No. 13-1371

In the Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, ET AL., PETITIONERS

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed May 13, 2014
Certiorari Granted October 2, 2014

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U.S. District Court
NORTHERN DISTRICT OF TEXAS (Dallas)
CIVIL DOCKET FOR CASE#: 3:08-cv-00546-D

The Inclusive Communities Project, Inc v. Texas Department of Housing and Community Affairs et al
Assigned to: Chief Judge Sidney A Fitzwater
Cause: 42:1981 Housing Discrimination

Date Filed	#	Docket Text
03/28/2008	1	COMPLAINT against Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, Gloria L Ray filed by The Inclusive Communities Project Inc. (Filing fee $350; Receipt number 20522) (npk) (Entered: 03/31/2008)
03/28/2008	2	CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by The Inclusive Communities Project Inc. (npk) (Entered: 03/31/2008)
06/27/2008	14	MOTION to Dismiss filed by Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, Gloria L Ray with

		Brief/Memorandum in Support. (Attachments: # 1 Text of Proposed Order) (Bray, Timothy) (Entered: 06/27/2008)
07/02/2008	17	CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, Gloria L Ray. (Bray, Timothy) (Entered: 07/02/2008)
07/17/2008	18	RESPONSE in Opposition filed by The Inclusive Communities Project Inc re 14 MOTION to Dismiss (Daniel, Michael) (Entered: 07/17/2008)
07/17/2008	19	Appendix in Support filed by The Inclusive Communities Project Inc re 18 Response in Opposition to Motion to Dismiss. (Daniel, Michael) Modified on 7/18/2008 (jyg). (Entered: 07/17/2008)
08/05/2008	21	SCHEDULING ORDER: Joinder of Parties due by 12/1/2008. Amended Pleadings due by 6/1/2009. Discovery due by 7/1/2009. Status Report due by 7/1/2009. Motions due by 8/1/2009. The court will set the

		case for trial by separate order. (Signed by Judge Sidney A Fitzwater on 8/5/2008) (axm) (Entered: 08/05/2008)
08/27/2008	23	RESPONSE in Opposition filed by The Inclusive Communities Project Inc re 14 MOTION to Dismiss. (Daniel, Michael) Modified on 8/29/2008 (tln). (Entered: 08/27/2008)
12/11/2008	25	Memorandum Opinion and Order denying 14 Defendants' Motion to Dismiss. (see order) (Ordered by Chief Judge Sidney A Fitzwater on 12/11/2008) (axm) (Entered: 12/11/2008)
03/11/2009	26	ANSWER to 1 Complaint, filed by Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, Gloria L Ray (Bray, Timothy) (Entered: 03/11/2009)
04/07/2009	27	TRIAL SETTING ORDER: Docket Call set on the court's two week docket beginning 2/1/2010 before Chief Judge Sidney A Fitzwater. (see order) (Ordered by Chief Judge Sidney A Fitzwater on 04/07/09) (lmp) (Entered: 04/08/2009)
07/01/2009	41	Joint Estimate of Trial Length and

		Report on Settlement Status filed by The Inclusive Communities Project Inc, Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, Gloria L Ray. (Daniel, Michael) (Entered: 07/01/2009)
10/02/2009	65	MOTION for Summary Judgment filed by The Inclusive Communities Project Inc (Daniel, Michael) (Entered: 10/02/2009)
10/02/2009	66	Brief/Memorandum in Support filed by The Inclusive Communities Project Inc re 65 MOTION for Summary Judgment (Daniel, Michael) (Entered: 10/02/2009)
10/02/2009	67	Appendix in Support filed by The Inclusive Communities Project Inc re 66 Brief/Memorandum in Support of Motion (Attachments: # 1 Appendix Pages 61 - 80, # 2 Appendix Pages 81 105, # 3 Appendix Pages 106 - 250, # 4 Appendix Pages 251 - 782, # 5 Appendix Pages 783 - 1475, # 6 Appendix Pages 1476 - 1821) (Daniel, Michael) (Entered: 10/02/2009)
10/02/2009	68	MOTION for Judgment *on the pleadings* filed by Texas

		Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, Gloria L Ray (MacIntyre, James) (Entered: 10/02/2009)
10/02/2009	69	Brief/Memorandum in Support filed by Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, Gloria L Ray re 68 MOTION for Judgment *on the pleadings* (MacIntyre, James) (Entered: 10/02/2009)
10/02/2009	70	MOTION for Summary Judgment filed by Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, Gloria L Ray with Brief/Memorandum in Support. (MacIntyre, James) (Entered: 10/02/2009)
10/02/2009	71	Appendix in Support filed by Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio

