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Martin Bershtein
New Jersey Housing and Mortgage Finance Agency
637 South Clinton Avenue
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Re: Proposed 2002 Low Income Housing Tax Credit Qualified Application Plan

Dear Mr. Bershtein:

On behalf of the Southern Burlington County NAACP, Camden County NAACP, and Fair Share Housing Center, Inc.¹, we write to comment on the re-proposed 2002 Low Income Housing Tax Credit Qualified Application Plan (QAP), 34 N.J.R. 1574(a)(May 6, 2002).

These comments discuss in detail how the 2002 QAP, if adopted as proposed, contravenes federal legislation, which requires that HMFA administer the LIHTC “in a manner consistent with [federal] housing policy governing non-discrimination” and in a manner consistent with state housing and public school policies governing non-discrimination. As proposed, the 2002 QAP’s funding allocations and point preferences will perpetuate racial segregation and poverty concentrations in New Jersey’s inner cities while limiting the creation of housing opportunities that would result in economic and racial integration. HMFA’s funding allocations, as discussed further herein, must promote racial integration, but HMFA’s continued failure to evaluate the racially-segregative implications of its funding decisions permits HMFA to promulgate a QAP that disproportionately allocates LIHTC funds to projects located in racially- and economically-segregated areas.

¹ The Southern Burlington and Camden County Branches of the NAACP are plaintiffs in Southern Burlington County NAACP, et al. v. Township of Mount Laurel, Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-25741-70PW, which resulted in the landmark Mount Laurel I (1975) and II (1983) New Jersey Supreme Court decisions. The NAACP branches and Fair Share Housing Center are plaintiffs in Fair Share Housing Center, Inc., et al. v. Township of Cherry Hill, et al., Superior Court of New Jersey, Law Division, Docket No. L-042750-85PW, which was filed in 1985, and Fair Share Housing Center, Inc. v. Township of Cherry Hill, et al, Superior Court of New Jersey, Law Division, Docket No.: L-04889-01, which was filed in 2001, both of which seek Mount Laurel compliance.

Finally, these comments raise procedural objections to the comment, approval and QAP application schedule, which involves a June 5, 2002 comment deadline, June 20, 2002 NJHMFA Board meeting to approve the 2002 QAP, and the June 21, 2002 QAP application deadline, because that timeframe does not permit a fair consideration of these comments and the adoption of revisions of the QAP application process. These comments also object to the administrative record that has thus far been maintained by HMFA and requests HMFA to gather and produce a complete administrative record.

I. Overview

By way of background, you will recall that HMFA proposed an amended QAP at 34 N.J.R. 47(a) on January 7, 2002. In response to that proposal, by letter dated February 6, 2002, Peter J. O'Connor submitted comments on behalf of the above parties. HMFA's responses to his comments appeared at 34 N.J.R. 1574(a) on May 6, 2002. This letter is in response to the re-proposed QAP and to the comments and responses that accompany that proposal.

This second set of comments primarily discusses how HMFA has contravened the LIHTC federal enabling legislation, federal civil rights legislation, and analogous state law in most fundamental and unfortunate ways. By totally ignoring the segregative effects of its funding decisions, and by focusing on funding poverty in place, HMFA's administration of the federal LIHTC program perpetuates and exacerbates racial segregation in a state that already is one of the most racially segregated in the nation. As an entity that receives and distributes federal funds, HMFA is required to act affirmatively to end racial segregation and to stem the tide of urban ghettoization. That that affirmative obligation is imposed on HMFA by several sources of law appears totally lost on HMFA. As discussed further below, HMFA's blind indifference to racial segregation, its utter failure to begin satisfying its affirmative duty to promote racial and economic integration, is plainly in contravention of IRS regulations, HUD regulations, state and federal anti-discrimination laws, and the state and federal constitutions.

That HMFA has not considered those sources of law is reflected most clearly by HMFA's continued focus on funding housing in neighborhoods that are already racially-segregated and by the proposed allocation amounts to each cycle, which, according to the November 29, 2001 and March 21, 2002 Requests for Action submitted to the HMFA Board, are as follows:

	11/29/2002 RFA	3/21/2002 RFA
Urban Cycle	4,750,000.00	6,000,000.00
Suburban Cycle	3,500,000.00	3,150,000.00
Hope VI Cycle	1,825,000.00	2,105,000.00
Special Need Cycle	1,500,000.00	1,300,000.00
Reserve	425,000.00	149,403.00
Final Cycle	2,500,000.00	3,105,000.00

The proposed 2002 QAP regulations related to those funding cycles, including the point scheme, guarantees that over \$12 million of the approximately \$16 million will be used to develop housing in racially segregated neighborhoods.

It is important to note that there is a significant moral dimension to HMFA's proposed 2002 QAP and that document's focus on funding housing in segregated areas. HMFA's justifications for making decisions that perpetuate racial segregation fail to take into account the terrible costs of such segregation, both financial and otherwise, to society and individuals. By focusing on the need of people in urban areas without even mentioning the terrible scourge of racial segregation, and without taking the most basic of steps to evaluate the segregative effects of its funding programs, HMFA is acting intentionally to segregate the races. With little effort, HMFA could do otherwise. By choosing not to, however, HMFA is making a statement that it is content with reinforcing trends that began with the forced servitude of a people and that continue today in public policy that evidences opposition to racial integration. The racial hostility of yesteryear's segregated water fountains and waiting rooms are reflected today in the 2002 QAP and other housing policies. The State of New Jersey might officially celebrate the birthday of Dr. Martin Luther King, Jr., but its housing policies, including those of HMFA, bespeak a decided hostility to that great man's dream that people of all races would one

day live together. As a result of Dr. King's advocacy, substantial federal civil rights legislation, including the Federal Fair Housing Act, Title VIII of the 1968 Civil Rights Act ("Title VIII"), was passed, but HMFA continues without justification to chose to ignore the obligations imposed on it by that legislation.

We also object to the comment, approval and QAP application schedule, which involves a June 5, 2002 comment deadline, June 20, 2002 NJHMFA Board meeting to approve the 2002 QAP, and the June 21, 2002 QAP application deadline. That schedule does not allow sufficient time for HMFA to review public comments and consider or make any QAP changes. The proximity of the June 20, 2002 Board meeting to the June 21, 2002 application deadline demonstrate HMFA's predetermination that any public comments will not be considered for purposes of QAP revisions. The application date makes it impossible for LIHTC applicants to submit applications pursuant to anything but the subject May 6, 2002 proposed QAP that is the subject of comments until June 5, 2002.

HMFA's review period and its approval of the 2002 QAP should be extended past June 20, 2002 and the June 21, 2002 application deadline should be extended accordingly to permit applications to be drafted on a QAP that is based on revisions made by HMFA in response to comments submitted by the public by June 5, 2002, including those submitted herein.

- II. HMFA is required by 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, as amended, to promulgate the 2002 QAP in a manner that affirmatively furthers the policies of Title VIII and, thus, is required pursuant to those sources of law to promote and seek out opportunities for racial integration. HMFA fails to satisfy or even acknowledge the existence of those obligations.**

A number of statutory, regulatory provisions control what HMFA must do in ensuring that its allocations of LIHTC funds do not exacerbate or perpetuate racial segregation in New Jersey. Those obligations are most directly imposed on federal agencies, which in turn have imposed them on agencies, such as HMFA, that distribute federal financial support for

housing. This section of the above-referenced parties' comments discuss the sources of law. The following section addresses what HMFA must do to comply with the laws identified below.

Pursuant to 42 U.S.C.A. § 3608(d), all federal agencies, including the Department of Treasury and the Internal Revenue Service, must administer their housing programs “in manner affirmatively to further” the purposes and policies of the Federal Fair Housing Act, Title VIII of the 1968 Civil Rights Act. Title 26 C.F.R. § 1.42-9(a)² in turn requires agencies disbursing tax credits under the LIHTC program to comply with Title VIII, “24 CFR subtitle A and chapters I through XX,” and the HUD Handbook, section 4350.3. (Similar obligations arise under the New Jersey Law Against Discrimination, specifically, N.J.S.A. 10:5-12(h) and (i).³) Read together, and as discussed in more detail below, those sources of law indicate plainly that HMFA is 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.

A. Legislative history of Title VIII and historical background.

² 26 C.F.R. § 1.42-9 provides in relevant part as follows:

(a) General rule. If a residential rental unit in a building is not for use by the general public, the unit is not eligible for a section 42 credit. A residential rental unit is for use by the general public if 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 (HUD) (24 CFR subtitle A and chapters I through XX). See HUD Handbook 4350.3 (or its successor). A copy of HUD Handbook 4350.3 may be requested by writing to: HUD, Directives Distribution Section, room B-100, 451 7th Street, SW., Washington, DC 20410.

³ In Bergen Commercial Bank v. Sisler, 157 N.J. 188, 200 (1999), the New Jersey Supreme Court discussed how New Jersey courts should borrow federal anti-discrimination law jurisprudence in applying the New Jersey Law Against Discrimination, stating as follows: “As a starting point, this Court in outlining approaches and infusing discrimination claims under the LAD with substantive content typically has looked to federal cases arising under analogous provisions of Title VII of the Civil Rights Act of 1964, Shaner v. Horizon Bancorp., 116 N.J. 433, 437 (1989) ([‘The LAD] standards have been influenced markedly by the experience derived from litigation under federal anti-discrimination statutes.’). To the extent the federal standards are useful and fair, they will be applied in the interest of achieving a degree of uniformity in the discrimination laws.” Ibid. (citations omitted and emphasis added).

The legislative history of Title VIII reveals how very relevant that law is to HMFA's refusal to consider the racially-segregative effects of its 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 country, especially the July 1967 riots in Newark, New Jersey and Detroit, Michigan. 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?

Similar concerns were also addressed locally. On August 8, 1967, Governor Richard J. Hughes appointed the Governor's Select Commission on Civil Disorders in the State of New Jersey. The Governor asked the Commission to prepare "a realistic analysis of the disorders . . . and practical proposals, which, hopefully, will prevent their recurrence in our state."

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:

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.

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.

The New Jersey Governor's Select Commission on Civil Disorder's February 1968 "Report for Action," at pages 64-65, reached conclusions similar to the Kerner Commission's report. In a section about "Basic Policy Issues," the Select Commission's report stated:

One conclusion that emerges from investigating housing conditions of the poor, especially in a large and aging city like Newark, is that the problem must be approached in a metropolitan context. The causes are not rooted in the city alone, and it is unrealistic to expect the city to cope with them.

Some urban experts classify optional solutions to the urban housing problems in terms of "dispersal" and "ghetto enrichment." The advocates of "dispersal" accurately point out that the problem can be solved only in the framework of relocating ghetto residents in the larger metropolitan area, including suburbs and neighborhoods that are operated almost exclusively by whites. The advocates of "ghetto enrichment", who include many militant and articulate Negro leaders, believe that development of human and physical resources in the central city, and the lodging of political and economic power in the population of the city cores, are the most effective ways to fight poverty.

The Commission sees merit in the arguments of both sides, and it does not see a contradiction. There is no question that effective, urgent action *in* the ghetto must be taken on the whole broad front of human and physical renewal. For without such action, we would be condemning large numbers of Americans to a continuation of the conditions that lead people to despair.

Furthermore, we believe that only by giving ghetto populations the opportunity to develop their skills and to make their neighborhoods decent places to live in can we begin to move meaningfully toward an integrated society. It is through social and physical renewal in the inner city that options become available to its inhabitants. And it is the reconstruction of the inner city, both physically and culturally, that may make urban living attractive again at least to some of those who have fled to the suburbs. The options, then, open up in both directions.

As development proceeds in the city core, planning must go ahead in the metropolitan context for a more deliberate approach to integrated housing throughout the area. This may have to include incentives to the present suburban populations to make them more amenable to integrated patterns of living.

Because this is a problem transcending city boundaries—indeed it is a predicament of national scope—the State Government is more equipped than any one municipality to grapple with it.

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.

[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”).

B. Legal provisions giving effect to Title VIII’s obligations

HUD has promulgated regulations addressing how it will comply with Title VIII. 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. As mentioned previously, 26 C.F.R. § 1.42-9(a) requires allocating agencies like HMFA to administer their LIHTC programs “in a manner consistent with housing policy governing non-discrimination,” as determined by HUD regulations, including Chapters I through XX of Title 24 of the Code of Federal Regulations, and the HUD Handbook. 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 concerted program to remedy the undesirable conditions.

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- (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.

[Ibid. (emphasis added).]

Titles 24 C.F.R. § 941.202(b) specifically identifies Executive Order 11063 as another source of law with which LIHTC allocating agencies, such as HMFA, 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

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 allocating agencies such as HMFA, 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, HMFA's allocation of tax credits is required to be done with racially-integrative guidelines at the fore. Despite the directions of the IRS that HMFA must comply with those anti-discrimination laws, HMFA is choosing not to and, in fact, has refused to acknowledge that it is required to promote racial integration.

