of Units in below Average Minority Areas</b>	<b>% of Units in above Average Income Areas</b>
Dallas	23%	12%
Fort Worth	44%	28%
Austin	14%	24%
Houston	28%	22%

Charts graphically showing these statistics are enclosed.

These statistics and charts glaringly show that TDCHA's and the BRB's funding decisions, arising out of the QAP's and Bond Rules in prior years, have continued to pigeonhole low income people in Impacted Areas, in direct opposition to the federal goal and mandate to further desegregation.

**An Overview of Federal Fair Housing Laws<sup>1</sup>**

<sup>1</sup> The work of the Lawyers' Committee for Civil Rights under Law and their lawyers and representatives with respect to the New Jersey 2002 QAP was essential to the preparation of this document, and is quoted extensively herein.

**Background:** Forty years ago, widespread racial segregation threatened to rip civil society asunder. In response, Congress adopted broad remedial provisions to promote integration. One such statute, [the Fair Housing Act (the “**FHA**”)], was enacted “to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>2</sup>

The legislative history of Title VIII reveals how relevant that law is to TDHCA’s and the BRB’s failure to consider the racially- and economically-segregative effects of their funding decisions. Title VIII’s passage in 1968 was the product of a tumultuous period in urban America. On July 27, 1967, President Lyndon Johnson appointed the National Advisory Commission on Civil Disorders (the “**Kerner Commission**”), which was led by Chairman Otto Kerner, to study the urban riots that had occurred throughout the county, especially the July 1967 riots. With regard to the riots, the President directed the Commission to answer three questions: What happened, why did it happen, and what can be done to prevent it from happening again?

The Kerner Commission in its March 1, 1968 report stated in the “Summary of Report” as follows:

This is our basic conclusion: Our nation is moving toward two societies, one black, one white—separate and unequal . . . . Discrimination and segregation have long permeated much of American life; they now threaten the future of every American. This deepening racial division is not inevitable. The movement apart can be reversed. Choice is still possible. Our principal task is to define that choice and to press for a rational resolution. To pursue our present course will involve the continuing polarization of the American community, and, ultimately, the destruction of basic democratic values.

The Kerner Commission continued on page 2 (of the New York Times 1968 edition) as follows:

Segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans.

What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.

It is time now to turn with all the purpose at our command to the major unfinished business of this nation. It is time to adopt strategies for action that will produce quick and visible progress. It is time to make good the promise of American democracy to all citizens—urban and rural, white and black, Spanish-surname, American Indian and every minority group.

In reviewing conditions of life in the racial ghetto, the Commission concluded on pages 12-14 as follows:

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<sup>2</sup> Huntington Branch NAACP v. Town of Huntington.

A striking difference in environment from that of white, middle-class Americans profoundly influences the lives of residents of the ghetto, defined as "an area within a city characterized by poverty and acute social disorganization, and inhabited by members of a social or ethnic group under conditions of involuntary segregation.

The difference in environment is exemplified by:

- ❖ Crime rates, consistently higher than other areas, create a pronounced sense of insecurity.
- ❖ Poor health and sanitation conditions in the ghetto result in higher mortality rates, a higher incidence of major diseases, and lower availability and utilization of medical services.
- ❖ Employment problems, aggravated by the constant arrival of new unemployed migrants, many of them from depressed rural areas, create persistent poverty in the ghetto. Employment problems have drastic social impact in the ghetto. Men who are chronically unemployed or employed in the lowest status jobs are often unable or unwilling to remain with their families. The handicap imposed on children growing up without fathers in an atmosphere of poverty and deprivation is increased as mothers are forced to work to provide support
- ❖ The culture of poverty that results from unemployment and family breakup generate a system of ruthless, exploitable relationships in the ghetto. Prostitution, dope addiction, and crime create an environmental "jungle" characterized by personal insecurity and tension. Children growing up under such conditions are likely participants in civil disorder

The Kerner Commission, on pages 21-23 of the report, assessed the future of urban America as follows:

By 1985, the Negro population in central cities is expected to increase by 72 percent to approximately 20.8 million. Coupled with the continued exodus of white families to the suburbs, this growth will produce Negro populations in many of the nation's largest cities.

The future of these cities, and of their burgeoning Negro populations, is grim. Most new employment opportunities are being created in suburbs and outlying areas. This trend will continue unless important changes in public policy are made. In prospect, therefore, is further deterioration of already inadequate municipal tax bases in the face of increasing demands for public services, and continuing unemployment and poverty among Negro population:

Three choices are open to the nation:

- ❖ We can maintain present policies, continuing both the proportion of the nation's resources now allocated to programs for the unemployed and the disadvantaged, and the inadequate and failing effort to achieve an integrated society.
- ❖ We can adopt a policy of "enrichment" aimed at improving

dramatically the quality of ghetto life while abandoning integration as a goal.

- ❖ We can pursue integration by combining ghetto “enrichment” with policies which will encourage Negro movement out of central city areas.

The first choice, continuance of present policies, has ominous consequences for our society. The share of the nation’s resources now allocated to programs for the disadvantaged is insufficient to arrest the deterioration of life in central city ghettos. . . To continue present policies is to make permanent the divisions of our country into two societies: one, largely Negro and poor, located in the central cities; the other, predominantly white and affluent, located in the suburbs and in outlying areas.

The second choice, ghetto enrichment coupled with abandonment of integration, is also unacceptable. It is another way of choosing a permanently divided country. Moreover, equality cannot be achieved under conditions of nearly complete segregation. In a country where the economy, and particularly the resources of employment, are predominantly white, a policy of separation can only relegate Negroes to a permanently inferior economic status.

We believe that the only possible choice for America is the third—a policy which combines ghetto enrichment with programs designed to encourage integration of substantial numbers of Negroes into the society outside of the ghetto.

Enrichment must be an important adjunct to integration, for no matter how ambitious or energetic the program, few Negroes now living in central cities can be quickly integrated. In the meantime, large scale improvement in the quality of ghetto life is essential.