		Vidal Flores, Juan Sanchez Munoz, Gloria L Ray re 68 MOTION for Judgment *on the pleadings*, 70 MOTION for Summary Judgment (Attachments: # 1 Appendix Part 2, # 2 Appendix Part 3, # 3 Appendix Part 4) (MacIntyre, James) (Entered: 10/02/2009)
10/22/2009	73	RESPONSE in Opposition filed by The Inclusive Communities Project Inc re 70 MOTION for Summary Judgment (Daniel, Michael) (Entered: 10/22/2009)
10/22/2009	74	RESPONSE in Opposition filed by The Inclusive Communities Project Inc re 73 Response in Opposition *Brief in Opposition to the Defendants' Motion for Summary Judgment* (Daniel, Michael) (Entered: 10/22/2009)
10/22/2009	75	Appendix in Support filed by The Inclusive Communities Project Inc re 74 Response in Opposition *ICP's Appendix in Opposition to Defendant' Motion for Summary Judgment* (Attachments: # 1 Appendix 128-185, # 2 Appendix Pages 186-200, # 3 Appendix Pages 201-213, # 4 Appendix Pages 214-225, # 5 Appendix Pages 226-317, # 6 Appendix Pages 318-407) (Daniel, Michael) (Entered: 10/22/2009)

10/22/2009	76	RESPONSE in Opposition filed by The Inclusive Communities Project Inc re 68 MOTION for Judgment *on the pleadings ICP's Brief in Opposition to the Defendants' Motion for Judgment on the Pleadings* (Daniel, Michael) (Entered: 10/22/2009)
10/22/2009	77	RESPONSE to 65 Motion for Partial Summary Judgment filed by Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, Gloria L Ray (Attachments: # 1 Appendix Appendix to Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, # 2 Appendix appendix part 1, # 3 Appendix appendix part 2, # 4 Appendix appendix part 3, # 5 Appendix appendix part 4, # 6 Appendix appendix part 5, # 7 Appendix appendix part 6, # 8 Appendix appendix part 7) (Rhodus, G) (Entered: 10/22/2009)
11/06/2009	78	ICP'S REPLY BRIEF IN SUPPORT OF 65 MOTION for Summary Judgment filed by The Inclusive Communities Project Inc. (Daniel, Michael) Modified on 11/9/2009 (mfw). (Entered:

11/06/2009)

11/06/2009	79	*Defendants'* REPLY *to Plaintiff's Brief in Response to* re: 68 MOTION for Judgment *on the pleadings*, 70 MOTION for Summary Judgment filed by Texas Department of Housing and Community Affairs (Attachments: # 1 Appendix Appendix to Defendants' Reply) (Rhodus, G) (Entered: 11/06/2009)
11/20/2009	83	NOTICE *of Withdrawal off 11th Amendment Claim* filed by Texas Department of Housing and Community Affairs (Rhodus, G) (Entered: 11/20/2009)
12/23/2009	91	MOTION to Continue filed by The Inclusive Communities Project Inc with Brief/Memorandum in Support. (Daniel, Michael) (Entered: 12/23/2009)
12/24/2009	92	RESPONSE filed by Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, Gloria L Ray re: 91 MOTION to Continue (Rhodus, G) (Entered: 12/24/2009)
12/30/2009	93	ORDER granting 91 Motion to

		Continue. Plaintiff's December 23, 2009 motion for a continuance, which defendants do not oppose, is granted, and this case is reset to the court's two-week civil docket of Monday, June 21, 2010. (Ordered by Chief Judge Sidney A Fitzwater on 12/30/2009) (Chief Judge Sidney A Fitzwater) (Entered: 12/30/2009)
12/30/2009		Set/Reset Hearings: Case is reset to the court's two-week civil docket of Monday, June 21, 2010 before Chief Judge Sidney A Fitzwater. (see order/doc. 93 for specifics) (tln) (Entered: 12/30/2009)
03/15/2010	100	RESPONSE filed by Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, Gloria L Ray re: 65 MOTION for Summary Judgment (Gair, David) (Entered: 03/15/2010)
03/15/2010	101	Brief/Memorandum in Support filed by Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, Gloria L Ray re 100 Response/Objection, 65 MOTION

for Summary Judgment (Gair, David) (Entered: 03/15/2010)