To assist HMFA in recognizing what it must do to promote racial integration, the next section discusses in greater detail what HMFA must do to comply with 42 U.S.C.A. § 3608(d).

- III. To affirmatively further the policies of Title VIII, HMFA at a minimum must collect data that will permit it to consider the segregative or integrative effects of its cycle allocations and project funding decisions and must include site selection criteria in the 2002 QAP that generally eschews funding housing in areas of high racial minority concentration and that permits funding in areas of high minority concentration only when there is an overwhelming need and no other location for the proposed affordable housing.**

As previously discussed, 42 U.S.C.A. § 3608(d) requires the IRS to administer its housing programs "in manner affirmatively to further" the purposes and policies of Title VIII. That requirement is extended to HMFA, the local arm of the IRS for the purpose of administering the LIHTC program in New Jersey, by 26 C.F.R. § 1.42-9(a). Thus, the nature of the obligations imposed by 42 U.S.C.A. § 3608(d), which are the subject of this section, should be considered by HMFA in promulgating its 2002 QAP.

Caselaw addressing the nature of 3608(d)'s obligation to affirmatively further fair

housing relies substantially on the legislative history of the Fair Housing Act, which reveals that Title VIII is intended to promote racial integration. See Trafficante, supra, 409 U.S. at 211; Otero v. New York City Housing Authority, 484 F.2d 1133-35 (2d Cir. 1973).

Consistent with that goal, courts have interpreted 3608(d) as requiring entities subject to that provision to do more than refraining from obviously discriminatory activity. 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. 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. 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 Act was designed to combat.”). The Shannon court noted that the federal housing administrators focused “on land use controls, building code enforcement, and physical conditions of buildings, [while] remain[ing] blind to the very real effect that racial concentration has had in the development of urban blight.” Id. at 820. Relying on 3608(d), the Third Circuit rejected that approach, finding that “[t]oday such color blindness is impermissible.” The Shannon court suggested the following criteria may be appropriately included in the institutionalized method required by 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 (emphasis added).]

By considering such criteria, housing agencies are able to evaluate whether locating affordable housing in a given site offends 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 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.

[Otero, supra 484 F.2d at 1134-35.]

Presently, HMFA has no “institutionalized method” for considering whether LIHTC cycle allocations and LIHTC-funded projects perpetuate, exacerbate, or reduce racial segregation. HMFA’s administration of the LIHTC program thus contravenes 26 C.F.R. § 1.42-9(a) and 42 U.S.C.A. § 3608(d). HMFA at a minimum must collect data that will permit it to analyze the segregative or integrative effects of its cycle-allocation and project funding decisions and must include site selection criteria in the 2002 QAP 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.

IV. By failing to promote racial integration that affects our cities and schools, the 2002 QAP fails to properly tailor the 2002 QAP to make it “appropriate to local conditions.”

Pursuant to 26 U.S.C. 42(m)(1)(B)(i), HMFA is required in drafting the 2002 QAP to “set[] forth selection criteria to be used to determine housing priorities of the housing credit

agency which are appropriate to local conditions.”⁴ HMFA also must include the following selection criteria as part of the 2002 QAP: project location, housing needs characteristics, project characteristics, including whether the project includes the use of existing housing as part of a community revitalization plan, sponsor characteristics, tenant populations with special housing needs, public housing waiting lists, tenant populations of individuals with children, and projects intended for eventual tenant ownership. 26 U.S.C. 42(m)(1)(C).

Logically, criteria such as project location, housing needs characteristics, and project characteristics, necessarily involve and require consideration of “local conditions.” The historic patterns of funding affordable housing also should be considered. Also, extensive data related to the demographics of occupants of publicly-assisted housing and public schools, data which is already collected on an annual basis by the State of New Jersey, should be considered. Several sources of relevant federal housing law require consideration of “local conditions” and by law HMFA must inform its discretion in drafting the QAP with those sources of law. To those sources of appropriate “local conditions” and their specific relevance to HMFA’s 2002 QAP these comments now turn.

⁴ The full relevant section of 26 U.S.C. 42(m) reads as follows:

- (B) Qualified allocation plan.--For purposes of this paragraph, the term "qualified allocation plan" means any plan--
 - (i) which sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions,
 - (ii) which also gives preference in allocating housing credit dollar amounts among selected projects to--
 - (I) projects serving the lowest income tenants,
 - (II) projects obligated to serve qualified tenants for the longest periods, and
 - (III) projects which are located in qualified census tracts (as defined in subsection (d)(5)(C)) and the development of which contributes to a concerted community revitalization plan, and
 - (iii) which provides a procedure that the agency (or an agent or other private contractor of such agency) will follow in monitoring for noncompliance with the provisions of this section and in notifying the Internal Revenue Service of such noncompliance which such agency becomes aware of and in monitoring for noncompliance with habitability standards through regular site visits.

A. 2000-2004 DCA Consolidated Plan for Spending Federal Housing Funds

One relevant source of guidance regarding “local conditions” for HMFA in drafting its 2002 QAP is the Consolidated Plan, which is required to be created as a condition of receiving federal housing funds and is authored by HMFA’s sibling entity, the Department of Community Affairs, N.J.S.A. 55:14K-4i. The Consolidated Plan “describes the State’s housing and community development goals for the next five years (2000-2004) and identifies the resources that New Jersey will use to meet those goals.” 2000-2004 Five-year Consolidated Plan at 48 (available at <http://www.state.nj.us/dca/dhcr/publicat.htm>). Pursuant to 24 C.F.R. § 91.315(k), a state’s Consolidated Plan “must describe the strategy to coordinate the Low-income Housing Tax Credit with the development of housing that is affordable to low-income and moderate-income families.”

The Consolidated Plan also must describe how federal funds, including the LIHTC program will promote racial integration. Title 24 C.F.R. § 91.325(a)(1) provides as follows:

Affirmatively furthering fair housing. Each State is required to submit a certification that it will affirmatively further fair housing, which means that it will conduct an analysis to identify impediments to fair housing choice within the State, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard. (See Sec. 570.487(b)(2)(ii)⁵ of this title.)

⁵ Title 24 C.F.R. 570.487(b)(2)(ii), which is incorporated by reference into 24 C.F.R. § 91.325(a)(1), provides as follows:

Affirmatively furthering fair housing. The Act requires the state to certify to the satisfaction of HUD that it will affirmatively further fair housing. The act also requires each unit of general local government to certify that it will affirmatively further fair housing. The certification that the State will affirmatively further fair housing shall specifically require the State to assume the responsibility of fair housing planning by:

- (1) Conducting an analysis to identify impediments to fair housing choice within the State;
- (2) Taking appropriate actions to overcome the effects of any impediments identified through that analysis;
- (3) Maintaining records reflecting the analysis and actions in this regard; and
- (4) Assuring that units of local government funded by the State comply with their certifications to affirmatively further fair housing.

New Jersey in fact certified to HUD that “[i]t has conducted an analysis to identify implements to fair housing choice within the State and has developed an action plan to overcome the effects of the identified impediments.” 2000-2004 Five-year Consolidated Plan at 107.⁶

Consistent with that certification, one of the five guiding principles used by the Five-Year Consolidated Plan to develop a “framework for implementing a comprehensive” strategy is that “[h]ousing programs and strategies must work to reduce and eliminate racial and economic segregation/low income concentration and, wherever possible[,] incorporate measures that will undo the negative effects of past practices.” 2000-2004 Five-year Consolidated Plan at 48. Three of the ten goals for implementing that strategy are especially significant: DCA has told the federal government that it will use federal resources and otherwise

⁶ Such certifications and statements regarding compliance with the duty affirmatively to further fair housing are common in plans required by the federal government to be created by state agencies administering federal housing programs. Those certifications and statements reveal the degree to which the federal government requires all state housing agencies to act to promote racial integration. See e.g. Housing Choice Voucher Program Draft Administrative Plan at 1-14 (New Jersey Department of Community Affairs, Division of Housing And Community Resources)(March 6, 2002 draft)(certifying that the New Jersey Department of Community Affairs, Division of Housing and Community Resources’ Housing Choice Voucher Program “will be administered in compliance with all equal opportunity requirements,” including “The Fair Housing Act,” “Title VI of the Civil Rights Act of 1964,” and “Executive Order 11063, Equal Opportunity in Housing (1962)”; 2002 Final Plan for New Jersey’s Administration of the Small Cities Community Development Block Grant Program at 8 (New Jersey Department of Community Affairs, Division of Housing And Community Resources)(available at <http://www.state.nj.us/dca/dhcr/publicat.htm>)(requiring resolution from applicants regarding ability to “affirmatively further[] fair housing”); FY 2001-2005 Fair Housing Plan at 5 (New Jersey Department of Community Affairs, May 15, 2001)(addressing “how laws, regulations, administrative policies, procedures, and practices affect the location, availability, and accessibility of housing and assesses private and public conditions that affect fair housing choice”); 2000-2004 Public Housing Agency Plan at 2,9 (New Jersey Department of Community Affairs) (available at <http://www.state.nj.us/dca/dhcr>)(requiring DCA’s “[a]nalysis of Impediments to Fair Housing Choice “ and “[r]ecords reflecting that the PHA has examined its programs or proposed programs, identified any impediments to fair housing choice in those programs, addressed or is addressing those impediments in a reasonable fashion in view of the resources available, and worked or is working with local jurisdictions to implement any of the jurisdictions’ initiatives to affirmatively further fair housing that require the PHA’s involvement.”). 1999 New Jersey Annual Performance Report to HUD at 1, 6-8 (New Jersey Department of Community Affairs, September 30, 2000)(listing “federal and State resources [used] to address the needs and priorities identified in the State’s Fiscal Year 1999 Annual Consolidated Plan”; stating that “[i]n FFY 2000, HMFA allocated \$8.8 million in tax credits to projects that produced 789 low-income rental units,” discussing New Jersey’s efforts affirmatively to further fair housing, and stating that “[t]he State will continue to investigate other feasible methods to affirmatively further fair housing goals in New Jersey.”).

New Jersey and any unit of local government receiving CDBG funds also must certify that they will “affirmatively further fair housing.” Housing and Community Development Act of 1974, 42 U.S.C. § 5306(d)(5)(B); see also § 5304(a)(1); 24 C.F.R. §§ 91.325(a)(1), 570.487(b) (2001).

act to “[i]ncrease the number of affordable housing units built for our most vulnerable populations, (0 to 50% of median county income)”; to “[r]educe regulatory barriers to developing affordable housing”; and to “[p]romote fair housing practices and educate the public about the benefits of and the need for affordable housing.” *Id.* at 10.

B. 2001-2005 Fair Housing Plan

A second source of guidance regarding “local conditions” for HMFA to use in drafting its 2002 QAP is the Department of Community Affairs’ FY 2001-2005 Fair Housing Plan (New Jersey Department of Community Affairs, May 15, 2001)(available at <http://www.state.nj.us/dca/dhcr/>)(. That document, which is required to be made as a condition of receiving federal housing funds, addresses “how laws, regulations, administrative policies, procedures, and practices affect the location, availability, and accessibility of housing and assesses private and public conditions that affect fair housing choice.” *Id.* at 5. The Fair Housing Plan notes that “HUD broadly defines ‘fair housing choice’ as ‘the ability of persons, regardless of race, color or religion, sex, or national origin, familial status or disability of similar income levels to have available to them the same housing choices.’”

HMFA’s sibling entity, DCA, has reported to HUD that, among others, the following fair housing impediments exist:

- The lack of decent, affordable housing for low income people. This is a critical problem facing many urban and suburban areas in the State. The State needs to encourage developers to build affordable housing units near employment centers to help low wage workers attain self-sufficiency.
- Racial, ethnic and/or class discrimination and the general lack of local support for the creation of affordable housing. Many of the State’s residents and municipalities fear the development of affordable housing in their immediate vicinity because they often view low-income residents as a transient population that will not add stability to their neighborhood.
- Racial segregation in urban areas limits housing opportunities. The persistent concentration of low income Black, Hispanic and other minority populations in the most dense, decaying urban areas and the reluctance/inability of developers to invest in these areas severely limit the affordable housing opportunities available to minority urban residents.

[Id. at 5-6.]

Regarding residential racial segregation, the Fair Housing Plan has this to say:

Over the last few decades, we have made some progress toward a more integrated society, as some minority and moderate income families have moved from the cities to suburbs. However, many more, particularly low income families, have not found such opportunities. Discrimination persists in the form of racial and ethnic steering: minority applicants are directed to neighborhoods with higher minority populations or less affluent neighborhoods. The individual applicant may not notice this subtle steering, but as a widespread practice it limits choices for minorities and perpetuates patterns of residential segregation.

Meanwhile, many upper and middle class people have fled the cities and many buildings have been left vacant. A large percentage of this urban housing is old, dilapidated, substandard, and expensive to repair and maintain. In these urban ghettos, the law of supply and demand does not apply. Low property values are not always conducive to housing affordability; instead the total cost of living, including maintenance, utilities, crime, vandalism, and insurance, is increased. As a result, abandoned homes go to waste.