But this can be no more than an interim strategy. Programs must be developed which will permit substantial Negro movement out of the ghettos. The primary goal must be a single society, in which every citizen will be free to live and work according to his capabilities and desires, not his color. (Emphasis added)

In a section titled “Recommendations for National Action,” on page 23 of the report, the Commission stated as follows:

The major goal is the creation of a true union—a single society and a single American identity. Toward that goal, we propose the following objective for national action:

- ❖ Opening up opportunities to those who are restricted by racial segregation and discrimination, and eliminating all barriers to their choice of jobs, education and housing.

Regarding what steps should be taken to reach that “major goal” the Kerner Commission set forth its recommendation as follows:

- ❖ Federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them.

....

The Commission recommends that the federal government:

- ❖ Enact a comprehensive and enforceable federal open housing law to cover the sale or rental of all housing, including single family homes.
- ❖ Reorient federal housing programs to place more low and moderate income housing outside of the ghetto areas.

(Emphasis added)

When Congress sat down to respond to the problems identified by the Kerner Commission, it set out to reverse the trend toward residential racial segregation:

Difficult as housing integration may be to achieve, it is clear that this goal was important to the Congress that passed the 1968 Fair Housing Act. Proponents of Title VIII in both the Senate and the House repeatedly argued that the new law was intended not only to expand housing choices for individual blacks, but also to foster racial integration for the benefit of all Americans. For example, Senator Mondale, the principle sponsor of the fair Housing Act, decried the prospect that “we are going to live separately in white ghettos and Negro ghettos.” The purpose of Title VIII, he said, was to replace the ghettos “by truly integrated and balanced living patterns.” On the House side, Congressman Celler, the Chairman of the Judiciary Committee, spoke of the need to eliminate “the blight of segregated housing and the pale of the ghetto,” and Congressman Ryan saw Title VIII as a way to help achieve the aim of an integrated society.” Aware of the conclusion of the Commission on Civil Disorders that the nation was dividing into two racially separate societies and the problems associated with them—segregated schools, lost suburban job opportunities for minorities, and the alienation of whites and blacks caused by the “lack of experience in actually living next” to each other. The intended beneficiaries of Title VIII were not only blacks and other minority groups, but, as Senator Javits said in supporting the bill, “the whole community.”

This legislative history makes clear that residential racial integration is a major goal of the Fair Housing Act, separate and apart of the goal of expanding minority housing opportunities. (Emphasis added)<sup>3</sup>

The US Supreme Court has observed that in the FHA “Congress has made a strong national commitment to promote integrated housing.” The Second Circuit has observed that the Act was intended to promote “open,

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<sup>3</sup> [Robert G. Schwemm, Housing Discrimination: Law and Litigation § 2.3, at 2-6 to 2-7 (West Group 2001)(emphasis added).] See also *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972)(quoting Senators Mondale and Javits in discussion of broad role of Title VIII in redressing urban racial segregation); *id.* at 209, 211-12 (discussing broad construction of Title VIII necessary to effect policy Congress considered to be of “highest priority”).

integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.” As Senator Mondale, the bill’s author, said, the proposed law was designed to replace the ghettos “by truly integrated and balanced living patterns.” Integration is an important goal of the FHA.<sup>4</sup> Congress intended that broad application of the anti-discrimination provisions would ultimately result in residential integration.<sup>5</sup>

Among other things, the FHA reflects “the recognition that in the area of public housing local authorities can no more confine low-income blacks to a compacted and concentrated area than they can confine their children to segregated schools.”<sup>6</sup> The FHA expressly provides that any state law “that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.”<sup>7</sup>

**The Specifics & The States’ Obligations under the FHA.** The FHA provides in pertinent part as follows:

1. It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.
2. All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner **affirmatively to further** the purposes of this title and shall cooperate with the Secretary to further such purposes.<sup>8</sup> [Emphasis added]

“Courts [have] emphasized that one of the act’s purposes and, specifically, the ‘affirmatively to further’ requirement was to ensure that ‘action ... be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.’ Otero v. New Your City Hous. Auth.; see also Shannon v. HUD (“Possibly before 1964 the administrators of the federal housing programs could ... remain blind to the very real effect that racial concentration has had in the development of urban blight. Today such color blindness is impermissible.”) ... This race-conscious reading of the FHA’s affirmative obligations -- considering the effect of housing programs on racial concentration -- continues to this day.”<sup>9</sup>

HUD has promulgated regulations addressing how it will comply with Title VIII.

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<sup>4</sup> Trafficante v. Metropolitan Life Insurance Co.

<sup>5</sup> Huntington Branch NAACP.

<sup>6</sup> Crow v. Brown.

<sup>7</sup> 42 USC 3615.

<sup>8</sup> The duty of all executive departments to affirmatively further fair housing has been reinforced in Executive Order 11063: "I hereby direct all departments and agencies in the executive branch, insofar as their functions relate to the provision ... of housing ... to take all action necessary and appropriate to prevent discrimination because of race, color, creed or national origin ... if such property and related facilities are ... provided in whole or in part with the aid of loans, advances, grants, or contributions hereafter agreed to be made by the Federal Government."

<sup>9</sup> Brief in Support of Lawyers' Committee for Civil Rights under Law's Motion for Leave to Appear in In re: Adoption of the 2002 Low Income Housing Tax Credit Qualified Allocation Plan for New Jersey (the “New Jersey Brief”).

The IRS, consistent with its Title VIII obligations, has by reference adopted HUD's regulatory scheme as a part of the Title VIII compliance scheme with which allocating agencies and LIHTC developers must comply. There is one Treasury Department LIHTC civil rights regulation, 26 CFR Sec. 1.42-9(a), which mandates compliance with HUD directives. Specifically, the "regulation provides that eligibility for the LIHTC requires that 'the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development, including Chapters I through XX of Title 24 of the Code of Federal Regulations, and the HUD Handbook.'" Section 1.42-9(a). The Treasury regulation is a welcome recognition of the pertinence of fair housing law to the LIHTC program.<sup>10</sup> Among other relevant provisions, 24 C.F.R. § 941.202, which is codified as part of Chapter IX of Title 24 of the Code of Federal Regulations (and thus incorporated into IRS requirements by 26 C.F.R. § 1.42-9(a)), provides in relevant part as follows:

**§ 941.202 Site and neighborhood standards.**

Proposed sites for public housing projects to be newly constructed or rehabilitated must be approved by the field office as meeting the following standards:

...