03/15/2010	102	Appendix in Support filed by Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, Gloria L Ray re 100 Response/Objection, 101 Brief/Memorandum in Support of Motion, 65 MOTION for Summary Judgment (Attachments: # 1 Appendix, # 2 Appendix, # 3 Appendix, # 4 Appendix, # 5 Appendix, # 6 Appendix, # 7 Appendix, # 8 Appendix, # 9 Appendix, # 10 Appendix, # 11 Appendix, # 12 Appendix, # 13 Appendix, # 14 Appendix, # 15 Appendix) (Gair, David) (Entered: 03/15/2010)
04/05/2010	103	REPLY filed by The Inclusive Communities Project Inc re: 65 MOTION for Summary Judgment (Daniel, Michael) (Entered: 04/05/2010)
04/05/2010	104	MOTION To File Supplemental Appendix on TDHCA'S Daubert Motion To Strike Expert Reports filed by The Inclusive Communities Project Inc with Brief/Memorandum

		in Support. (Daniel, Michael) (Entered: 04/05/2010)
04/05/2010	105	Appendix in Support filed by The Inclusive Communities Project Inc re 104 MOTION To File Supplemental Appendix on TDHCA'S Daubert Motion To Strike Expert Reports (Daniel, Michael) (Entered: 04/05/2010)
04/16/2010	106	NOTICE *Defendant's Notice of Non-Opposition to Plaintiff's Motion to File Supplemental Appendix on TDHCA's Daubert Motion to Strike Expert Reports and Memorandum in Support of Motion* re: 104 MOTION To File Supplemental Appendix on TDHCA'S Daubert Motion To Strike Expert Reports, 105 Appendix in Support filed by Texas Department of Housing and Community Affairs (Rhodus, G) (Entered: 04/16/2010)
04/27/2010	107	ELECTRONIC ORDER granting 104 MOTION To File Supplemental Appendix (Ordered by Chief Judge Sidney A Fitzwater on 4/27/2010) (Chief Judge Sidney A Fitzwater) (Entered: 04/27/2010)
04/27/2010	108	Appendix in Support filed by The Inclusive Communities Project Inc re 104 MOTION To File

		Supplemental Appendix on TDHCA'S Daubert Motion To Strike Expert Reports (Daniel, Michael) (Entered: 04/27/2010)
05/18/2010	109	ORDER: There are pending motions in this case that the court has determined should be decided before the parties, attorneys, and witnesses are required to incur the financial and other costs and burdens of preparing for trial and making pretrial filings. Accordingly, the court resets the case for trial for the two-week docket of Monday, August 23, 2010. (Ordered by Chief Judge Sidney A Fitzwater on 5/18/2010) (Chief Judge Sidney A Fitzwater) (Entered: 05/18/2010)
05/18/2010		Set/Reset Scheduling Order Deadlines: The court resets the case for trial for the two-week docket of Monday, 8/23/2010 before Chief Judge Sidney A Fitzwater. (Per 109 Order.) (twd) (Entered: 05/18/2010)
07/22/2010	110	Unopposed MOTION to Continue *Trial Date or Pretrial Deadlines* filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs

		(Attachments: # 1 Proposed Order Proposed Order) (Gair, David) (Entered: 07/22/2010)
07/23/2010	111	ELECTRONIC ORDER granting 110 Unopposed MOTION to Continue Trial Date or Pretrial Deadlines. The trial setting is VACATED. The court will set a new trial date after deciding the pending motions. (Ordered by Chief Judge Sidney A Fitzwater on 7/23/2010) (Chief Judge Sidney A Fitzwater) (Entered: 07/23/2010)
09/28/2010	112	Memorandum Opinion and Order granting plaintiff's 65 October 2, 2009 motion for partial summary judgment; denying 68 defendants' October 2, 2009 motion for judgment on the pleadings and 70 October 2, 2009 motion for summary judgment; and denying plaintiff's 80 November 9, 2009 motion for leave to file supplemental appendix as moot. (Ordered by Chief Judge Sidney A Fitzwater on 9/28/2010) (Chief Judge Sidney A Fitzwater) (Entered: 09/28/2010)
11/04/2010	113	TRIAL SETTING ORDER: The court sets this case for trial for the two-week docket of Monday, March 7, 2011. (Ordered by Chief Judge Sidney A Fitzwater on 11/4/2010)