[Id. at 46.]

To ameliorate that stratification, DCA has reported to HUD that it will “increase opportunities for low income and minority residents to migrate from cities to suburbs through programs such as Regional Opportunity Counseling (ROC).” Ibid.

C. State Development and Redevelopment Plan

A third source of guidance regarding “local conditions” for HMFA to use in drafting its 2002 QAP is the State Development and Redevelopment Plan (March 2001)(available at <http://www.state.nj.us/osp/>). That document, which is “a guide to when and where available State funds should be expended to achieve the Goals of the State Planning Act,” id. at 11, and was drafted by an agency that, like HMFA, is part of the Department of Community Affairs, contends that New Jerseyans should aspire to be integrated racially and economically and proposes ways to achieve that goal. See id. at 107 (discussing policy for urban revitalization of “[p]romot[ing] the development of a variety of rental and owner-occupied,

single- and multi-family housing and housing for a broad range of income groups, diverse cultures and for groups with special needs, so as to balance the mix of residential uses and to reduce the concentration of low income and minority housing in areas undergoing revitalization without causing undue displacement of existing residents”); id. at 61 (envisioning a state in which “[t]he once prevalent patterns of minority concentration and segregation have attenuated considerably”); id. at 86 (including “[d]evelop[ment of] plans that create opportunities for and reduce barriers to economic and racial integration” as policy for comprehensive planning for New Jersey’s future); id. at 104 (citing reduction of “racial and economic segregation in distressed urban schools” as necessary component of “thorough and efficient education”); id. at 23 (discussing a vision of New Jersey in 2020 and stating that “[a]reas that had high crime rates, pollution, poor infrastructure, segregation and concentrated poverty are now safe, vital, growing, racially integrated neighborhoods”); id. at 108 (discussing policy for urban revitalization of “[r]evers[ing] the trend toward large concentrations of low-income households in municipalities experiencing distress, including those disproportionately occupied by racial minorities, by creating and affirmatively marketing low-income housing opportunities in less distressed neighborhoods and communities while selectively demolishing vacant, obsolete housing for parks, community gardens or housing expansion, and development of market rate housing”); id. at 107 (discussing policy for urban revitalization of “[p]romot[ing] the development of a variety of rental and owner-occupied, single- and multi-family housing and housing for a broad range of income groups, diverse cultures and for groups with special needs, so as to balance the mix of residential uses and to reduce the concentration of low income and minority housing in areas undergoing revitalization without causing undue displacement of existing residents”). See also N.J.S.A. 52:18A-196(g)(“An increasing concentration of the poor and minorities in older urban areas jeopardizes the future well-being of this State, and a sound and comprehensive planning process will facilitate the provision of equal social and economic

opportunity so that all of New Jersey's citizens can benefit from growth, development and redevelopment").

D. The Mount Laurel Doctrine

A fourth source of guidance regarding local conditions, a source that is of special legal significance and is by its nature compliant with Title VIII, is the Mount Laurel doctrine. Although that doctrine has traditionally been enforced against only municipalities, it does provide significant guidance on whether housing laws may be used to exclude low- and moderate-income New Jerseyans from non-segregated municipalities. At its core, the Mount Laurel doctrine creates economic remedies to problems with economic and racial origins.

Chief Justice Wilentz in Mount Laurel II, 92 N.J. 158 (1983), responding to a system of government-sanctioned apartheid wrote the following:

While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality, to which this control over land has been constitutionally delegated.

The clarity of the constitutional obligation is seen most simply by imagining what this state could be like were this claim never to be recognized and enforced: poor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted; poor people forced to live in urban slums forever not because suburbia, developing rural areas, fully developed residential sections, seashore resorts, and other attractive locations could not accommodate them, but simply because they are not wanted. It is a vision not only at variance with the requirement that the zoning power be used for the general welfare but with all concepts of fundamental fairness and decency that underpin many constitutional obligations.

[Mount Laurel II, 92 N.J. at 209-10.]

Chief Justice Wilentz continued:

Unfortunately, this unpleasant "vision" is to a large extent already with us, as can be seen by comparing the poverty and decay of Newark and Camden with the prosperity of many of their suburban neighbors As many commentators ranging from law review writers to national commissions have maintained, a major cause of this urban-suburban inequality has been suburban exclusionary zoning (by which we mean zoning whose purpose or

effect is to keep poor people out of a community). See, e.g., Report of the National Advisory Commission on Civil Disorders 1 (U.S.Gov't Printing Office, 1968) (citing suburban exclusion as one of the principal causes making America "two societies, one black, one white--separate and unequal") See also N.J. Department of Community Affairs, State Development Guide Plan 84-85 (1980) (noting the "ultimately self-destructive division between affluent suburban areas and depressed inner cities").

As these commentators document, since World War II there has been a great movement of commerce, industry, and people out of the inner cities and into the suburbs. At the same time, however, exclusionary zoning made these suburbs largely inaccessible to lower income households. Beside depriving the urban poor of an opportunity to share in the suburban development, this exclusion also increased the relative concentration of poor in the cities and thereby hastened the flight of business and the middle class to the suburbs. A vicious cycle set in as increased business and middle class flight led to more urban decay, and more urban decay led to more flight, etc.

The provision of lower income housing in the suburbs may help to relieve cities of what has become an overwhelming fiscal and social burden. It may also make jobs more accessible for the unemployed poor. Deconcentration of the urban poor will presumably make cities more attractive for businesses and upper income residents to return to. For an in-depth discussion of the relationship between ending exclusionary zoning and the revitalization of our inner cities, see Downs, "Why Improving the Inner City Requires Opening up the Suburbs," in A. Downs, Opening up the Suburbs 115-30 (1973). See also the Community Development Act of 1974, in which Congress found that a "significant" cause of our nation's urban crisis is "the concentration of persons of lower income in central cities," 42 U.S.C. 5301(a)(1) (1977), and called for the "reduction of the isolation of income groups within communities" and the "spatial deconcentration of housing opportunities for persons of lower income," 42 U.S.C. 5301(c)(6) (1977); and the 1968 Report for Action of the Governor's Select Commission on Civil Disorder at 64-65.

Cities, while most directly affected, are not the sole victims of exclusionary zoning. The damage done by urban blight and decay is in no way confined to those who must remain in our cities. It affects all of us. Violent crime and drug abuse spawned in urban slums do not remain within city limits, they spread out to the suburbs and infect those living there. Efforts to combat these diseases require expenditures of public dollars that drain all taxpayers, urban and suburban alike. The continuing disintegration of our cities encourages business and industry to leave New Jersey altogether, resulting in a drain of jobs and dollars from our economy. In sum, the decline of our cities and

the increasing economic segregation of our population are not just isolated problems for those left behind in the cities, but a disease threatening us all. Zoning ordinances that either encourage this process or ratify its results are not promoting our general welfare, they are destroying it.

[Mount Laurel II, 92 N.J. at 209-11 n.5 (citations omitted).]

The relief the Court awarded in Mount Laurel II was economic in nature, but the Court obviously was concerned about the economic and racial segregation plaguing New Jersey.

That concern should be shared by HMFA, which has been broadly empowered to improve the life of New Jerseyans, N.J.S.A. 55:14K-5ff (empowering HMFA “[t]o do any acts and things necessary or convenient to carry out the powers expressly granted”), by, among other things, “[r]espond[ing] to changing housing demographic and economic circumstances by the development of innovative and flexible finance vehicles,” N.J.S.A. 55:14K-2a(5). Although compliance with the Mount Laurel doctrine has not explicitly been made mandatory for state agencies that are involved in land use and housing, authority exists that suggests that compliance with the Mount Laurel doctrine is required by agencies such as HMFA.

In In re Egg Harbor Associates, 94 N.J. 358, 371 (1983), the Supreme Court held that an environmental statute (CAFRA) permits the DEP “to oversee and plan land development, including residential development, in the coastal area,” and that that statute “mandates DEP to utilize, in performing that statutory role, all relevant considerations of an enlightened public policy. The statutory directives to ‘promote the public health, safety and welfare’ and to advance the ‘best long term, social, economic, aesthetic and recreational interest of all people of the State’ are not. . . reasonably subject to any narrower reading.” The Court thus held that “the DEP may and must include in its land use planning all relevant criteria, including, as here, the social and economic impact of development. Environmental protection, like good zoning, is not an exercise in abstract analysis, but in the pragmatics of responsible and sensitive land use control.” Thus, the Court held that “[i]n deciding whether to grant permits

for large scale residential development, DEP may consider the housing needs of low and moderate income residents.”

Thus, in addition to providing another consistent source of “appropriate . . . local conditions” related to concentrations of poor racial minorities, which must be considered by HMFA pursuant to 26 U.S.C. 42(m)(1)(B)(i), the Mount Laurel doctrine suggests that pursuant to the state constitution, it would be arbitrary and capricious for HMFA to ignore the poverty and racial segregation that plagues New Jersey’s urban municipalities and the people who live there.

E. New Jersey constitutional provisions on school segregation and public education and data collected by the State of New Jersey annually on the demographics, including race, of public school students.

A fifth source of guidance for the purposes of determining appropriate “local conditions” to which HMFA must tailor the 2002 QAP is the State Constitution of 1947, which specifically prohibits actions by the state, whether intentional or otherwise, that, for instance, segregate black and white students. Pursuant to the state constitution, and as a matter of common sense, that prohibition and the conditions of New Jersey’s racially-impacted urban schools, including whether those schools are capable of educating more poor students, must be considered by HMFA as a local condition.

Although the New Jersey Supreme Court has never expressly reconciled its racial-discrimination and Abbott jurisprudence with constitutional and statutory prohibitions against racially-segregative housing policies, New Jersey’s commitment to remedying discrimination that disproportionately affects racial minorities and the poor in our urban schools provides a common theme and a useful benchmark for evaluating whether the 2002 QAP complies with the state constitution. New Jersey’s school segregation jurisprudence and this state’s commitment to racial integration certainly should inform HMFA’s promulgation of the 2002 QAP and serve as a primary “local condition” that HMFA responds to in the 2002 QAP.

In Booker v. Board of Ed. of Plainfield, 45 N.J. 161, 170-71 (1965), the Supreme Court discussed the benefits of racial integration and the pitfalls of racial segregation:

In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multiracial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. It may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem. But in the meantime the states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by. It is heartening to note that, without awaiting further Supreme Court pronouncements, some states, including our own, have taken significant legislative or administrative steps towards the elimination or reduction of de facto segregation

[ibid. (emphasis added).]

The Court has recognized the state's obligation to remedy even de facto segregation in public schools by requiring regional solutions to such segregation, stating that "while such feeling and denial [caused by racial segregation] may appear in intensified form when segregation represents official policy, they also appear when segregation in fact, though not official policy, results from long standing housing and economic discrimination and the rigid application of neighborhood school districting." Jenkins v. Morris Sch. Dist., 58 N.J. 483, 497 (1971). The Court has noted that

It seems clear . . . that . . . governmental subdivisions of the state may readily be bridged when necessary to vindicate state constitutional rights and policies. This does not entail any general departure from the historic home rule principles and practices in our State in the field of education or elsewhere; but it does entail suitable measures of power in our State authorities for fulfillment of the educational and racial policies embodied in our State Constitution and in its implementing legislation. Surely if those policies and the views firmly expressed by this Court in Booker

and now reaffirmed are to be at all meaningful, the State Commissioner must have power to cross district lines to avoid "segregation in fact" [Booker, 45 N.J. at 168], at least where, as here, there are no impracticalities and the concern is not with multiple communities but with a single community without visible or factually significant internal boundary separations.

[Jenkins, supra, 58 N.J. at 500-01 (emphasis added)].

As then-Judge Long noted in Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood, 257 N.J. Super. 413, 464-65 (App. Div. 1992), aff'd 132 N.J. 327 (1993), “the promise of Brown [v. Board of Education] remains only partially fulfilled and the optimism it engendered has been sorely tested. In these circumstances, the principle enunciated in . . . Booker is more hallowed than ever: when children of all races learn to live with and respect each other in school at an early age, education is enhanced and the groundwork is laid for future participation of all in the ‘mainstream’ of human affairs.”

Although the focus of the Court’s Abbott jurisprudence has been on spending and programs, the racial segregation and other urban problems that are unfortunate realities in most every Abbott district has not been ignored by the Court, and should be considered when HMFA considers how the state constitution impacts upon its exercise of discretion. Indeed, Chief Justice Wilentz in Abbott v. Burke, 119 N.J. 287, 391-94 (1990) (Abbott II), recognized the degree to which racial and economic housing segregation negatively affects the people, and especially the children, who call urban New Jersey home:

This case has a special context that brings the constitutional obligation into sharp focus as it applies to the urban poor. While we necessarily deal with our system of education statewide, the issue put to us by the plaintiffs is the education of those children who live in poverty. Their cities have deteriorated and their lives are often bleak. They live in a culture where schools, studying, and homework are secondary. Their test scores, their dropout rate, their attendance at college, all indicate a severe failure of education. While education is largely absent from their lives, we get some idea of what is present from the crime rate, disease rate, drug addiction rate, teenage pregnancy rate, and the unemployment rate.