(b) The site and neighborhood must be suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, Executive Order 11063, and HUD regulations issued pursuant thereto.

(c)(1) The site for new construction projects must not be located in:

(i) An area of minority concentration unless (A) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (B) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area. An "overriding need" may not serve as the basis for determining that a site is acceptable if the only reason the need cannot otherwise feasibly be met is that discrimination on the basis of race, color, religion, creed, sex, or national origin renders sites outside areas of minority concentration unavailable; or

(ii) A racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area.

...

(d) The site must promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

(e) The site must be free from adverse environmental conditions, natural or manmade, such as instability, flooding, septic tank back-ups, sewage hazards or mudslides; harmful air pollution, smoke or dust; excessive noise vibration, vehicular traffic, rodent or vermin infestation; or fire hazards. The neighborhood must not be one which is seriously detrimental to family life or in which substandard dwellings or other undesirable elements predominate, unless there is actively in progress a

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<sup>10</sup> Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Law, 52 U. Miami Law Rev. 1011.

concerted program to remedy the undesirable conditions.

. . .

(g) The housing must be accessible to social, recreational, educational, commercial, and health facilities and services, and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing.

(emphasis added).

HUD's site selection criteria state clearly their aim of preventing increases in minority concentration due to locations chosen for subsidized housing. Specifically, HUD's regulations for public housing require that "[t]he site for new construction projects must not be located in [a]n area of minority concentration" unless specified exceptions are met, including the existence of "sufficient, comparable opportunities for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration."<sup>11</sup> In addition, "[t]he site must promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons."<sup>12</sup> "[A]s the Seventh Circuit has noted, such regulations exist because, '[a]s a part of HUD's duty under the Fair Housing Act, an approved housing project must not be located in an area of undue minority concentration, which would have the effect of perpetuating racial segregation.'"<sup>13</sup>

24 C.F.R. § 941.202(b) specifically identifies Executive Order 11063 as another source of law with which LIHTC and Bond allocating agencies, such as TDHCA and the BRB, must comply. Executive Order 11063, "Equal Opportunity in Housing," which was issued by President John F. Kennedy, 27 F.R. 11527 (Nov. 20, 1962), and amended by Presidents Jimmy Carter, Ex. Ord. No. 12259, 46 F.R. 1253 (Dec.31, 1980), and William J. Clinton, Ex. Ord. No. 12892, 59 F.R. 2939 (Jan. 17, 1994), identifies its purposes as follows:

WHEREAS the granting of Federal assistance for the provision, rehabilitation, or operation of housing and related facilities from which Americans are excluded because of their race, color, creed, or national origin is unfair, unjust, and inconsistent with the public policy of the United States as manifested in its Constitution and laws; and

WHEREAS the Congress in the Housing Act of 1949 . . . had declared that the general welfare and security of the Nation and the health and living standards of its people require the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family; and

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<sup>11</sup> 24 CFR Section 941.202(c)(1)(i).

<sup>12</sup> 24 CFR Section 941.202(d). Indeed, HUD's other subsidized housing programs impose virtually identical standards for site selection, requiring state implementing agencies to affirmatively further fair housing through consideration of a project's effect on desegregation. For example, all Section 8 rehabilitation units and new construction sites must comply with standards furthering the Fair Housing Act. See 24 CFR Section 983.6(b)(3)(i), (ii) .... Similarly, site selection decisions in the program for supportive housing for the elderly and persons with disabilities must likewise be outside areas of minority concentration, subject to the same exceptions. See 24 CFR Section 891.125(c)(1). New Jersey Brief.

<sup>13</sup> New Jersey Brief, citing *Alschuler v. HUD*.

WHEREAS discriminatory policies and practices based upon race, color, creed, or national origin now operate to deny many Americans the benefits of housing financed through Federal assistance and as a consequence prevent such assistance from providing them with an alternative to substandard, unsafe, unsanitary, and overcrowded housing; and

WHEREAS such discriminatory policies and practices result in segregated patterns of housing and necessarily produce other forms of discrimination and segregation which deprive many Americans of equal opportunity in the exercise of their unalienable rights to life, liberty, and the pursuit of happiness; and

WHEREAS the executive branch of the Government, in faithfully executing the laws of the United States which authorize Federal financial assistance, directly or indirectly, for the provision, rehabilitation, and operation of housing and related facilities is charged with an obligation and duty to assure that those laws are fairly administered and that benefits thereunder are made available to all Americans without regard to their race, color, creed, or national origin:  
[Emphasis added.]

Executive Order 11063 directs executive agencies involved in the provision of housing and, in view of 26 C.F.R. § 1.42-9(a), LIHTC and Bond allocating agencies such as TDHCA and the BRB, to act to end discriminatory policies and practices that “result in segregated patterns of housing and necessarily produce other forms of discrimination and segregation” as follows:

Section 101. I hereby direct all departments and agencies in the executive branch of the Federal Government, insofar as their functions relate to the provision, rehabilitation, or operation of housing and related facilities, to take all action necessary and appropriate to prevent discrimination because of race, color, religion (creed), sex, disability, familial status or national origin--

(a) in the sale, leasing, rental, or other disposition of residential property and related facilities (including land to be developed for residential use), or in the use or occupancy thereof, if such property and related facilities are--

(i) owned or operated by the Federal Government, or

(ii) provided in whole or in part with the aid of loans, advances, grants, or contributions hereafter agreed to be made by the Federal Government, or

(iii) provided in whole or in part by loans hereafter insured, guaranteed, or otherwise secured by the credit of the Federal Government, or

(iv) provided by the development or the redevelopment of real property purchased, leased, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under a loan or grant contract hereafter entered into; and

(b) in the lending practices with respect to residential property and related facilities (including land to be developed for residential use) of lending

institutions, insofar as such practices relate to loans hereafter insured or guaranteed by the Federal Government.