		(Chief Judge Sidney A Fitzwater) (Entered: 11/04/2010)
01/21/2011	114	Unopposed MOTION to Continue filed by The Inclusive Communities Project Inc (Daniel, Michael) (Entered: 01/21/2011)
01/25/2011	115	ORDER granting 114 Unopposed MOTION to Continue filed by The Inclusive Communities Project Inc. (Ordered by Chief Judge Sidney A Fitzwater on 1/25/2011) (Chief Judge Sidney A Fitzwater) (Entered: 01/25/2011)
01/25/2011		Reset Scheduling Order Deadline per Order (doc 115): Trial reset for 6/20/2011 before Chief Judge Sidney A Fitzwater. (axm) (Entered: 01/26/2011)
06/06/2011	130	MOTION Challenges and Objections to Plaintiff's Expert Reports filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs with Brief/Memorandum in Support. (Gair, David) (Entered: 06/06/2011)
06/15/2011	137	ELECTRONIC ORDER: Having considered the parties' positions

concerning scheduling difficulties presented by the proposed trial dates of July 11-14, 2011, the court has decided that it should consider other possible trial dates. The parties are directed to confer and advise the court whether they can be available on any of the following dates: August 8-11 (pretrial conference would be conducted telephonically on July 27 or 28, provided counsel are available); August 15-18; and August 29-September 1. By joint letter or by simultaneous letters to the court, they may advise the court of their availability or of specific issues with any of these particular trial dates. (Ordered by Chief Judge Sidney A Fitzwater on 6/15/2011) (Chief Judge Sidney A Fitzwater) (Entered: 06/15/2011)

06/20/2011	138	RESPONSE filed by The Inclusive Communities Project Inc re: 130 MOTION Challenges and Objections to Plaintiff's Expert Reports (Daniel, Michael) (Entered: 06/20/2011)
06/20/2011	139	Appendix in Support filed by The Inclusive Communities Project Inc re 138 Response/Objection (Attachments: # 1 Additional Page(s) 54-105, # 2 Additional

		Page(s) 106-135) (Daniel, Michael) (Entered: 06/20/2011)
06/20/2011	140	ADDITIONAL ATTACHMENTS to 139 Appendix in Support by Plaintiff The Inclusive Communities Project Inc. (Attachments: # 1 Additional Page(s) 136-201, # 2 Additional Page(s) 202-215, # 3 Additional Page(s) 216-265, # 4 Additional Page(s) 266-315) (Daniel, Michael) (Entered: 06/20/2011)
06/21/2011	141	ORDER: This case is set for a nonjury trial on Monday, August 29, 2011 at 9:00 a.m. The case will be tried under time limits so that the trial is completed by Thursday, September 1, 2011. The court will later set a telephonic pretrial conference. (Ordered by Chief Judge Sidney A Fitzwater on 6/21/2011) (Chief Judge Sidney A Fitzwater) (Entered: 06/21/2011)
06/21/2011		Set/Reset Hearings: Non-jury trial set for 8/29/2011 09:00 AM before Chief Judge Sidney A Fitzwater. (see doc. 141 for image) (tln) (Entered: 06/22/2011)
07/05/2011	142	NOTICE *of Defendants' Confirmation of Informal Leave of Court Pursuant to Local Rule 7.3* re: 140 Additional Attachments to Main Document, 130 MOTION

		Challenges and Objections to Plaintiff's Expert Reports, 139 Appendix in Support, 138 Response/Objection filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs (Gair, David) (Entered: 07/05/2011)
07/06/2011	143	REPLY filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs re: 130 MOTION Challenges and Objections to Plaintiff's Expert Reports (Gair, David) (Entered: 07/06/2011)
07/11/2011	144	ORDER denying 130 MOTION Challenges and Objections to Plaintiff's Expert Reports filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs. Defendants' June 6, 2011 motion to renew challenges and objections to

		plaintiff's expert reports is denied. In denying the motion, the court does not foreclose defendants from making objections at trial or moving for relief that is not foreclosed by the law of the case. (Ordered by Chief Judge Sidney A Fitzwater on 7/11/2011) (Chief Judge Sidney A Fitzwater) (Entered: 07/11/2011)
08/25/2011	145	ELECTRONIC Minute Entry for proceedings held before Chief Judge Sidney A. Fitzwater: Pretrial Conference held on 8/25/2011. Attorney Appearances: Plaintiff - Michael M. Daniel and Laura Beth Beshara; Defense - G. Tomas Rhodus, William B. Chaney, David C. Gair, and Russell E. Jumper. (Court Reporter: Not Recorded) (No exhibits) Time in Court - 0:43. The court conducted the pretrial conference with counsel. There was no objection to entering the Pretrial Order. The parties will make brief opening statements and will present closing arguments in post-trial written submissions. The case will be tried under time limits, with 11 hours allocated to each side. The parties will attempt to narrow their objections to the exhibits so that exhibits to which there are no objections can be admitted at the