. . .

Clearly, we are failing to solve this problem. It is the problem of bringing this important and increasingly isolated class into the life of America, for this is not just a New Jersey problem. There is progress, and there are some successes in education, but the central truth is that the poor remain plunged in poverty and severe educational deprivation. The devastation of the urban poor is more significant in New Jersey than in most states both because of our demographics and the structure of our society. Our large black and hispanic population is more concentrated in poor urban areas and will remain isolated from the rest of society unless this educational deficiency in poorer urban districts is addressed.

While the constitutional measure of the educational deficiency is its impact on the lives of these students, we are also aware of its potential impact on the entire state and its economy--not only on its social and cultural fabric, but on its material well-being, on its jobs, industry, and business.

...

We note a further impact on the continuing constitutional failure. Soon, one-third of our citizens will be black or hispanic, and many of them will be undereducated. This substantial segment of our population is isolated in a separate culture, in a society they see as rich and poor, for to the urban poor, all other classes are rich. There is despair, and sometimes bitterness and hostility.

The fact is that a large part of our society is disintegrating, so large a part that it cannot help but affect the rest. Everyone's future is at stake, and not just the poor's. Certainly the urban poor need more than education, but it is hard to believe that their isolation and society's division can be reversed without it. That part of the constitutional standard, then, requiring an education sufficient to enable students to assume their proper roles as citizens takes on a new significance.

...

This record proves what all suspect: that if the children of poorer districts went to school today in richer ones, educationally they would be a lot better off. Everything in this record confirms what we know: they need that advantage much more than the other children. And what everyone knows is that--as children--the only reason they do not get that advantage is that they were born in a poor district. For while we have underlined the impact of the constitutional deficiency on our state, its impact on these children is far more important. They face, through no fault of their own, a life of poverty and isolation that most of us cannot begin to understand or appreciate.

[ibid. (emphasis added)].

The Court's Booker, Jenkins, Englewood, and Abbott jurisprudence reflects a keen appreciation of the urban problems faced by New Jersey's urban dwellers and a commitment to responding to the discrimination that has caused the urban misery of the urban poor, especially racial minorities and children.

Unfortunately, HMFA has not recognized its obligation to comply with that body of law. A review of the three prior years' (1999-2001) LIHTC allocations reveal that HMFA has failed to consider, as part of its LIHTC allocations and funding decisions, the racially-segregated nature of schools that most LIHTC-development children attend. Although children in Abbott districts on average are 86% racial minorities⁷, the municipalities that host those notoriously troubled school districts, not including the racially-segregated, non-Abbott municipalities, receive the most LIHTC funding:

- In 1999, 10 of the 16 municipalities that received LIHTC funds were racially-impacted Abbott districts. \$5.2 million of the total \$9.6 million in LIHTC funds were given to those districts. All 10 of those projects were for families.
- In 2000, 12 of the 18 municipalities that received LIHTC funds were racially-impacted Abbott districts. \$7 of the total \$10.2 million in LIHTC funds were given to those districts. 10 of those 12 projects were for families.
- In 2001, 15 of the 23 municipalities that received LIHTC funds were racially-impacted Abbott districts. \$8 of the total \$13.3 million in LIHTC funds were given to those districts. 13 of those 15 projects were for families.

Those are troubling statistics, which only begin to reveal the stratifying effects of HMFA's administration of the LIHTC program. That sort of funding pattern fundamentally offends the state constitutional prohibition against school segregation and also forces the poorest, most vulnerable students, almost all of whom are racial minorities, into the public schools in environments in which they are least able to be effectively educated – the very opposite of what

⁷ Camden's, Plainfield's, and Irvington's students are 99% racial minorities. Passaic City has just 1% more than those cities, with 98% racial minorities. Newark's are 91% racial minorities. Union's are 96% racial minorities. New Brunswick, with 97% racial minorities, has just 3% of students who are white. East Orange's students are 97% racial minorities. Despite the high concentration of minorities in their schools, those municipalities are among the primary recipients of LIHTC funds.

HMFA and the State of New Jersey should be doing. See Gary Orfield, [Schools More Separate: Consequences of a Decade of Resegregation](#) at 13 (Harvard Civil Right Project July 2001)(available at <http://www.law.harvard.edu/civilrights/>) (discussing 2000 Census and stating “[t]here has been no major push to integrate schools since the early 1970s. The courts, Congress, and the executive branch all reduced enforcement a generation ago. . . . Many states have quietly abandoned the offices, agencies, and policies they set up to produce and support interracial education. California, Illinois, and New Jersey are three examples of this process. An observer might assume that the problem had either been solved or proved to be unsolvable. Many white Americans believe that there has been a substantial decline in educational inequality by race and that civil rights issues have been fully or even excessively addressed.”)(emphasis added). See also id. at 43-50 (discussing hypersegregation of New Jersey’s schools and stating that “[t]he most segregated states for black students include the leaders for the last quarter century -- Illinois, Michigan, New York and New Jersey” and that “New York, Texas, New Jersey, Illinois and California have been centers of segregation for Latino students for some time. Each has more than 38% of all Latino students in schools with less than a tenth white pupils.”).

And, yet, it does not have to be that way. With a little bit of effort, providing housing opportunities in the right locales could quickly improve the quality of life and education of New Jersey’s poor Hispanic and Black children. “Moving a child from Camden, where 94 percent of all elementary school pupils are low income, to Cherry Hill or Haddonfield, where less than 5 percent of pupils are low income, would, on average, improve that child’s test scores by 20 to 24 percentiles. And other children from strong, well-educated, middle-class families will perform well regardless of whether 5 percent or 25 percent of their classmates come from low-income families. Only when the school environment becomes predominantly low income does there seem to be any adverse impact on middle-class children.” David Rusk, Camden’s future depends on suburbs, Courier Post at 11B, November 21, 1999.

Further, all evidence reveals that Mount Laurel-like efforts that comply with Title VIII are better suited to helping the racially-segregated poor than are efforts to attempt to make a racially-separate school system equal through the massive infusion of public funds. See generally James E. Ryan, Schools, Race and Money, 109 Yale L.J. 249, 268-69 (1999)(cited in Abbott v. Burke, 163 N.J. 95, 121 (2000)(Stein, J., concurring))⁸; James Traub, Schools Are Not The Answer, N.Y. Times Magazine, Jan. 16, 2000 at 56 (cited in Abbott, supra, 163 N.J. at 121 (Stein, J., concurring))⁹.

⁸ Professor Ryan notes that

[e]ducation law, policy, and commentary are clearly moving away from integration as a direct goal on education reform and are embracing various methods to improve the resources available and the education provided in racially and socioeconomically isolated schools. I contend that it is too early to abandon concerted efforts to achieve greater integration and to relegate integration to merely a potential by-product of alternative reforms. I also suggest specifically that, as between integration and school finance reform, if one were rationally to choose a strategy for assisting poor minority students, the evidence . . . points clearly in the direction of integration. School finance reform litigation has not proven, as its advocates had hoped, to be an adequate substitute for school desegregation. Simply put, the evidence suggests that increasing expenditures does not have the same educational punch as integration."

[James E. Ryan, Schools, Race and Money, 109 Yale L.J. 249, 268-69 (1999)(emphasis added)].

⁹ In Schools Are Not The Answer, James Traub argues that that by simply improving education in most inner-city areas

we would still be asking ghetto children to thrive in an incredibly adverse environment. The idea of directly addressing the environment through job programs, housing, health care or the adoption of a 'living wage' survives only in the fringes of the political discourse. But you cannot disentangle the objective conditions of a place like New York from the habits and values of the people who live there. The most effective solution- and the most unlikely one of all- is to move families out of the ghetto environment altogether. As Lawrence Katz, a Harvard economist, puts it, "You can't change the parents, but you can change the neighborhood." Katz points to the famous Gautreaux experiment in Chicago, in which families were given subsidies to move from high-poverty neighborhoods to the suburbs; studies have found that children in these families were far more successful academically than would have otherwise been predict. Katz is now in the midst of a long-term study of families involved in Moving to Opportunity, a five year old program sponsored by the Department of Housing and Urban Development that allowed a small number of families in five cities to leave the ghetto for working class neighborhoods. Though it is too early to look at academic results, Katz's early study found very large drops in incidents of misbehavior and sizable improvements both in children's physical health and in mother's mental health.

[James Traub, Schools Are Not The Answer, N.Y. Times Magazine, Jan. 16, 2000 at 56 (emphasis added).]

From a practical standpoint, it would be very, very easy for HMFA to consider the characteristics, including race, economics, achievement, etc., of the schools or school districts that children in any given proposed LIHTC development would attend. That data is collected in each school district pursuant to N.J.A.C. 6:4-1.3 (requiring equal opportunity plans), and is evaluated frequently by the Commissioner of Education, N.J.A.C. 6:4-1.8(a) (“At least once every three years the commissioner or designee shall review and evaluate the progress of each school district in implementing its affirmative action plan. . . . The commissioner shall provide each local school district with a copy of such analysis.”). Data regarding the quality of schools is collected annual by New Jersey, as required by N.J.A.C. 6:8-2.2(ii).

HMFA could thus easily obtain information about New Jersey’s schools, and it should do so in keeping with its obligation to consider local conditions and in keeping with its obligation as a state agency to reduce school segregation.

F. Housing-related data, including historic funding patterns and data on the race of occupants in multi-family housing developments that is collected annually by the State of New Jersey and is maintained by HUD for Public Housing Authorities.

In view of HMFA’s obligation to affirmatively further fair housing, a sixth category of information that is highly relevant to the “local conditions” inquiry is who occupies governmentally subsidized housing in and around neighborhoods in which LIHTC-funded housing is proposed. That information, perhaps more than any other source, gets at the heart of whether the proposed LIHTC project will perpetuate or exacerbate racial segregation or whether it will promote racial integration. The following sources should be considered by HMFA when setting its funding priorities and when making individual funding decisions:

1. Division on Civil Rights Multifamily Housing data. Pursuant to N.J.A.C. 13:10-2.5, the owners of “multiple apartment developments” must maintain records regarding the “[r]acial/ethnic designation of each applicant for apartment rental,” “of each apartment leaseholder,” and “of each new leaseholder.” That HMFA considers such information relevant and already has the capacity to evaluate that information is reflected by the facts that it requires the recipients of its funds to provide that information to it pursuant to

N.J.A.C. 5:80-22.23 as part of an affirmative fair housing marketing program.

2. HUD's Resident Characteristics Reports. Those reports are the product of HUD Form 50058, which requires local and state public housing authorities to report demographic data, including race and income, on a monthly basis to HUD. See "Forms, Guidebooks and Tools -- Form HUD-50058" (available at <http://www.hud.gov/offices/pih/systems/pic/50058/pubs/>). That data is available for all public housing agencies. It is readily available on the internet.
3. Census data. The Census office of the federal government reports block-by-block and tract-by-tract data for all of New Jersey. That data reflects the degree to which urban New Jersey is racially segregated. Applicants already are required to identify their census tract. Considering whether the neighborhood in which the proposed LIHTC project is located would be easy to do. Those demographics should also be accessed to evaluate the past housing policies and their resulting segregative effects.
4. Location of prior LIHTC projects. Information regarding the location and racial composition of LIHTC-funded projects is readily available to HMFA and also should be considered.

G. New Jersey-specific data regarding broad trends of racial segregation.

A seventh source of guidance for the purposes of determining appropriate local conditions to which HMFA must tailor the 2002 QAP are the statistics that reveal that New Jersey is one of the most racially- and economically-segregated states in the nation. The 2000 census reveals that New Jersey still is one of the most segregated states in the country- both racially and economically. "New Jersey's growing diversity has had little impact on the state's historical pattern of black-white housing segregation." Robert Gebeloff, New Jersey's New Blend Isn't Block By Block, The Star-Ledger, March 11, 2001. Urban strategist David Rusk explains that the issues of economic and racial segregation often overlap and points to South Jersey as an example of this relationship. As Rusk points out, in New Jersey, concentrated poverty and racial segregation is a phenomenon that affects only poor racial minorities, not Whites:

There were 39,000 poor whites [in South Jersey] in 1990; only 8 percent lived in poverty neighborhoods and only 3 percent lived in high-poverty neighborhoods (greater than 40 percent poverty). By contrast, of 27,000 poor blacks, 69 percent lived in poor ghettos and 34 percent lived in very high-poverty ghettos.

And of 14,000 poor Hispanics, 87 percent lived in poor neighborhoods, 60 percent in high-poverty neighborhoods -- the highest relative concentration of poor Hispanics outside of the lower Rio Grande Valley along the Texas-Mexico border.