Sec. 102. I hereby direct the Department of Housing and Urban Development and all other executive departments and agencies to use their good offices and to take other appropriate action permitted by law, including the institution of appropriate litigation, if required, to promote the abandonment of discriminatory practices with respect to residential property and related facilities heretofore provided with Federal financial assistance of the types referred to in Section 101(a)(ii), (iii), and (iv).

Pursuant to 42 U.S.C.A. § 3608(d), 26 C.F.R. § 1.42-9(a), 24 C.F.R. § 941.202, and Executive Order 11063, TDHCA's allocation of LIHTC's and the BRB's administration of the Bonds is required to be done with racially integrative guidelines at the fore.

An unbroken line of cases demonstrates that the FHA's "affirmatively furthering" requirement applies to state and local agencies using federal funds. Otero v. New York City Housing Authority; Blackshear Res. Org. v. Housing Authority of City of Austin; Banks v. Perk. The LIHTCs and Bonds are managed by the States, but are clearly federal funds. A brief challenging the New Jersey tax credit allocation process for failure to consider the racial and socio-economic impact of the New Jersey QAP pointed out that "[T]he duty affirmatively to further fair housing in site selection applies equally to those programs where the sites are proposed by private developers rather than selected by HUD or the local public housing authority. See, e.g., Alschuler, 686 F.2d at 474-79 (private developer proposed site location). "Courts have also recognized that the [affirmatively further] duties apply to such state entities [participating in subsidized housing programs]. Indeed, shortly after the passage of the Fair Housing Act, the Second Circuit in Otero v. New York City Housing Authority, 484 F.2d 1122 (21d Cir. 1973), affirmed the duty of local public housing authorities to consider racial integration when selecting public housing tenants. Id. at 1133-34. ...

"We are satisfied that the affirmative duty placed on the Secretary of HUD by Section 3608(e)(5) and through him on other agencies administering federally-assisted housing programs also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the [Fair Housing Act] was designed to combat." Id. at 1133-34. ... Since HUD and the federal defendants had previously been dismissed from that case, see id. at 1130 n. 11, the affirmative duty claims lay only against the local housing authority -- a state agency. Thus, the Second Circuit's decision was unequivocal; under the Fair Housing Act, state and local entities are subject to the same affirmative duties imposed on HUD.

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Other courts have since affirmed Otero, noting that, like HUD, state entities which administer subsidized housing programs have an

affirmative duty to promote integrated housing opportunities and avoid creation of areas of minority concentration. See, e.g., *Reese v. Miami-Dade County*, 210 F. Supp. 2d 1324, 1329 (S.D. Fla. 2002) (in challenge to county's administration of HOPE VI demolition and rehabilitation program, noting that "the Court finds that the duty to affirmatively further fair housing imposes a binding obligation upon the States"); *Project B.A.S.I.C. v. Kemp*, 776 F. Supp. 637 (D.R.I. 1991) (claims against both HUD and public housing authority); *Blackshear Residents Organization v. Housing Authority of the City of Austin*, 347 F. Supp. 1138, 1148 (W.D. Tex. 1971) ("both the housing authority and HUD are charged with the affirmative obligation to further" the goals of the Fair Housing Act). As one decision summarized, "for the past thirty years, claims arising under [the Fair Housing Act] and Section 3608(e)(5) have been enforced consistently with *Otero* -- recognizing an affirmative duty imposed upon the Secretary of HUD and through him on entities like the PHAs [public housing authorities]." *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33, 73 (D. Mass. 2002) ... "When viewed in the larger context of [the Fair Housing Act], the legislative history, and the case law, there is no way -- at least, none that makes sense -- to construe the boundary of the duty to affirmatively further fair housing as ending with the Secretary."

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Thus, a review of the Fair Housing Act, its implementing regulations, and cases interpreting its provisions, make clear that the affirmative obligations to further fair housing principles apply with equal force and directly to HUD and to any local or state entities implementing federal housing programs. The applicability of this affirmative obligation -- particularly in the consideration of relevant racial and socio-economic factors in program site selection for both the LIHTC and other federal housing programs -- to state and local entities is essential to ensuring that federal housing programs promote integrated housing opportunities and avoid creation of minority concentration.<sup>14</sup>

In one case, "the First Circuit held that Section 3608 requires that the federal agency must 'consider [the] effect [of a grant] on the racial and socio-economic composition of the surrounding area.' ... The First Circuit held HUD liable for 'failure, over time, to take seriously its minimal Title VIII obligation to evaluate alternative courses of action in light of their effect upon open housing.' It held HUD liable not for something that it did but for not doing what it was obliged to do, for accepting only cosmetic, ineffectual fair housing efforts by the City of Boston and for not having 'used ... its immense leverage' under the UDAG program 'to provide adequate desegregated housing ....'"<sup>15</sup>

**Given this background, it is clear that all federal housing programs, including the tax credit and tax-exempt bond programs, and the States, Counties and local governments in administering these programs, such as LIHTCs and tax-exempt bonds, must further the national policy of integrated housing by considering the**

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<sup>14</sup> New Jersey Brief.

<sup>15</sup> NAACP Boston Chapter, as summarized in *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Law*, 52 U. Miami Law Rev. 1011.