		beginning of the trial. To promote the efficiency of presenting the evidence, objections, including Daubert-type objections, can be made on the record during trial and addressed in the post-trial written submissions. The court covered other housekeeping matters with counsel. The trial will begin on Monday, August 29, 2011 at 9:00 a.m. (Chief Judge Sidney A. Fitzwater) (Entered: 08/25/2011)
08/25/2011	146	PRETRIAL ORDER. (Ordered by Chief Judge Sidney A Fitzwater on 8/25/2011) (Chief Judge Sidney A Fitzwater) (Entered: 08/25/2011)
08/29/2011		ELECTRONIC Minute Entry for proceedings held before Chief Judge Sidney A Fitzwater: 1st Day of Bench Trial begun on 8/29/2011. Opening statements. Testimony begins. Adjourned until Tuesday, August 30, 2011 at 9:00am. Attorney Appearances: Plaintiff - Michael M. Daniel with Laura Beth Beshara; Defense - William B. Chaney with G. Thomas Rhodus. (Court Reporter: Pamela Wilson) (Exhibits admitted) Time in Court - 5:32. (chmb) Modified on 8/29/2011 (chmb). (Entered: 08/29/2011)
08/30/2011		ELECTRONIC Minute Entry for

	proceedings held before Chief Judge Sidney A Fitzwater: 2nd day of Bench Trial held on 8/30/2011. Testimony continued. Adjourned until Wednesday, August 31, 2011 at 9:00am. Attorney Appearances: Plaintiff - Michael M. Daniel with Laura Beth Beshara; Defense - William B. Chaney with G. Thomas Rhodus. (Court Reporter: Pamela Wilson) (Exhibits admitted) Time in Court - 4:55. (chmb) (Entered: 08/31/2011)
08/31/2011	ELECTRONIC Minute Entry for proceedings held before Chief Judge Sidney A Fitzwater: 3rd Day of Bench Trial held on 8/31/2011. Testimony continued. Adjourned until Thursday, Sept 1, 2011 at 9:00am. Attorney Appearances: Plaintiff - Michael M. Daniel with Laura Beth Beshara; Defense - William B. Chaney with G. Thomas Rhodus. (Court Reporter: Pamela Wilson) (Exhibits admitted) Time in Court - 4:59. (chmb) (Entered: 09/01/2011)
09/01/2011	ELECTRONIC Minute Entry for proceedings held before Chief Judge Sidney A Fitzwater: 4th and Final day of Bench Trial completed on 9/1/2011. Deft's rest. Plaintiff's close case. Taken under advisement.

		Written order to follow. Attorney Appearances: Plaintiff - Michael M. Daniel with Laura Beth Beshara; Defense - William B. Chaney with G. Thomas Rhodus. (Court Reporter: Pamela Wilson) (Exhibits admitted) Time in Court - 1:31. (chmb) (Entered: 09/01/2011)
09/19/2011	152	NOTICE OF FILING OF OFFICIAL ELECTRONIC TRANSCRIPT of Volume 1 Trial Proceedings held on 8/29/2011 before Judge Sidney A. Fitzwater. Court Reporter/Transcriber Pamela Wilson, Telephone number 214.662.1557. Parties are notified of their duty to review the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Redaction Request - Transcript must be filed within 21 days. If no such Request is filed, the transcript will be made available via PACER without redaction after 90 calendar days. If redaction request filed, this transcript will not be accessible via PACER; see redacted transcript. The clerk will mail a copy of this notice to parties not electronically noticed. (280 pages) Redaction Request due 10/11/2011. Redacted

		Transcript Deadline set for 10/20/2011. Release of Transcript Restriction set for 12/19/2011. (pjw) (Entered: 09/19/2011)
09/19/2011	153	NOTICE OF FILING OF OFFICIAL ELECTRONIC TRANSCRIPT of Trial Proceedings held on 8/30/2011 before Judge Sidney Fitzwater. Court Reporter/Transcriber Pamela Wilson, Telephone number 214.662.1557. Parties are notified of their duty to review the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Redaction Request - Transcript must be filed within 21 days. If no such Request is filed, the transcript will be made available via PACER without redaction after 90 calendar days. If redaction request filed, this transcript will not be accessible via PACER; see redacted transcript. The clerk will mail a copy of this notice to parties not electronically noticed. (219 pages) Redaction Request due 10/11/2011. Redacted Transcript Deadline set for 10/20/2011. Release of Transcript Restriction set for 12/19/2011. (pjw) (Entered: 09/19/2011)