[David Rusk, Cities, Suburbs Win with Inside Game/Outside Game, New Jersey Future Newsl. (New Jersey Future Jan/Feb 2000)(available at <http://www.njfuture.org/>).]

See also New Jersey State Development and Redevelopment Plan at 65 (March 1, 2001)(available at <http://www.state.nj.us/osp/>)(“New Jersey continues to exhibit a segregated housing pattern. Two out of three African-American and Hispanic households live in only 25 municipalities, and 60 percent of all African-American and Hispanic households live in cities where they constitute a majority of the population. In contrast, there are over 300 municipalities with virtually no minority population.”).

The misfortune of cities directly contrasts the success of developing suburbs. The HUD report identified five New Jersey cities -- Atlantic City, Camden, Jersey City, Newark, and Trenton -- that posted unemployment rates that doubled the national average. State of the Cities, U.S Dep’t of Housing and Urban Dev., June 1999, at 16 available at <http://www.huduser.org/publications/pdf/soc99.pdf>. Camden and Newark are two of the remaining thirty cities in the nation in which the poverty rate is thirty percent or higher. Id. at 17.

The truth is in the numbers: New Jersey is intensely racially segregated, and that has implications for the people, most especially the children, who bear the brunt of the apartheid that HMFA perpetuates and promotes with its QAP allocation and funding decisions.

H. HMFA fails to properly tailor the 2002 QAP to make it “appropriate to local conditions.”

The Consolidated Plan, the Fair Housing Plan, the State Development and Redevelopment Plan, HUD, the Department of Community Affairs, and credible commentaries from nationally-recognized urbanists recognize that New Jersey has a big problem with racial and economic stratification. Pursuant to 26 U.S.C. 42(m)(1)(B)(i), the 2002 QAP must “set[]

forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions.” In view of the unified concern expressed in state documents regarding housing and the obligation of state housing agencies affirmatively to further fair housing, that HMFA should consider the racially segregative effects of its funding decisions is quite obvious.

HMFA, however, has declined to consider the racially-segregative effects of its funding decisions and in fact appears to assert that it may make funding decisions without regard to their segregative effects. Considered against the backdrop of massive segregation, the practice of deeply funding urban projects without regard to race contravenes virtually every statement HMFA and DCA have made to HUD and the IRS in certifying that it would comply with fair housing laws. HMFA not only fails to affirmatively further fair housing by promoting racial and economic integration; it actively promotes racial and economic segregation, and it actively promotes the exacerbation of New Jersey’s “two society” status. In a state that is as segregated as New Jersey, HMFA’s promotion of racial segregation contravenes 26 U.S.C. 42(m)(1)(B)(i). HMFA has not “set[] forth selection criteria . . . which are appropriate to local conditions” in New Jersey, even as set forth by DCA in its promissory documents to HUD, and the proposed 2002 QAP is thus invalid under federal law.

- V. The IRS’s requirement that housing in qualified census tracts be given a preference does not explicitly or implicitly require or permit HMFA to ignore its obligations under 26 C.F.R. § 1.42-9(a) or Title VIII to promote racial integration in New Jersey. HMFA is required affirmatively to further affordable housing while giving a preference to qualified census tracts. Further, pursuant to 26 U.S.C. 42(m)(1)(B)(ii)(III), HMFA’s preference for developments in qualified census tracts is required to incorporate a requirement for a “concerted community revitalization plan.” The 2002 QAP fails to incorporate the “concerted community revitalization plan” requirement and thus contravenes 26 U.S.C. 42(m)(1)(B).**

Special attention by HMFA to 26 U.S.C. 42(m)(1)(B) is deserved for two reasons:

The first reason is that HMFA looks improperly to 26 U.S.C. 42(m)(1)(B), which requires a

preference for “qualified census tracts,” for protection from its Title VIII obligations. The second reason that statute deserves special attention by HMFA is that the present draft of the 2002 QAP contravenes 26 U.S.C. 42(m)(1)(B)(ii)(III) by giving a preference for projects in a “qualified census tract” without also requiring those projects to be part of a “concerted community revitalization plan,” a second prong to the qualified census tract preference.

A. Qualified census tracts and HMFA’s duty affirmatively to further fair housing.

Pursuant to 26 U.S.C. 42(m)(1)(B)(i) and (ii), a “qualified allocation plan” is any plan that “sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions” and that

gives preference in allocating housing credit dollar amounts among selected projects to--

- (I) projects serving the lowest income tenants,
- (II) projects obligated to serve qualified tenants for the longest periods, and
- (III) projects which are located in qualified census tracts (as defined in subsection (d)(5)(C)) and the development of which contributes to a concerted community revitalization plan, and

HMFA appears to claim that pursuant to 26 U.S.C. 42(m)(1)(B)(ii)(III) it is not obliged to promote racial integration and instead can choose to fund housing without regard to the racially-segregative effects of its decisions. That it so contends is reflected in HMFA’s responses to comments on the 2002 QAP on May 6, 2002, 34 N.J.R. 1574(a). In response to a comment that HMFA is perpetuating racial segregation by disproportionately funding LIHTC projects in areas of high minority concentration, and is thus violating Title VIII, HMFA wrote the following:

With respect to the funding of projects in distressed urban areas that may have high concentrations of racial minorities, it is important to recognize that Federal law requires that the QAP give a priority to projects in “qualified census tracts.” 26 U.S.C. § 42(m)(1)(B)(ii)(III). The QAP, in fact, achieves an appropriate funding balance between urban and suburban-rural projects.

That policy also is reflected in the following exchanges:

COMMENT: The QAP should eliminate any additional points awarded to projects in urban areas that require the 45-year extended use period of affordability controls.

RESPONSE: The current point category at N.J.A.C. 5:80-33.16(a)1i satisfies 26 U.S.C. s 42(m)(1)(B)(ii)(I), which mandates that a preference be given to "projects obligated to serve qualified tenants for the longest periods. . . ." However, the Agency agrees with the commenter that growth should be encouraged in distressed urban areas. If market rents can be achieved in what are now "pockets of poverty," defined as qualified census tracts by HUD and the IRS, then this program and the Agency have succeeded in the goal of revitalization. Consequently, the Agency proposes to insert new N.J.A.C. 5:80-33.16(a)1ii to provide points for projects which are located in qualified census tracts as defined by HUD and the IRS. This proposed amendment also conforms with changes made to 26 U.S.C. s 42(m)(1)(B)(ii)(III) with the passage of the Community Renewal Act of 2000.

COMMENT: The QAP disproportionately directs tax credits toward urban projects and, in so doing, violates New Jersey's Mount Laurel doctrine, which directs municipalities to afford a realistic opportunity for the creation and maintenance of their fair share of the regional need for low-and moderate-income housing.

RESPONSE: By striking an appropriate funding balance between urban and suburban/rural projects, the QAP is fully consistent with the Mount Laurel doctrine. It is important to recognize that the Mount Laurel doctrine itself, as reflected in the regional contribution agreements authorized by the 1985 New Jersey Fair Housing Act, N.J.S.A. 52:27D-301 et seq., recognizes the need for funding urban projects as well as those in the suburbs. The Code, moreover, requires that the QAP grant a priority to projects in "qualified census tracts," as defined in 26 U.S.C. s 42(d)(5)(C), which are typically distressed urban areas.

COMMENT: The commenter suggests that the QAP does not conform to the State Plan.

RESPONSE: The QAP extensively incorporates aspects of smart growth with its locational targeting based on recommendations from the Smart Growth Policy Council. The QAP further assists distressed areas with greater levels of poverty in accordance with 26 U.S.C. s 42(m)(1)(B)(ii)(III).

HMFA's preference for funding urban housing without regard to the racially segregative effects of that housing is also reflected by the fact that more than seventy-five percent of all tax credits funds are intended to be distributed to urban areas. The allocation of funds among the six funding cycles and the rules related to those funding cycles guarantee that over \$12 million of the approximately \$16 million available in tax credits will be used to develop housing in racially segregated neighborhoods that are blighted and impoverished. Further, although the final cycle does not by its name apply only to urban areas, the point system for awarding credits in the final cycle and the set-asides in that cycle virtually guarantee that only urban projects will receive the \$3,105,000 in credits allocated to that cycle. See N.J.A.C. 5:80-33.8 and -33.20.

LIHTC funds are distributed without regard to most of the characteristics of the community — including crime, access to employment, quality of municipal services, quality of schools, many environmental hazards, whether there are prostitutes or drug markets on the corner, and whether it is safe for children to walk to school. HMFA's 2002 QAP would permit it to distribute funds to the worst ghetto in New Jersey without regard to whether the people who will have an opportunity to live in that ghetto will ultimately benefit from living in the new housing.

LIHTC funds are not intended to continue putting children in harm's way when there are more desirable alternatives. Although HMFA is correct that 26 U.S.C. 42(m)(1)(B)(ii)(III) requires it to give applicants for funding for housing in qualified census tracts a preference in the QAP, compliance with that requirement must be evaluated in the context of the other preferences that HMFA must use — the appropriate "local conditions" and other legal requirements, such as the obligation to affirmatively further fair housing. To be sure, HMFA cannot hide so big a social and moral choice as perpetuating racial segregation behind the qualified census tract provision. So significant a public policy that exacerbates racial

segregation cannot rest legitimately on one phrase among many in view of the numerous sources of law requiring HMFA to affirmatively further fair housing.

Rather, a proper integration of the legislation requiring a preference for qualified census tracts, 26 U.S.C. 42(m)(1)(B)(ii)(I), and the legislation and the obligation to affirmatively further fair housing imposed by 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 results in a policy of preferring impoverished areas under some circumstances while attempting to promote racial integration. See Superior Air Products Co. v. NL Industries, Inc., 216 N.J. Super. 46, 63-64 (App. Div. 1987)(“It is basic in the construction of legislation that every effort should be made to harmonize the law relating to the same subject matter. Statutes in pari materia are to be construed together when helpful in resolving doubts or uncertainties and the ascertainment of legislative intent. Such enactments are to be considered as a homogeneous and consistent whole, giving effect to all their provisions.”)(citations omitted). HMFA’s failure to recognize the existence of those dual obligations constitutes an abuse of discretion.

To correct that abuse of discretion, HMFA should tailor the 2002 QAP to apply the three preferences and “local conditions” analysis required under 26 U.S.C. 42(m)(1)(B) while affirmatively furthering fair housing with an institutionalized method for evaluating whether specific projects will be racially-integrated, whether they will promote racial integration, or are otherwise permitted under law because some presumption against segregated housing is overcome. See 24 C.F.R. § 941.202 (HUD site-selection criteria creating high presumption against funding affordable housing in racially-impacted and impoverished neighborhoods); Shannon, supra, 436 F.2d at 821(holding that duty to affirmatively further fair housing requires “some institutionalized method whereby, in considering site selection or type selection, [a housing agency] has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts”).

As discussed in the following section, that balancing between funding poverty in-place and funding broader, pro-integrative regional affordable housing opportunities pursuant to 26 U.S.C. 42(m)(1)(B)(ii), 26 C.F.R. § 1.42-9(a), and 24 C.F.R. § 941.202 must consider whether housing in impoverished areas is part of a “concerted community revitalization plan” and whether the neighborhood of the proposed project is detrimental to people, and, if so, whether “there is actively in progress a concerted program to remedy the undesirable conditions.” Further, the success, or likelihood thereof, of the concerted program should be evaluated to determine whether the “undesirable conditions” are likely to be remedied, and thus whether the LIHTC funds ought to be allocated.

B. Qualified census tracts and the requirement that projects that take advantage of the preference for projects in qualified census tracts be part of a “concerted community revitalization plan”

As presently drafted, the 2002 QAP pursuant to proposed N.J.A.C. 5:80-33.16, “Point system for the Urban Cycle,” awards fifteen points to projects located in qualified census tracts, which are census tracts “designated by the Secretary of Housing and Urban Development in which 50% or more of households have an income less than 60% of the area median gross income or in which there exists a poverty rate of 25 percent or greater,” N.J.A.C. 5:80-33.2. HMFA notes in the recently-proposed QAP that that preference is awarded pursuant to 26 U.S.C. 42(m)(1)(B)(ii)(III). That statutory provision, however, also requires that the preference given to projects in qualified census tracts be given only if the project “contributes to a concerted community revitalization plan.” Ibid. The 2002 QAP contravenes 26 U.S.C. 42(m)(1)(B)(ii)(III) by giving a preference for projects in a “qualified census tract” without also requiring that those projects contribute to a “concerted community revitalization plan.”