**racial and socio-economic impact of their funding decisions.** Read together, these sources of law indicate plainly that **TDHCA and the BRB are obliged to affirmatively further the policies of Title VIII by promoting racial integration and collecting data to permit it to assess its compliance with anti-discrimination housing laws.** More specifically, “[t]o comply with their affirmative obligations under the Fair Housing Act, agencies implementing federally-subsidized housing programs must consider, during site selection, the impact of the housing created on maintaining or eroding segregated patterns of racial concentration.”<sup>16</sup> In *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970) (cited with approval in *Trafficante*, supra, 409 U.S. at 211), the Third Circuit held that Title VIII prohibits federal agencies involved in housing from making funding decisions “without some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts.” Id. at 821 (emphasis added). See also *Otero*, supra 484 F.2d at 1134 (“[W]e are satisfied that the affirmative duty placed on the Secretary of HUD . . . and through him on other agencies administering federally-assisted housing programs also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built.”)

Notwithstanding the directions of federal law that require TDHCA and the BRB to comply with those anti-discrimination laws, TDHCA and the BRB, in large part due to the legislation governing the QAP and the Bond Rules, are either choosing not or cannot, in fact, acknowledge that they are required to promote racial integration, as the statistics presented earlier clearly show. **This failure to focus on the need for desegregation in the LIHTC and Bond programs in Texas is particularly harmful, as the LIHTC and Bond programs are currently the nation’s most significant low-income housing programs.**<sup>17</sup>

Texas is not alone in this regard. As one commentator has noted: “Despite massive governmental involvement, the LIHTC program operates without effective regard to civil rights laws, due primarily to the fact that the Treasury and state and local agencies have failed to impose meaningful bars to discrimination. The Treasury and state and local agencies administering the LIHTC lack information regarding the extent of discrimination or segregation in the program. **What little information is available suggests that tax credit developments are racially segregated** .... The federal housing programs which began in the 1930’s have effectively imposed and enhanced racial segregation causing ‘lasting damage.’ **The LIHTC program seems now to be repeating those past errors.**”<sup>18</sup> [Emphasis added]

Notwithstanding the applicability of the FHA to LIHTCs and Bonds, the States

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<sup>16</sup> New Jersey Brief.

<sup>17</sup> Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Law, 52 U. Miami Law Rev. 1011. “The Low Income Housing Tax Credit program is ‘currently the largest federal program to fund the development and rehabilitation of housing for low-income households.’ General Accounting Office, Tax Credits: Opportunities to Improve Oversight of the Low-Income Housing Program Sec. 2 (March 1997).” “With the withdrawal of federal support for most other subsidized housing development programs, the LIHTC program stands as essentially “the only game in town.” 24 CFR Sec. 81 (1998) (explaining that the LIHTC program is “the only major Federal assistance program ... that is currently active for funding new or rehabilitated subsidized housing units.”)

<sup>18</sup> Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Law, 52 U. Miami Law Rev. 1011.

and the federal government have not adequately addressed their responsibilities for making funding decisions that evaluate the segregative or desegregative effects, the racial and socio-economic implications, of the location of federally financed housing.<sup>19</sup>

**State Implementation:  
Lack of Data on Racial and Socio-Economic  
Consequences of Funding Decisions**

Even given these directives, TDCHA and the BRB do not utilize, to use the language of the court decisions, any “institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information” on the areas in which LIHTC and Bond developments are located. By totally ignoring the segregative effects of their funding decisions, and by focusing on funding poverty in place, TDCHA’s administration of the federal LIHTC program and the BRB’s administration of the Bond Program perpetuate and exacerbate racial segregation. To be fair to TDHCA and the BRB, it should be noted that a significant majority of TDCHA’s QAP provisions and the Bond Rules are dictated by state legislation, and TDHCA and the BRB have very little authority to alter the statutory provisions. **Nonetheless, as entities that receive and distribute federal funds, TDCHA and the BRB are required to act affirmatively to end racial segregation and to stem the tide of urban ghettoization. TDHCA and the BRB must do so even if the changes required to the QAP and the Bond Rules, in order to further desegregation, violate existing state law as dictated by the legislature, as federal FHA law is clearly superior to state law.** This affirmative obligation of federal law has been ignored by the legislature in enacting the statutory provisions governing TDHCA and the BRB and has been further ignored by TDHCA and the BRB in promulgating the QAP and the Bond Rules. This blind indifference to racial segregation, and utter failure to satisfy the affirmative duty to promote racial and economic integration, is plainly in contravention of IRS regulations, HUD regulations and federal anti-discrimination laws.

The fact that the segregative effects arise latently from the QAP and the Bond Rules does not excuse TDCHA and the BRB from an obligation to consider these effects. “The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous to private rights and the public interest as the perversity of a willful scheme.” Hobson v. Hansen.

That TDCHA, the BRB and the legislature have not considered these sources of law is reflected most clearly by the continued focus on funding housing in neighborhoods that are already Impacted Areas -- racially-segregated and economically disadvantaged.

Given the statistics cited earlier, it is readily apparent that the QAP and the Bond Rules have resulted in the funding of LIHTC and Bond/LIHTC developments without

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<sup>19</sup> Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Law, 52 U. Miami Law Rev. 1011. “[A]ll federal agencies have been under a statutory mandate since 1968 ‘affirmatively to further’ non-discrimination and desegregation. ... Perhaps the most blatant of the federal shortcomings is the failure of the nation’s largest subsidized housing program to secure information about its compliance with civil rights laws and to act effectively to prevent discrimination and segregation.”

regard to racial or low income concentrations, in violation of the FHA. By their failure to adopt regulations that incorporate these guidelines on site selection, or that otherwise consider the racial impact of Texas' LIHTC allocations and Bond awards, TDCHA and the BRB are violating their obligations to affirmatively further fair housing and implement housing programs in a desegregative manner. **To comply with their affirmative obligations under the Fair Housing Act, agencies implementing federally-subsidized housing programs must consider, during site selection, the impact of the housing created on maintaining or eroding segregated patterns of racial concentration.**<sup>20</sup>

The Shannon court suggested the following criteria may be appropriately included in the institutionalized method required by 42 U.S.C.A. §3608(d):

1. What procedures were used by the LPA [Local Public Agency] in considering the effects on racial concentration when it made a choice of site or of type of housing?
2. What tenant selection methods will be employed with respect to the proposed project?
3. How has the LPA or the local governing body historically reacted to proposals for low income housing outside areas of racial concentration?
4. Where is low income housing, both public and publicly assisted, now located in the geographic area of the LPA?
5. Where is middle income and luxury housing, in particular middle income and luxury housing with federal mortgage insurance guarantees, located in the geographic area of the LPA?
6. Are some low income housing projects in the geographic area of the LPA occupied primarily by tenants of one race, and if so, where are they located?
7. What is the projected racial composition of tenants of the proposed project?
8. Will the project house school age children and if so what schools will they attend and what is the racial balance in those schools?
9. Have the zoning and other land use regulations of the local governing body in the geographic area of the LPA had the effect of confining low income housing to certain areas, and if so how has this effected racial concentration?
10. Are there alternative available sites?
11. At the site selected by the LPA how severe is the need for restoration, and are other alternative means of restoration available which would have preferable effects on racial concentration in that area?