09/19/2011	154	NOTICE OF FILING OF OFFICIAL ELECTRONIC TRANSCRIPT of Volume 3 Trial Proceedings held on 8/31/2011 before Judge Sidney Fitzwater. Court Reporter/Transcriber Pamela Wilson, Telephone number 214.662.1557. Parties are notified of their duty to review the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Redaction Request - Transcript must be filed within 21 days. If no such Request is filed, the transcript will be made available via PACER without redaction after 90 calendar days. If redaction request filed, this transcript will not be accessible via PACER; see redacted transcript. The clerk will mail a copy of this notice to parties not electronically noticed. (211 pages) Redaction Request due 10/11/2011. Redacted Transcript Deadline set for 10/20/2011. Release of Transcript Restriction set for 12/19/2011. (pjw) (Entered: 09/19/2011)
09/19/2011	155	NOTICE OF FILING OF OFFICIAL ELECTRONIC TRANSCRIPT of Volume 4 Trial Proceedings held on 9/1/2011 before

Judge Sidney Fitzwater. Court Reporter/Transcriber Pamela Wilson, Telephone number 214.662.1557. Parties are notified of their duty to review the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Redaction Request - Transcript must be filed within 21 days. If no such Request is filed, the transcript will be made available via PACER without redaction after 90 calendar days. If redaction request filed, this transcript will not be accessible via PACER; see redacted transcript. The clerk will mail a copy of this notice to parties not electronically noticed. (82 pages) Redaction Request due 10/11/2011. Redacted Transcript Deadline set for 10/20/2011. Release of Transcript Restriction set for 12/19/2011. (pjw) (Entered: 09/19/2011)

10/03/2011	156	ORDER REGARDING SCHEDULING OF POST-TRIAL SUBMISSIONS. The court directs the parties to advise the court by letter, which may be submitted electronically by one attorney on behalf of all counsel, of the three-stage schedule to which they have

agreed. Although the court has no objection to the schedule proposed in the September 14, 2011 letter, it is seeking to ensure that both sides have been fully heard regarding the timing of submissions, considering this change from a two- to a three-stage process. The court will approve a scheduling order once it has been advised of the parties' positions. (See order for specifics.) (Ordered by Chief Judge Sidney A Fitzwater on 10/3/2011) (Chief Judge Sidney A Fitzwater) (Entered: 10/03/2011)

10/05/2011	157	ORDER APPROVING POST-TRIAL BRIEFING SCHEDULE AND RELATED MATTERS. (See order for specifics.) (Ordered by Chief Judge Sidney A Fitzwater on 10/5/2011) (Chief Judge Sidney A Fitzwater) (Entered: 10/05/2011)
11/09/2011	158	TRIAL BRIEF *ICP's Initial Post Trial Brief* by The Inclusive Communities Project Inc. (Daniel, Michael) (Entered: 11/09/2011)
11/09/2011	159	Proposed Findings of Fact by The Inclusive Communities Project Inc. (Daniel, Michael) (Entered: 11/09/2011)
11/09/2011	160	*Defendants' Post Trial Brief* filed by Leslie Bingham-Escareno, Tomas

		Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs re 157 Order (Rhodus, G) Modified Text on 11/10/2011 (egb). (Entered: 11/09/2011)
11/09/2011	161	Appendix in Support filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs re 160 to *Defendants' Post Trial Brief* (Rhodus, G) Modified Text on 11/10/2011 (egb). (Entered: 11/09/2011)
11/09/2011	162	Proposed Findings of Fact by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs. (Rhodus, G) (Entered: 11/09/2011)
12/07/2011	163	RESPONSE filed by The Inclusive Communities Project Inc re: 160 Brief/Memorandum in Support of Motion, (Daniel, Michael) (Entered: 12/07/2011)