HMFA’s failure to even define or recognize the term “concerted community revitalization plan” for the purposes of the 2002 QAP is significant because in not including that prong of the qualified census tract preference in the 2002 QAP HMFA is unduly favoring

impoverished municipalities. Congress clearly did not intend to permit a high poverty rate to be the lone criterion for benefiting from the qualified census tract preference. Congress did not dispense with the requirements of 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 and, without a specific statutory exemption, suddenly begin favoring housing in areas that are substantially impacted by poverty. Rather, assuming Congress intended to permit some housing in segregated, impoverished neighborhoods and intended for that housing to be given a preference, Congress wanted that preference to be given only when the applicant could demonstrate that its proposed project would amount to more than new housing amidst blight that itself may be likely to become blighted. In fact, in recognition of the problems that accompany concentrated poverty, the “concerted community revitalization plan” caveat could be read to disfavor the construction of affordable housing in poverty-impacted areas when that housing is divorced from a successful broader revitalization plan by the community.

HUD intended as much in its site selection criteria, 24 C.F.R. § 941.202, which in relevant part provide that

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.
 - ...
 - (e) 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 concerted program to remedy the undesirable conditions.
 - ...

Reading 26 U.S.C. 42(m)(1)(B)(ii)(III) and 24 C.F.R. § 941.202 in pari materia, as one must, it appears that Congress intended that prior to awarding tax credits to a project in a poor area, the blight that accompanies poverty must be mitigated by some sign of hope in the form of a concerted plan to revitalize that neighborhood. Otherwise, the expenditure of such funds in those areas would be at best unwise.

Whatever the case, it is clear that qualified-census-tract status, and the accompanying preference, may not be given to projects that are not part of a “concerted community revitalization plan.”

VI. HMFA has failed to consider the wealth of evidence that demonstrates that creating more housing opportunities for the poor in racially-impacted, impoverished urban areas is terrible public policy that will not improve life for New Jerseyans of any economic capacity in the long term. The sociological and demographic research points to the fact that New Jersey and all New Jerseyans will benefit from substantial investments in regional affordable housing.

In addition to offending federal and state fair housing laws, HMFA’s focus on funding affordable housing projects in racially-impacted poor neighborhoods contravenes the recommendations of virtually every scholar in the country who has studied the issue of how best to remedy racial and economic stratification and how best to revitalize urban areas. HMFA’s plans for revitalizing urban areas by creating more opportunities for the poor to live there is but a reinforcement of a political preference for segregation and an avoidance of the reality that creating opportunities for the poor in suburbia will alienate suburbanites who prefer living in a segregated society. Underlying the platitude that more affordable housing in places like Camden actually helps Camden is the notion that poor racial minorities prefer living in the ghetto. In reality, there are very strong forces at work, such as racial discrimination, the tendency to pretend that historic forces dating back to slavery are not still at work, and a tendency to blame the poor for their plight, that will prevent regional mobility from becoming a reality today as long as policymakers cower to the politically powerful interests who prefer

apartheid in New Jersey. To be sure, many, many urban racial minorities of moderate and low incomes will take quick advantage of the creation of regional affordable housing opportunities outside of places like Camden and Newark.

Thankfully, fair housing laws requires HMFA to create those opportunities, which is for the following reasons a very good thing.

A recent book, American Metropolitcs: The New Suburban Reality (Brookings Institution Press 2002) by Myron Orfield, addresses the primary role affordable housing plays ameliorating social and economic stratification as part of a broad strategy for returning urban areas to good health. His approach may appear radical to those who prefer a segregated society and to policymakers who are unacquainted with the scholarship that addresses why ghettos exist and what perpetuates the existence of ghettos. For those who are acquainted with what causes ghettoization and for those who actively promote racial and economic integration, such as the lawmakers who passed Title VIII, Orfield's recommendations are elementary. HMFA would do well to distribute his book to its policymakers as a first step in a strategy of affirmatively furthering fair housing under the QAP law.

On the issue of whether money should be used to target revitalization of specific neighborhoods, or should be used for regional efforts, Orfield has this to say:

The problems most associated with large cities and increasingly with at-risk suburbs—concentrated poverty, racial segregation, crime, and community disinvestments—have become accepted as a natural feature of the metropolitan landscape. Government, philanthropic, and community-based programs to assist the poor and revitalize inner-city areas, though well-intentioned and often attracting some of the nation's brightest and most dedicated people, have had limited success at best. Often, such programs unintentionally maintain the status quo, a politically comfortable arrangement that leaves the neediest people confined to the inner city.

Many U.S. urban efforts to address the decline of the metropolitan core have failed for four main reasons. First, antipoverty and urban revitalization efforts have been largely symbolic and reactive. Second, those initiatives have been targeted at the localized symptoms of the problems, not the root causes—the structural systems operating at the metropolitan

level. Third, policies that do address the metropolitan nature of the problems have lacked the political backing to move through the political process. Fourth, the effectiveness of antipoverty and urban revitalization programs is hard to judge because many lack explicit goals. As a result, no one has ever really argued that such strategies will turn the tide and restore the city or the urban poor to robust health.

...
 Because urban policy has been reactionary instead of proactive in nature, its programs almost universally target the symptoms, not the root causes, of the poor people's segregation in blighted neighborhoods. Thus, despite the billions of dollars spent and time and effort expended, the United States has failed to make meaningful progress in more than a half century. Today, with persistent concentrations of poverty in the inner cities and many older suburbs and widening disparity between rich and poor, there is little evidence of change in the lives of the urban poor, or in the ongoing process of decline in the core of the nation's largest metropolitan areas.

The problem is that the nation's primary policies and programs for addressing urban problems are stuck in the same basic model. Empowerment zones are the beginning and the end of federal urban revitalization policy, while philanthropic organizations and local activists are busy with community-development activities. Both kinds of initiatives have been referred to as "gilding-the-ghetto" strategies—in-place revitalization strategies that attempt to bring jobs, money, and human capital into the ghetto through tax breaks, physical rehabilitation of neighborhoods, and other economic incentives.

Yet there is little evidence such strategies work to revitalize communities. They may have lifted some individuals out of poverty, but those people usually move out of the ghetto, leaving a space quickly filled by another impoverished individual. As one political journalist and urban historian puts it, "The standard model of progress for poor people living in urban slums . . . is to get a good job outside the neighborhood and then decamp for a nicer part of town. In-place economic revitalization strategies run against the natural and powerful tide of upward mobility—something like running up a down escalator.

In-place strategies are our only revitalization effort when they should be part of a comprehensive national strategy to strike at the roots of urban decay. Central cities function within structural systems that operate across entire metropolitan areas, their housing and job markets, their transportation networks. Those structural systems must be altered before the spatial distribution of jobs, housing, and residents will shift. Until the problems of the cities are placed in their true, metropolitan geographical context, in-place initiatives will remain palliatives—a series of small, broken arrows in an increasingly empty quiver.

The intergenerational phenomena of poverty, the continuing and systematic exclusion of blacks and Latinos from

opportunities to accumulate wealth, racial discrimination in housing and employment, and the growing concentration of poverty in the inner-city are testament to the failure of anti-poverty and urban revitalization initiatives to make a real difference. They have not succeeded in turning around urban neighborhoods, much less in restructuring the network of educational employment, and other opportunities available to the urban poor.

[American Metropolitcs at 70-72 (footnotes omitted).]

Regarding HMFA's and other governmental organizations' practice of feeding poverty with money by building more housing in poor areas, Orfield wrote the following:

Though only a small force on the urban scene, community development is the dominant revitalization strategy for declining, low-income inner-city neighborhoods in the United States. As of 1998, after a period of rapid growth in which many new community development corporations (CDCs) appeared, an estimated 1,800 were operating in urban areas, with combined budgets of hundreds of millions of dollars.

The production and management of housing in declining inner-city neighborhoods has come to be recognized as the major success of these organizations, originally conceived as grass-roots organization to foster community empowerment. . . . It is widely recognized, however, that despite the billions of dollars spent on community development, the budget of the average CDC is inadequate to launch the type of sustained and comprehensive neighborhood redevelopment effort needed to resuscitate declining inner-city neighborhoods. Furthermore, many argue that the focus on the individual neighborhoods is much too limited and must be expanded to include the entire social and economic playing field in which metropolitan areas operate. The entire region must be the focus of a revitalization strategy.

Still community development has been both theoretically and politically attractive as a means of improving the lives of the urban poor. First, it provides an opportunity for federal government and private philanthropic support for people who are trying to revitalize their neighborhoods. Second, it seems to make sense that people who live or work in a depressed neighborhood would have the best understanding of where and how money should be spent to make improvements.

Whether intentionally or not, leaving the comfortable status quo of residential segregation intact is a hallmark of in-place strategies. Often, it is quietly rationalized by those outside the distressed neighborhoods with statements like, "They [poor blacks] want to live near their own" or "Even when they have the opportunity to move out, they choose to stay." That convenient sentiment was expressed by a Housing and Urban Development administrator during the Johnson administration: "Many middle-class Negroes, who could move to the suburbs if they wanted to . . .

. decide to stay on in the central city.” The evidence, if not basic logic, suggests otherwise.

Community development, as a primary strategy for addressing urban poverty and neighborhood decline, cannot address the regional forces that created the decline in the first place. Even when a few families and individuals manage to find good jobs and improve their standard of living, they often move to more prosperous and stable neighborhoods. In a recent study of the effects of several of the country’s largest and most successful inner-city focused antipoverty initiatives, family and individual poverty rates substantially increased and moved farther from metropolitan norms. In addition, the median household income declined and moved farther away from the metro average, and the communities grew more segregated.

In the end, despite the best and most admirable efforts of CDCs, poor neighborhoods are typically transitional and chronically poor. No matter how well organized a poor community is, it cannot become stable and not poor as long as the people with good jobs keep moving out and the people left behind have very little income.

The many who remain mired in poverty and despair can do little but ask for more money to pay for low-income housing or a few more jobs, deepening their dependence on public money to support their neighborhoods. The problem is that the neighborhoods where community development organizations work are not islands within the metropolitan political and economic landscape—they are an integral part of it. The solution? We should be trying to bring the poor closer to the social and economic mainstream of American society, not encouraging them to develop a self-contained community apart from the mainstream.

CDCs are expected to miraculously revitalize distressed urban neighborhoods with inadequate funding and, even more miraculously, to do it while combating the powerful forces of suburbanization that are sucking private capital and human potential out of the city core. What they are being asked to do is impossible. Doing nothing would be the alternative, but it would probably make conditions worse. But, if conditions worsened, perhaps frustration would build to the point that a series of significant and equitable changes would occur. If governments at every level stopped reacting to only the symptoms of urban poverty and instead invested their energy and resources in a sustained attack on the roots of the problem—in overhauling the larger institutional frameworks in which poor communities are located—perhaps distressed neighborhoods in cities and older suburbs would stand a fighting chance.

[American Metropolitics at 79-83 (footnotes omitted).]

Orfield further contends that “metropolitan areas need to increase the construction of entry-level housing in developing suburban areas and at the same time increase upper-income housing opportunities in the region’s core.” Id. at 123-24. He maintains that “[p]romoting the supply of affordable housing in suburban areas requires three complimentary policies: reduced barriers to affordable housing, fair-share requirements to ensure that all municipalities contribute to a pool of affordable housing, and financial assistance for very low income housing.” Ibid.

Orfield makes those observations, as have others like him, after conducting hundreds of demographic studies around the country. Orfield’s analysis is authoritative, yet HMFA refuses to follow the advice of Orfield and others when the advice was referenced in the past during the QAP rulemaking process. In view of HMFA’s unwillingness to adopt a truly regional approach to funding affordable housing, the entities commenting herein request HMFA to answer these questions as part of the rulemaking/comment process: On what body of scholarship does HMFA rely in attempting to revitalize urban areas by concentrating more poverty there? On what scholarship does HMFA rely in contending that perpetuating segregation will help New Jersey? On what scholarship does HMFA rely in choosing to focus on urban housing opportunities rather than suburban housing opportunities? Please state why HMFA does not follow Orfield’s advice for revitalizing urban areas.

HMFA also should consider the effects of its funding decisions on individual families as a barometer for success. Again, the scholarship of which the authors of these comments are aware indicates that the provision of regional affordable housing opportunities, not in-place revitalization efforts, best benefits urban dwellers—especially children.¹⁰ In view of

¹⁰ The effects of racial and economic integration are the subject of extensive studies in connection with Moving to Opportunity, a federally-funded effort to provide regional housing opportunities for the poor through the provision of supportive services and Section 8 vouchers. The results of the Moving to Opportunities program suggest that moving low-income families out of high-poverty areas positively effects mental health (among both children and single mothers), employment, juvenile behavior, and academic achievement. A New York-based study found that among families that moved to low-poverty areas “employment rose, welfare receipt fell, mental health improved, parenting became less harsh, and children’s lives became more structured.” Moving to Better Neighborhoods Improves Health and Family

HMFA's unwillingness to adopt a truly regional approach to funding affordable housing, the entities commenting herein request HMFA to answer these questions as part of the rulemaking/comment process: With regard to HMFA's focus on funding housing in urban areas, on what research or other materials or assumptions, if any, does HMFA rely in thinking that that housing will long-term benefit the people who live in urban areas? On what research or other materials or assumptions, if any, does HMFA rely in thinking that that housing will long-term benefit the people who live in that housing itself? Does HMFA have any reason to believe that housing for the urban poor will be of greater benefit to the urban poor if that housing is in racially-segregated, high-crime urban areas than in non-racially-impacted, safe suburban areas? Is HMFA concerned about the effects of high crime rates on our urban children? Why is HMFA ignoring the effects of racial and economic segregation on our urban children?