[Shannon, supra, 436 F.2d at 821-22]

By considering such criteria, housing agencies are able to evaluate whether locating affordable housing in a given site offends Section 3608(d). “[T]he [housing] agency’s judgment must be an informed one; one which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration.” Id. at 822. See also Business Ass’n of University City v. Landrieu, 660 F.2d 867, 877 (3d Cir. 1981) (discussing Shannon and HUD’s promulgation of “regulations requiring its officials to consider, prior to the approval of a new low income

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<sup>20</sup> New Jersey Brief.

housing project, the impact of the project on the concentration of racial and low income persons”); 24 C.F.R. § 941.202 (present HUD site selection criteria). Although locating more affordable housing in racially-segregated areas may be permitted under some circumstances, the presumption of 3608(d) against exacerbating segregated housing trends is not easily overcome:

To allow housing officials to make decisions having the long range effect of increasing or maintaining racially segregated housing patterns merely because minority groups will gain an immediate benefit would render such persons willing, and perhaps unwitting, partners in the trend toward ghettoization of our urban centers.

There may be some instances in which a housing decision will permissibly result in greater racial concentration because of the overriding importance of other imperative factors in furtherance of national housing goals. But Congress’ desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing, even though the effect in some instances might be to prevent some members of a racial minority from residing in publicly assisted housing in a particular location. The affirmative duty to consider the impact of publicly assisted housing programs on racial concentration and to act affirmatively to promote the policy of fair, integrated housing is not to be put aside whenever racial minorities are willing to accept segregated housing. The purpose of racial integration is to benefit the community as a whole, not just certain of its members.<sup>21</sup>

**Presently, TDHCA and the BRB have no “institutionalized method” for considering whether LIHTC cycle allocations and LIHTC and/or Bond/LIHTC-funded projects perpetuate, exacerbate, or reduce racial segregation.** TDHCA’s administration of the LIHTC program and the BRB’s administration of the Bond Program thus contravene 26 C.F.R. § 1.42-9(a) and 42 U.S.C.A. § 3608(d). TDHCA and the BRB at a minimum must collect data that will permit them to analyze the segregative or integrative effects of their cycle-allocation and project funding decisions and must include site selection criteria in the QAP and the Bond Rules that permit funding in areas of high minority concentration only when there is an overwhelming need, a concerted community revitalization plan, and no other location for the proposed affordable housing exists.

### **The FHA and QAP Notification Provisions & Political Support Points**

Recently, State law has been altered to give some preferential treatment to developments in higher income, predominantly suburban, areas. The QAP provides for additional points for developments located in a census tract which has a median family income that is higher than the median family income for the county in which the census tract is located. We call this preference area a “high income census tract.” Similarly, the Bond Rules provide that “Priority 1” transactions, which have first priority at the bonds reserved for multifamily developments, include those developments “which are located in a census tract in which the median income ... is higher than the median income for the county, metropolitan statistical area, or primary metropolitan statistical area in which the

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<sup>21</sup> Otero, supra 484 F.2d at 1134-35 (emphasis added).]

census tract is located.” Although from a FHA standpoint this focus on higher income census tracts is welcome, the scoring item (and bond preference item) for higher income census tracts is merely one of a number of site selection scoring options, including lower income, primarily minority areas.

Contravening this move to decentralize affordable housing into the suburbs are the notification provisions of the QAP. The QAP provides that all applicants for LIHTCs must notify homeowner associations, as follows:

B) Notification must be sent to all of the following individuals and entities. Officials to be notified are those officials in office at the time the Application is submitted.

(i) Notification to Local Elected Officials for Neighborhood Organization Input. Evidence must be provided that a letter requesting information on neighborhood organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site ... was sent no later than December 20, 2004 to the local elected official for the city .... If the Development is located in a jurisdiction that has district based local elected officials, or both at-large and district based local elected officials, the notification must be made to the city council member or county commissioner representing that district; if the Development is located in a jurisdiction that has only at-large local elected officials, the notification must be made to the mayor or county judge for the jurisdiction. ... For urban/exurban areas, entities identified in the letter from the local elected official whose boundaries include the proposed Development whose listed address has the same zip code as the zip code for the Development must be provided with written notification, and evidence of that notification must be provided. If any other zip codes exist within a half mile of the Development site, then all entities identified in the letters with those adjacent zip codes must also be provided with written notification, and evidence of that notification must be provided.

In responding to a request for information on homeowners associations, many cities take the conservative position of listing all neighborhood organizations in the area and in adjoining zip codes within ½ mile of the site. For a recent Fort Worth LIHTC application, 19 homeowner organizations were required to be notified.

In addition, the QAP requires that the following political officials be notified:

- Superintendent of the school district containing the Development.
- Presiding officer of the board of trustees of the school district containing the Development.
- Mayor of any municipality containing the Development.
- All elected members of the governing body of any municipality containing the Development.
- Presiding officer of the governing body of the county containing the Development.
- All elected members of the governing body of the county containing the Development.

- State senator of the district containing the Development.
- State representative of the district containing the Development.

Many cities have 6 city council members and many counties have 6 county commissioners, resulting in a total of 18 political officials being notified of the development.