12/07/2011	164	RESPONSE filed by The Inclusive Communities Project Inc re: 162 Proposed Findings of Fact (Daniel, Michael) (Entered: 12/07/2011)
12/07/2011	165	RESPONSE filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs re: 158 Trial Brief (Gair, David) (Entered: 12/07/2011)
12/07/2011	166	RESPONSE filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs re: 159 Proposed Findings of Fact (Gair, David) (Entered: 12/07/2011)
12/21/2011	167	REPLY filed by The Inclusive Communities Project Inc re: 165 Response/Objection (Daniel, Michael) (Entered: 12/21/2011)
12/21/2011	168	REPLY filed by The Inclusive Communities Project Inc re: 166 Response/Objection (Daniel, Michael) (Entered: 12/21/2011)
12/21/2011	169	REPLY filed by Leslie Bingham-

		Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs re: 163 Response/Objection (Rhodus, G) (Entered: 12/21/2011)
12/21/2011	170	REPLY filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs re: 162 Proposed Findings of Fact (Rhodus, G) (Entered: 12/21/2011)
02/14/2012	171	ORDER: On November 7, 2011, after the trial was completed, the Supreme Court granted certiorari in Gallagher v. Magner. The court has concluded that it should defer its decision in this case until Magner is decided. After the Supreme Court's opinion is filed, this court will decide whether to establish a supplemental schedule for briefing in the present case. (Ordered by Chief Judge Sidney A Fitzwater on 2/14/2012) (Chief Judge Sidney A Fitzwater) (Entered: 02/14/2012)
02/15/2012	172	NOTICE *Plaintiff ICP's Notice that*

		Petition for Certiorari in Magner v. Gallagher is Dismissed re: 171 Order, filed by The Inclusive Communities Project Inc (Daniel, Michael) (Entered: 02/15/2012)
02/17/2012	173	Unopposed MOTION for Leave to File Amicus Curiae Brief filed by Frazier Revitalization Inc. with Brief/Memorandum in Support. (Attachments: # 1 Exhibit(s) proposed amicus brief, # 2 Proposed Order). Party Frazier Revitalization Inc. added. (Rosenthal, Brent) (Entered: 02/17/2012)
02/21/2012	174	ORDER granting 173 Unopposed MOTION for Leave to File Amicus Curiae Brief filed by Frazier Revitalization Inc. (Ordered by Chief Judge Sidney A Fitzwater on 2/21/2012) (Chief Judge Sidney A Fitzwater) (Entered: 02/21/2012)
03/20/2012	178	MEMORANDUM OPINION AND ORDER. Following a summary judgment decision and a bench trial, the court finds that plaintiff has proved its disparate impact claim under the Fair Housing Act, but it otherwise finds in favor of defendants. Within 60 days of the date this memorandum opinion and order is filed, defendants must file their remedial plan. Plaintiff may

submit objections within 30 days after the remedial plan is filed. If objections are filed, the court will establish any necessary additional procedures by separate order. (Ordered by Chief Judge Sidney A Fitzwater on 3/20/2012) (Chief Judge Sidney A Fitzwater) (Entered: 03/20/2012)

04/30/2012	179	MOTION to Intervene filed by Frazier Revitalization Inc. (Attachments: # 1 Proposed Order) (Rosenthal, Brent) (Entered: 04/30/2012)
04/30/2012	180	Brief/Memorandum in Support filed by Frazier Revitalization Inc. re 179 MOTION to Intervene (Rosenthal, Brent) (Entered: 04/30/2012)
05/18/2012	181	NOTICE *of Defendants' Proposed Remedial Plan* filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs (Chaney, William) (Entered: 05/18/2012)
05/21/2012	182	RESPONSE AND OBJECTION filed by The Inclusive Communities Project Inc re: 179 MOTION to Intervene (Daniel, Michael)

(Entered: 05/21/2012)

05/21/2012	183	Appendix in Support filed by The Inclusive Communities Project Inc re 182 Response/Objection *to FRI Motion to Intervene* (Attachments: # 1 Additional Page(s) Pages 50 - 115, # 2 Additional Page(s) Pages 116 - 170) (Daniel, Michael) (Entered: 05/21/2012)
06/04/2012	184	REPLY filed by Frazier Revitalization Inc. re: 179 MOTION to Intervene (Rosenthal, Brent) (Entered: 06/04/2012)
06/12/2012	185	Memorandum Opinion and Order granting 179 Motion to Intervene filed by Frazier Revitalization Inc. (Ordered by Chief Judge Sidney A Fitzwater on 6/12/2012) (skt) (Entered: 06/13/2012)
06/18/2012	186	RESPONSE filed by The Inclusive Communities Project Inc re: 181 Notice (Other), Notice (Other) (Daniel, Michael) (Entered: 06/18/2012)
06/18/2012	187	Appendix in Support filed by The Inclusive Communities Project Inc re 186 Response/Objection *Of ICP's Response to Defendants' Proposed Remedial Plan* (Daniel, Michael) (Entered: 06/18/2012)