VII. HMFA is violating Title VIII and the federal and state constitutions by acting purposefully to perpetuate racial segregation. At the very least, HMFA's regulations have an illegal disparate impact on racial minorities and perpetuate racial segregation in violation of Title VIII.

In addition to imposing the obligation to affirmatively further fair housing on federal agencies, Title VIII prohibits housing-related activity that is intentionally segregative. Likewise, Title VIII and the New Jersey Law Against Discrimination prohibit conduct that has a

Life among New York Families, 5 Poverty Research News 1 (Northwestern University/University of Chicago Joint Center for Poverty Research News, Chicago, IL (2001))(available at http://www.jcpr.org/newsletters/vol5_no1/index.html). A Baltimore-based study revealed "evidence suggesting that the offer to relocate families from high-to low poverty neighborhoods reduces juvenile arrests for violent offenses by 30 to 50 percent of the arrest rate for controls." Jens Ludwig, Greg J. Duncan & Paul Hirschfield, Urban Poverty and Juvenile Crime: Evidence from a Random Housing-Mobility Experiment, 116 Q. J. of Econ. 2, 665, 678 (2001). A Chicago-based study revealed that "the MTO program has achieved remarkable success in improving the neighborhood and housing conditions of participating families." Emily Rosenbaum & Laura E. Harris, Residential Mobility and Opportunities: Early Impacts of the Moving to Opportunities Program in Chicago, 12 Housing Pol'y Debate 2, 321, 342 (2001).

The results of the Moving To Opportunities program demonstrate that providing opportunities for low-income families to move to low-poverty neighborhoods has a wide range of positive effects, all of which appear to combat poverty effectively. For an extensive discussion of the landmark Chicago Guatreaux litigation and of the resulting positive effects that integrated living and education has on families and children, see Leonard S. Rubinowitz and James E. Rosenbaum, Crossing the Class and Color Lines: From Public Housing to White Suburbia (Univ. of Chicago Press 2000).

disparate impact on racial minorities. In that the duty to affirmatively further fair housing has been imposed on HMFA with regard to the LIHTC program, it is indeed odd that HMFA's administration of the LIHTC program is doing just the opposite – affirmatively resisting fair housing by indifference. The only question is whether that indifference and the resulting deleterious impact on racial minorities is intentional or not. If it is intentional, the fair housing laws and the state and federal constitutions are implicated. If HMFA's funding policies merely have a disparate impact, then only the fair housing laws are implicated.

The intentional segregation of the races by governmental actors is unconstitutional. See Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 2d 873 (1954)(reversing Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896)). As history unfolds following the sorry period when intentional segregation was permitted, we are left with the remnants of history; our housing patterns and other demographic data reveal that the oppression of Blacks and Hispanics continues. In New Jersey, that oppression takes the form of state-sanctioned racial segregation. It is a sad truth that governmental decisionmakers when faced with a real choice still choose segregation over integration, Plessy over Brown, living divided over living together.

Too often, policymakers rationalize their decision as attempting to make separate conditions in housing and schools equal, as was permitted from 1896 to 1954, when Plessy's law of separate-but-equal conditions for black Americans was good law. Justice Harlan, in an historic and later-praised dissent from the Plessy majority's pronouncement of separate but equal conditions for the "Negro" people, handily disposed then of arguments that HMFA relies on in 2002, one-hundred-and-six years later, stating, "We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens — our equals before the law. The thin disguise of 'equal' accommodations for

passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.”

Plessy, supra, 163 U.S. 537, 562, 16 S. Ct. 1138, 1147 (1896)(Harlan, J., dissenting).

HMFA's 2002 QAP, like every QAP that preceded it, is a clear statement that HMFA does not object to, but rather actively promotes, the segregation of the races in housing and in schools. HMFA chooses Plessy over Brown: it attempts to maintain the racial segregation of the “railroad coaches” and schools while striving to make sure that the “railroad coaches” and schools of the urban racial minorities offer the same accommodations as those used by mostly white New Jerseyans.

In view of the massive allocation of funds for racially-segregated projects in communities with racially-segregated schools, there is a strong claim to be made that HMFA is intentionally causing racial segregation in housing. Simms v. First Gibraltar Bank, 83 F.3d 1546, 1556 (5th Cir.), cert. denied, 519 U.S. 1041, 117 S.Ct. 610, 136 L.Ed.2d 535 (1996), provides that discriminatory intent in violation of the Fair Housing Act may be established by demonstrating a fact issue as to whether HMFA's stated reasons for funding segregated housing projects are pretextual and by introducing a reasonable inference that race was a significant factor in the that decision, facts which are established here by census data and HMFA's own allocations. See also Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 143 (3rd Cir. 1977)(“Once such a ‘disproportionate impact’ is shown, the normal course will be to search out other facts which, in conjunction with that impact, will demonstrate an ‘invidious discriminatory purpose’ as well.”). That so much of HMFA's housing funds go to racially-segregated neighborhoods, including terribly ghettoized Abbott districts, that so many of HMFA's LIHTC-funded projects are occupied almost entirely by racial minorities, and that HMFA refuses to consider the racially-segregative impacts of its decisions are facts that alone demonstrate its intent to segregate.

HMFA's investment in the perpetuation of racial segregation, even if unintentional, also contravenes Title VIII. Pursuant to Metropolitan Housing Development Corp.

v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978), HMFA's funding decisions produce a discriminatory effect "on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups. " See also Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937 (2d Cir.), aff'd per curiam, 488 U.S. 15 (1988)(noting that perpetuation-of-segregation claims "advance[] the principle purpose of Title VIII to promote 'open, integrated residential housing patterns'")(citation omitted); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-49 (3rd Cir. 1977), cert. denied 435 U.S. 908 (1978).

That HMFA's administration of the LIHTC program disparately impacts racial minorities is also quite obvious. "The cases interpreting Title VIII uniformly hold that a facially-neutral law or policy that results in a discriminatory effect on the sale or rental of housing will establish a prima facie violation of Title VIII, even if unaccompanied by evidence of discriminatory intent." In re Warren, 132 N.J. 1, 22 (1993). To survive a legal challenge on racial segregation grounds under Title VIII's and NJLAD's disparate impact analyses, HMFA must show that it is furthering a "legitimate, bona fide governmental interest" and that no alternative would serve that interest with less discriminatory effect. Id. at 24 (citations omitted).

Here, assuming HMFA could satisfy the first part of that analysis, it would fail the second part. HMFA would be hard-pressed to assert that it has a legitimate interest in increasing or perpetuating the percentage of poor people, who are often racial minorities, that live in any urban area in New Jersey, one of the most racially-segregated states in the nation with one of the most segregated systems of schools. The best argument HMFA could make is that it has an interest in revitalizing cities, which falls on its own weight because there is no demonstrable causal connection between increasing urban affordable housing opportunities in racially-segregated urban areas and thereby "helping" urban New Jersey. Moreover, the existence of a less discriminatory means, such as regional affordable housing, deeply funding

Mount Laurel projects, and other methods of revitalization, necessarily trump HMFA's focus on funding housing that is located in racially-segregated neighborhoods. See generally Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 939 (2nd Cir. 1988)(finding absence of legitimate bona fide reason for disparate impact and finding existence of less discriminatory alternative for failure to rezone and stating, "The Town asserts that limiting multi-family development to the urban renewal area will encourage restoration of the neighborhood because, otherwise, developers will choose to build in the outlying areas and will bypass the zone. The Town's goal, however, can be achieved by less discriminatory means, by encouraging development in the urban renewal area with tax incentives or abatements. The Town may assert that this is less effective, but it may actually be more so.")(emphasis added); Dews v. Town of Sunnyvale, 109 F.Supp.2d 526, 569 (N.D. Texas 2000)("The Court concludes that Plaintiffs have established liability under § 3604(a) of the Fair Housing Act by proving that the town's acts had both an adverse impact on African Americans and tended to perpetuate segregation, that Sunnyvale's offered justifications are neither bona fide nor legitimate, and that less discriminatory alternatives to the current zoning ordinance exist."). See also Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1294 (7th Cir. 1977)(stating that "if we are to liberally construe the Fair Housing Act, we must decide close cases in favor of integrated housing").

VIII. HMFA's 2002 QAP will violate the state constitution. Pursuant to the state constitution, and consistent with its duty affirmatively to further fair housing, HMFA should provide internal fair housing training to the HMFA staff and board and should affirmatively support the Mount Laurel doctrine by creating incentives and providing training that would permit urban-based CDCs to participate in regional solutions to concentrated poverty and racial segregation.

In addition to providing relevant sources of "appropriate . . . local conditions" related to concentrations of poor racial minorities, which must be considered by HMFA pursuant to 26 U.S.C. 42(m)(1)(B)(i), the New Jersey Constitution of 1947 independently requires HMFA

to promote racial and economic integration. Put differently, as a state agency, HMFA is uniquely required to promote racial integration in schools. Without recapitulating the prior discussion of Mount Laurel, Booker, Jenkins, Englewood, and Abbott, a few points are worth highlighting in that regard.

First, HMFA is part of a greater whole, namely, the State of New Jersey. Though obvious, the existence of that fact should be paramount when HMFA promulgates regulations that so significantly impact matters of state constitutional significance, such as housing and schools. That HMFA is in fact a state agency run by state actors who must obey the state constitution is generally ignored by HMFA.

But obey the state constitution it must. See N.J.S.A. 41:1-1 (oath of office for, among others, DCA commissioner and executive director of HMFA, which includes statement that those individuals will support the state constitution). When the Supreme Court states passionately that schools must be integrated and that exclusionary zoning must end, it certainly expects that agencies like HMFA will not actively attempt to reverse or frustrate the realization of what the state constitution requires.

Unfortunately, HMFA does just that. The state constitution provides that “[n]o person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin. N.J. Const. Art. 1, ¶ 5. The New Jersey constitution likewise guarantees children a thorough and efficient education, N.J. Const. Art. VIII, § 4, ¶ 5. The caselaw likewise recognizes the relationship between those educational guarantees. Despite the presence of those guarantees in our state’s fundamental legal document, HMFA’s primary recipients of money, namely, distressed urban, racially-segregated Abbott municipalities, have the worst schools in the state.

Another example of HMFA’s failure to recognize the existence of the state constitution is its active resistance to a full implementation of the Mount Laurel doctrine. One of

the biggest barriers to effecting social change through Mount Laurel is the high affordability levels established and utilized by COAH. Although half of all Mount Laurel housing was intended for “low-income” persons who earn 10-50% of median income and half was intended for “moderate-income” persons who earn 50.1-80% of median income, COAH adopted a certification standard of average affordability at 57.5% of median income.¹¹ That standard permits a suburban municipality to receive COAH’s substantive certification of its Mount Laurel housing plan simply by providing housing which on average is affordable to persons with 57.5% of median income, or approximately \$32,000 for a family of four persons. That standard can be satisfied by providing housing for persons earning from about \$26,000 (45% of median income) to \$38,000 (65% of median income). When asked why the affordability levels must be so high, COAH’s response is that that level of affordability is necessary because of the absence of subsidies available to complement the internal subsidy.

In addition to an overall propensity to fund deeply only urban developments, DCA, which administers the Balanced Housing program, N.J.A.C. 5:43-1.4(c)¹², and HMFA, N.J.A.C. 5:80-33.13¹³, have both by regulation refused to supplement the internal subsidy generated by market units and provided by developers of suburban inclusionary developments

¹¹ N.J.A.C. 5:93-7.4, the regulation by which COAH regulates rents and prices of affordable units, recently was amended to 55% for for-profit developers and 52% for non-profit developers, 32 N.J.R. 3559 (2000), which, though better, is still too high to effect social change.

¹² N.J.A.C. 5:43-1.4 provides as follows:

(c) Except as noted in (c)1 below, any project which is located in a non-urban aid municipality and which is being developed in accordance with a COAH-certified plan or a court settlement and judgment of repose and for which the developer, or its assignee, has received a density bonus shall not be eligible for Balanced Housing funding.

1. A project will be considered eligible for funding if 100 percent of the units are affordable and if the project is not identified, by sale or transfer or any other means, with an inclusionary development.