The practical effect of this extensive pre-application notification of homeowners and political officials is to mobilize NIMBY opposition to LIHTC developments, particularly in the suburbs where the apartment site may be adjacent to or in the neighborhood of \$150,000-\$350,000 homes. This level of opposition is not normally seen in the lower income, primarily minority areas, such that many developers choose to avoid the higher income areas and NIMBY opposition, thereby continuing the concentration of tax credit housing in Impacted Areas.

The QAP also requires that all applicants post a sign on the property that in essence says that an application has been filed with TDHCA for a LIHTC supported apartment complex.

The QAP does not stop at notifications, but further institutionalizes NIMBY by providing points for support letters from the State Senator and State Representative from the area and from neighborhood organizations, and negative points for opposition letters from these elected officials and neighborhood organizations..

Letters from State of Texas Representative or Senator: support letters are 7 points each for a maximum of 14 points; opposition letters are -7 points each for a maximum of -14 points.

Furthermore, letters of support from an appropriate neighborhood organization can qualify a LIHTC application for up to 24 points, whereas a letter of opposition results in zero points.

**The net effect of these positive or negative letters is a 52 point swing for these support letters.** In sum total, the effect of the these point scoring provisions for letters from State Representatives, State Senators and neighborhood organizations (the **“NIMBY Scoring Provisions”**) is to provide an institutionalized means for objecting homeowners to eliminate any affordable housing in their neighborhoods. Many city council members now understand this procedure and use it effectively to their political advantage whenever a tax credit transaction is proposed in their district. In a typically tight scoring matrix for the award of credits, where a point or two can determine whether a particular transaction is awarded LIHTCs, suburban homeowners motivated by NIMBY can easily sway their State Representatives, State Senators and neighborhood groups to write opposition letters, thereby allowing NIMBY to deny developments in the suburbs.

TDHCA’s Analysis of Impediments correctly identifies the NIMBY problem as one which is an impediment to fair housing. However, as shown above, **rather than effectively addressing the impediment, the QAP notification rules and NIMBY Scoring Provisions encourage NIMBY.**

The interplay of these types of notification provisions and the FHA was recently analyzed in a case concerning disabled adults, another protected class under the FHA.

In Larkin v. Michigan Protection and Advocacy Service, the Court held that the notification provisions of the Adult Foster Care Licensing Act are preempted by the FHA and violate the equal protection clause of the 14th Amendment. “The notice requirements required the state agency responsible for disabled adult care to notify the municipality of the proposed facility, and the local authorities to then notify all residents within 1500 feet of the proposed facility. These statutes applied only to AFC [Adult Foster Care] facilities which will house the disabled, and not to other living arrangements.” The Court noted that “statutes that single out for regulation group homes for the handicapped are facially discriminatory. ... Accordingly, this is a case of intentional discrimination or disparate treatment, rather than of disparate impact.” (Emphasis added) The Court continued: “Notifying the municipality or the neighbors of the proposed AFC facility seems to have little relationship to the advancement of these goals [integration and deinstitutionalization]. In fact, **such notice would more likely have quite the opposite effect, as it would facilitate the organized opposition to the home, and animosity towards its residents.** ... **We find that the notice requirements violate the FHAA and are preempted by it.**” (Emphasis added)

Similarly, the notification provisions in the QAP, which are dictated by legislation governing TDCHA and the LIHTC program, single out affordable housing, which is significantly beneficial to minorities, another protected class under the FHA. There are no similar notification provisions for any other type of housing in Texas – market rate multifamily apartments, townhomes, condominiums or single family homes. **The sole effect and unstated purpose of the QAP notification provisions is to facilitate the NIMBY attitudes and actions of the residents, galvanizing opposition to affordable apartment developments.** Similarly, under the NIMBY Scoring Provisions points are earned only if the residents are supportive of the development, and an application is penalized if the residents are in opposition to a development, notwithstanding that the political and neighborhood opposition are solely driven by NIMBY concerns. In the highly competitive LIHTC application process, where the difference of 1 point can be critical, motivated suburban homeowners can easily convince their elected officials and neighborhood organizations to write opposition letters (or withhold support letters), effectively eliminating LIHTC developments in suburban areas.

### **Conclusion**

These comments have necessarily been broad in scope because the range of information needed to properly inform TDHCA and the BRB of their affirmative housing duties with regard to the LIHTC and Bond programs is broad and multifaceted. Although these comments rely on different sources of law in broadly addressing urban schools, ghettos, regionalism, racial and economic segregation, the benefits of integration, and TDHCA’s and the BRB’s obligation to affirmatively further fair housing, a clear theme runs throughout the comments that unite those otherwise disparate matters and reflect how the various constitutional provisions, statutes, regulations and rules are contravened:

**TDHCA and the BRB have failed to establish and implement an institutionalized method for considering the social and demographic data when making their LIHTC and Bond funding decisions**

TDHCA’s and the BRB’s complicity in funding poverty in place is reflected by their decision to commit in excess of 70% of the LIHTC and Bond/LIHTC units in Dallas,

Austin and Houston to Impacted Areas – both economically and racially impacted.

What TDHCA and the BRB should do to satisfy their duty to affirmatively further fair housing is in part left to their discretion, as guided by the federal regulations. The touchstone of the obligation to affirmatively further fair housing is integration. **For starters, TDCHA and the BRB and the legislature should consider adding provisions to the QAP and the Bond Rules that give significant point scoring and/or a set-aside of credits for “affirmatively furthering fair housing” – the extent to which the proposed development will expand housing opportunities outside Impacted Areas.**

Assuming that point scoring were utilized to further integration, we submit the following language as a revision to the “Development Location” point scoring in the 2006 QAP (revisions shown are from the 2005 QAP):

Development Location. (2306.6725(a)(4) and (b)(2); 2306.127; 42(m)(1)(C)(i); 42 U.S.C. 3608(d) and (e)(5)) Applications may qualify to receive 4 points. Evidence, not more than 6 months old from the date of the close of the Application Acceptance Period, that the subject Property is located within one of the geographical areas described in subparagraphs (A) through (H) of this paragraph. Areas qualifying under any one of the subparagraphs (A) through (C) of this paragraph will receive 14 points. Areas qualifying under any one of the subparagraphs (D) will receive 28 points. An Application may only receive points under one of the subparagraphs (A) through (H) of this paragraph.

(A) A geographical area which is an Economically Distressed Area; a Colonia; or a Difficult Development Area (DDA) as specifically designated by the Secretary of HUD [these areas continue to need affordable housing and economic development, despite the fact that they are frequently low income, minority concentrated areas].

~~(B) a designated state or federal empowerment/enterprise zone, urban enterprise community, or urban enhanced enterprise community. Such Developments must submit a letter and a map from a city/county official verifying that the proposed Development is located within such a designated zone. Letter should be no older than 6 months from the first day of the Application Acceptance Period. [these areas are mainly commercial zones that are also frequently low income, minority concentrated – without a housing, neighborhood based revitalization plan, which is covered elsewhere, these are not appropriate areas for affordable housing as they may continue to promote segregation]~~

(B) a city or county-sponsored area or zone where a city or county has, through a local government initiative, specifically encouraged or channeled growth, neighborhood preservation, or redevelopment. Such Developments must submit all of the following documentation: a letter from a city/county official verifying that the proposed Development is located within the city or county-sponsored zone or district; a map from the city/county official which clearly delineates the boundaries of the district; and a certified copy of the appropriate resolution or documentation from the mayor, local city council, county judge, or county commissioners court which documents that the designated area was created by the local city council/county commission, and targets a specific geographic area which was not created solely for the benefit of the Applicant.

(C) the Development is located in a county that has received an award as of November 15, 2004, within the past three years, from the Texas Department of Agriculture’s Rural Municipal Finance Program or Real Estate Development and Infrastructure Program. Cities which have received one of these awards are categorized

as awards to the county as a whole so Developments located in a different city than the city awarded, but in the same county, will still be eligible for these points.

(D) the Development is located in a census tract (a) in which there are no other existing developments supported by housing tax credits, and (b) the Development is located in a census tract which has a median family income (MFI), as published by the United States Bureau of the Census (U.S. Census), that is higher than the median family income for the county in which the census tract is located, and (c) the percentage of persons of a particular racial or ethnic minority is no more than 10% and the total minority population is no more than 20%. This comparison shall be made using the most recent data available as of the date the Application Round opens the year preceding the applicable program year. Developments eligible for these points must submit evidence documenting the median income for both the census tract and the county and the racial and ethnic minority percentage of the census tract. ~~[(2306.6725(b)(2))]~~

~~(G) the proposed Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and is proposed to be located in an elementary school attendance zone of an elementary school that has an academic rating of "Exemplary" or "Recognized," or comparable rating if the rating system changes. The date for consideration of the attendance zone is that in existence as of the opening date of the Application Round and the academic rating is the most current rating determined by the Texas Education Agency as of that same date. (42(m)(1)(C)(vii)) [there are many highly rated schools in the inner city, but these areas are still low income, minority concentrated areas, and the schools alone do not address the overall needs of the families]~~

~~(H) the proposed Development will expand affordable housing opportunities for low income families with children outside of poverty areas. This must be demonstrated by showing that the Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and that the census tract in which the Development is proposed to be located has no greater than 10% poverty population according to the most recent census data. (42(m)(1)(C)(vii)) [poverty alone is not the criteria]~~

This scoring item recognizes that the selection of a development site in a predominately non-minority, suburban area can involve risks for a developer related to potential community opposition that may not be encountered to the same degree with other sites, and provides an incentive to a developer to assume these risks in order to provide a high quality housing opportunity in such areas for the families that are eligible for tax credit units. This scoring item is consistent with the determination by the TDHCA in its current Analysis of Impediments that NIMBY is an impediment to fair housing.

Furthermore, stricter limits should be placed on new construction developments in low income, minority concentrated areas (even with significant revitalization efforts) to avoid over-concentration of LIHTC units. In addition to the one year, one-mile rule (TDCHA will not allocate credits to more than one development in a single year in a one-mile radius) and the three-year one mile rule (TDCHA will not allocate credits to a new development in a one-mile radius of another tax credit development for a similar type of housing – elderly or family – if that other development has received its allocation within 3 years) – the QAP and Bond Rules should contain a provision that prohibits any LIHTC or Bond allocation to a development in a census tract that already has 500 units funded with LIHTCs or Bonds/LIHTCs, unless approval of the local governing body is secured.

**An institutionalized method for testing and reporting the success of**

**TDHCA's pro-integrative efforts at set timeframes (along the lines of a progression of the enclosed graphs) should be established, and the results of such tests should inform TDHCA's promulgation of future QAPs.**

TDHCA also should demonstrate an internal commitment to promoting racial integration. Such a commitment could start by committing learned staff to an office that drafts and implements pro-integrative techniques and programs for TDHCA to use. Methods of evaluating the ghettoized nature of a neighborhood using various criteria, such as poverty, concentration of racial minorities, crime, blight, environmental conditions, etc., should be developed.

**Furthermore, the notification, signage, political support scoring and neighborhood organization scoring provisions of the QAP are facially discriminatory and should be eliminated.** The only effect of these provisions is to facilitate NIMBY attitudes of primarily suburban homeowners and officials, and as such these provisions have no place in funding decisions for affordable housing.

Promoting racial and economic integration may be politically unpopular, but in service to the obligations imposed by law, TDHCA and the BRB must promote integration. TDHCA and the BRB should demonstrate their willingness to do so by voluntarily complying with the law. Most immediately, TDHCA and the BRB should recognize their obligations to affirmatively further fair housing and pledge to begin promoting racial integration in the QAP and the Bond Rules.

Thank you for considering these comments. Please let me know if you would like to meet to further discuss these issues.

Very truly yours,

Robert H. Voelker

RHV:rhv

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