¹³ N.J.A.C. 5:80-33.13 provides as follows:

(a) If a municipality has created a density bonus subsidy to assist the low or moderate-income units in a project, the project may not compete for tax credits (ceiling tax credits). This subsection shall not be evaded by failing to apply all or any portion of the subsidy to the low or moderate-income units, by diverting all or any portion of the subsidy to other uses or by using any other device by which all or any portion of the subsidy is not used to benefit low or moderate-income housing.

with zoning created by a density bonus. Thus, COAH does not require developers or municipalities in the suburbs to provide opportunities for the poor, and the agencies with housing funds keep the poor from benefiting if a well-intentioned developer attempts to do so. As a result, the primary tool for Mount Laurel compliance, namely inclusionary developments, by design will never reach the urban poor. Whereas a reasonable interpretation of Mount Laurel's affirmative obligations would require HMFA to make its funds available to and solicit the assistance of the inclusionary developers and municipalities so that the truly poor could benefit from Mount Laurel, HMFA and DCA have failed to assist in implementing the Mount Laurel doctrine.

A second point worth noting is that nothing in the federal legislation pursuant to which HMFA distributes housing funds requires HMFA to distribute its funds so freely to ghettoized, racially-segregated municipalities. Rather, all indications, both practically and legally speaking, are that the requirements of the state constitution and 26 U.S.C. 42(m)(1)(B)(i) may coexist comfortably. Title VIII, Mount Laurel, Booker, Jenkins, Englewood, and Abbott all play for the same team: they cry out for integration and eschew every policy that relegates black and Hispanic children to the worst schools and black and Hispanic families to the most blighted, crime-ridden, environmentally-dangerous communities.

Title 26 U.S.C. 42(m)(1)(B)(ii)(III) does require HMFA to give applicants for funding for housing in qualified census tracts a preference in the QAP. That provision does not dictate how much money must be allocated to those municipalities, how much of a preference must be given, and what the nature of that preference should be. Further, the other required preferences that accompany the qualified census tract preference, which are for projects that reach the lowest income tenants for the longest periods of time, 26 U.S.C. 42(m)(1)(B)(ii)(I) and (II), are virtually ignored by HMFA. While HMFA ignores those preferences, it exercises its discretion to make applicants from qualified census tracts the primary beneficiary of its LIHTC largesse.

Not only does 26 U.S.C. 42 not require funding decisions that perpetuate segregation and ghettoization, it actually supports efforts to fight such social harms. In addition to the above-mentioned preferences and the requirement that the 2002 QAP be tailored to appropriate “local conditions,” HMFA must include the following selection criteria as part of the 2002 QAP: project location, housing needs characteristics, project characteristics, including whether the project includes the use of existing housing as part of a community revitalization plan, sponsor characteristics, tenant populations with special housing needs, public housing waiting lists, tenant populations of individuals with children, and projects intended for eventual tenant ownership. 26 U.S.C. 42(m)(1)(C).

Thus, HMFA surely has the discretion to not use LIHTC funds to massively exacerbate segregation in violation of the state constitution. To remedy its past misdeeds, HMFA, among other things, should provide internal fair housing training to the HMFA staff and board and should affirmatively support the Mount Laurel doctrine by creating incentives and providing training that would permit urban-based CDCs to participate in regional solutions to concentrated poverty and racial segregation.

IX. HMFA should prepare an exhaustive administrative record in this rulemaking process to support its positions in and to permit effective appellate review of HMFA’s 2002 QAP regulations.

Kevin D. Walsh, counsel for the entities commenting herein, visited HMFA on May 24, 2002 and was kindly presented with the administrative record HMFA relied on in proposing regulations for adoption at 34 N.J.R. 47(a)(January 7, 2002) and 34 N.J.R. 1574(a)(May 6, 2002). That record consisted exclusively of procedural rulemaking documents and a few comments from interested parties. As set forth below, HMFA’s position in that regard is inconsistent with the standard of R. 2:5-5(a), administrative law caselaw, and fundamental administrative law precepts. HMFA should thus consider preparing an exhaustive administrative record that would comply with the legal requirements.

R. 2:5-5(a) requires agencies to provide rule challengers and the Appellate Division with documents that support its rulemaking decision. Although N.J.A.C. 1:30-5.6 (“Rulemaking record”) mandates only that specific procedural documents involved with the rulemaking process be retained, such as OAL rulemaking forms, public comments, and an agency’s responses to those comments, R. 2:5-5(a) contemplates the creation and maintenance of a broader rulemaking appellate record that includes both procedural documents and documents that support the assertions in and underlying the regulations. Indeed, in providing that “[a] party who questions whether the record fully and truly discloses what occurred in the court or agency below shall apply on motion” to that agency or the court, R. 2:5-5(a) focuses on the substance of the rulemaking, not the procedural technicalities reflected in OAL forms. Thus, when a rulemaking decision is appealed to the Appellate Division, the record may be expanded pursuant to R. 2:5-5(a) to resemble, for instance, the more thorough record of an adjudicate administrative proceeding. See N.J.A.C. 1:1-2.1 (providing definitions for Uniform Administrative Procedures Rules in contested cases and stating, “‘Record’ means all decisions and rulings of the judge and all of the testimony, documents and arguments presented before, during and after the hearing and accepted by the judge for consideration in the rendering of a decision.”). See also Winberry v. Salisbury, 5 N.J. 240, 245 (1950)(holding that N.J. Const. art. VI, § 2, ¶ 3 grants New Jersey Supreme Court the exclusive power to control the rules of court, subject only to substantive law, under doctrine of separation of powers).

The administrative law jurisprudence of this state also requires HMFA to provide substantial documentary support for its regulations in an appellate record. “A careful review of the record in testing the findings is vital to the proper management of a government of laws, for a determination predicated on unsupported findings is the essence of arbitrary and capricious action.” Application of Boardwalk Regency Corp., 180 N.J. Super. 324, 334 (App. Div. 1991), modif’d, 90 N.J. 361 (1982)(emphasis added). In Schwerman Trucking v. Department of

Environmental Protection, 125 N.J. Super. 14, 19 (App. Div. 1973), this Court stated that in reviewing administrative decisions, it looks for

support in the credible evidence in the whole record, and by the employment of reasonable presumptions (to avoid specious, frivolous, or parochial attack), allow the administrative agency the benefit of the doubt in this search. The generosity of this approach, in the interest of administrative accomplishment and an acknowledgment of expertise in the agency, will not suffice, however, to supply missing record support in a situation where the challenge is substantial and the regulation far-reaching, as here.

[Emphasis added.]

See also In re Mountain Ridge State Bank, 244 N.J. Super. 115, 118 (App. Div. 1990)(ordering on motion to supplement pursuant to R. 2:5-5(b) that matter be remanded and that administrative record be supplemented).

“The rulemaking record serves three major purposes. First the record provides the body of information necessary to participate in rulemaking. Second the record is the body of information the agency relies on in promulgating its final rule. Third the record provides support for the final rule at judicial review.” 1 Charles H. Koch, Jr., Administrative Law and Practice § 4.44[1] (1997 & Supp.2001).

Basically the rulemaking record is all the information which the agency used to make the rule. A rulemaking record then can include anything the agency finds helps it to make the best possible rule.

. . . A rulemaking record . . . would include the notice, comments, transcript, reports of advisory committee, statement of basis and purpose and factual information included in the foregoing that was considered by the authority responsible for promulgation of the rule or that was proffered by the agency as pertinent to the rule.

. . .

. . . Inherent in notice and comment rulemaking is the duty on the agency to develop a complete record. Although the rulemaking record is imprecisely defined, there are certain things which must be in it. At a minimum, the record should contain the notice of the proposed rulemaking, the statement of basis and purpose, and the written or oral comments.

...

An agency should try, to the extent possible, to include in the record information about the expertise and experience it will rely upon. A problem for the agency in relying on its own experience as factual support for its decision to promulgate a rule is the necessity of adequately recording and explaining that experience on the record. For this purpose, staff memorandum with reference to the authority and past experience which might affect the decision should be included in the record. Other methods should be explored for memorializing this type of information.

The agency should also do its best to incorporate all technical type information even though many participants and the courts will not find that information useful. . . .

[Koch, Administrative Law and Practice § 4.44[1]
(emphasis added).]

See also James T. O'Reilly, Administrative Rulemaking at 124 (McGraw-Hill 1983) ("The challenger to an agency rule can use the record's appearance and content to advantage. One should be aware that reviewing courts are hostile when they find that the agency's supporting files are disorganized, poorly indexed, and haphazard. It is not certain that a court will disregard the agency file for its poor presentation, but the court which chastises the agency for the difficulty encountered in review of the rule is not likely to praise the merits of the agency's conclusion from the evidentiary record."); 37 New Jersey Practice, Appellate Practice and Procedure § 4.16, at 96-97 (Edward A. Zunz, Jr.)(2000), which states that

where an agency's determination does not satisfy the relevant standards of review, the reviewing court is not merely permitted to overturn the administrative action; it must set it aside.

In order for an appellate court to apply these standards, it must have the benefit of the thinking of the administrative agency. There can be no meaningful appellate review, no deference can be given, and due process would be lacking if the administrative agency fails to disclose to the party aggrieved and to the reviewing court the basis for its decision. In such situations, the administrative decision is likely to be reversed and remanded with appropriate instructions.

It has been stated that a determination predicated on unsupported findings is the essence of arbitrary and capricious action.

[Footnotes and quotation marks omitted;
emphasis added.]

The administrative record thus far maintained by HMFA, which consists of comments from interested parties and a few procedural documents, does not meet the standard of R. 2:5-5(a), New Jersey caselaw, or the standards recognized by the treatises.

X. Conclusion

These comments have necessarily been broad in scope because the range of information needed to properly inform HMFA of its affirmative housing duties with regard to the LIHTC program 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 HMFA'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: HMFA has failed to establish and implement an institutionalized method for considering the social and demographic data when making its QAP allocation and funding decisions.

HMFA, rather, operates the LIHTC program in a poverty vacuum by singularly considering where the poverty is located, funneling funds to those locations in the hopes that better housing will somehow remedy the poverty, and doing so without regard to the racial and social ills that are perpetuated and exacerbated.

HMFA's commitment to funding poverty in place is reflected by its decision to commit approximately 75 percent of all LIHTC funds in 2002 to impoverished urban areas in New Jersey – virtually all of which are racially impacted. To be sure, the last thing that Abbott school districts need are more socially-needy children, yet municipalities in those districts (not including other racially-impacted municipalities) consistently receive between 50 and 70 percent of all funds despite the fact that their students are on average 86 percent racial minorities.

What HMFA should do to satisfy its duty to affirmatively further fair housing is in part left to its discretion, and in part the subject of guidance by the state constitution and federal regulations. The touchstone of the obligation to affirmatively further fair housing is integration. These comments have identified some of the tools HMFA should use to reach that goal—such as data that the federal government and the State of New Jersey, including HMFA, DCA, the Division on Civil Rights, and the Department of Education, already collect and maintain. Getting

that information should be easy enough; it's all located on the internet or within a mile or so of HMFA's headquarters.

How to use that information should be the subject of rulemaking. A greater distribution of LIHTC funds to the region surrounding areas of impacted poverty will be required. Adjustments to the 2002 QAP, such as a reduction in the preference awarded to Qualified Census Tracts and the massive allocations to impoverished urban areas will be required. A point system that generally disfavors racially-impacted neighborhoods and areas with racially-impacted schools, in compliance with federal regulations and the state constitution, would be appropriate. Expert advice from regionalists and experts who understand the dynamics of racial integration should be solicited, and they should be charged with implementing a funding scheme that will result in stable racial and economic integration.

An institutionalized method for testing and reporting the success of HMFA's pro-integrative efforts at set timeframes should be established, and the results of such tests should inform HMFA's promulgation of future QAPs.

HMFA 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 HMFA 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.

Promoting racial and economic integration may be politically unpopular, but in service to the obligations imposed by law, HMFA must promote integration. HMFA should demonstrate its willingness to do so by voluntarily complying with the law. It should begin to solicit the assistance of urban developers to work in the suburbs. Those developers have the infrastructure and the expertise; they only need the support and the incentives to look beyond their racially-segregated neighborhoods.

Initially, HMFA should reallocate funds among the funding cycles to permit a greater focus on non-segregated areas. Proposed LIHTC projects in intensely-segregated neighborhoods should be rejected. Funds that may be maintained for future use should be. Most immediately, HMFA should recognize its obligation to affirmatively further fair housing and pledge to begin promoting racial integration in the 2002 QAP and to increase its efforts to do so in the 2003 QAP. HMFA should also soon look to its sibling agency, DCA, and to other state entities involved in affordable housing. Our state's affordable housing machinery should work united to achieve a more integrated society. Although these comments are focused on the LIHTC program, other programs have similar, and at times, more exacting obligations to affirmatively further fair housing.

Ultimately, if New Jersey is to reverse the trend of segregation and ghettoization, and if our urban children are to thrive, HMFA and its leaders, among others, must accept that living together is better than living apart and must realize that a racially-segregated society will never be equal.

Thank you.

Respectfully submitted on behalf of the
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Branches of the NAACP and Fair Share
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