06/18/2012	188	OBJECTION filed by Frazier Revitalization Inc. re: 181 Notice (Other), Notice (Other) (Rosenthal, Brent) (Entered: 06/18/2012)
07/12/2012	189	Letter to Texas Department of Housing and Community Affairs from Representative Eric Johnson. (twd) (Entered: 07/12/2012)
07/24/2012	190	Letter to Texas Department of Housing and Community Affairs from Representative Rafael Anchia. (cea) (Entered: 07/24/2012)
08/03/2012	191	MOTION for Leave to File Supplement to Objections filed by Frazier Revitalization Inc. with Brief/Memorandum in Support. (Attachments: # 1 Declaration(s), # 2 Proposed Order) (Rosenthal, Brent) (Entered: 08/03/2012)
08/07/2012	192	ORDER granting 191 MOTION for Leave to File Supplement to Objections filed by Frazier Revitalization Inc. (Ordered by Chief Judge Sidney A Fitzwater on 8/7/2012) (Chief Judge Sidney A Fitzwater) (Entered: 08/07/2012)
08/07/2012	193	MEMORANDUM OPINION AND ORDER. The court adopts a remedial plan and it enters judgment today in accordance with its memorandum opinions and

orders in this case and the remedial plan adopted today. (Ordered by Chief Judge Sidney A Fitzwater on 8/7/2012) (Chief Judge Sidney A Fitzwater) (Entered: 08/07/2012)

08/07/2012	194	JUDGMENT partially in favor of The Inclusive Communities Project Inc against, Texas Department of Housing and Community Affairs, C Kent Conine, Dionicio Vidal Flores, Gloria L Ray, Juan Sanchez Munoz, Leslie Bingham-Escareno, Michael Gerber, Tomas Cardenas. Objections and supplement to objections of intervenor Frazier Revitalization Inc. denied to the extent remedial plan adopted. Pursuant to LR 79.2 and LCrR 55.2, exhibits may be claimed during the 60-day period following final disposition (to do so, follow the procedures found at www.txnd.uscourts.gov/Court Records). The clerk will discard exhibits that remain unclaimed after the 60-day period without additional notice. (Clerk to notice any party not electronically noticed.) (Ordered by Chief Judge Sidney A Fitzwater on 8/7/2012) (Chief Judge Sidney A Fitzwater) (Entered: 08/07/2012)
08/21/2012	195	MOTION for Attorney Fees *and Nontaxable Costs from TDHCA*

		filed by The Inclusive Communities Project Inc with Brief/Memorandum in Support. (Attachments: # 1 Proposed Order) (Daniel, Michael) (Entered: 08/21/2012)
08/21/2012	196	BILL OF COSTS by The Inclusive Communities Project Inc. (Daniel, Michael) (Entered: 08/21/2012)
08/31/2012	197	NOTICE of Attorney Appearance by Beth Klusmann for James "Beau" Eccles on behalf of All Defendants. (Klusmann, Beth) (Entered: 08/31/2012)
09/04/2012	198	Costs Taxed in amount of $ 8657.06 against The Texas Department of Housing and Community Affairs. (ndt) (Entered: 09/04/2012)
09/04/2012	199	MOTION to Alter or Amend Judgment or Alternatively, for New Trial filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs with Brief/Memorandum in Support. (Attachments: # 1 Brief in Support) (Klusmann, Beth) Modified on 9/5/2012 (skt). (Entered: 09/04/2012)
09/06/2012	200	ORDER: Unless the court requests

		a response to 199 defendants' September 4, 2012 motion to alter or amend judgment or, alternatively, for new trial, no response is permitted or required. (Ordered by Chief Judge Sidney A Fitzwater on 9/6/2012) (Chief Judge Sidney A Fitzwater) (Entered: 09/06/2012)
09/10/2012	201	SCHEDULING ORDER for making submissions concerning 195 08/21/2012 MOTION for Attorney Fees and Nontaxable Costs from TDHCA filed by The Inclusive Communities Project Inc. (Ordered by Chief Judge Sidney A Fitzwater on 9/10/2012) (Chief Judge Sidney A Fitzwater) (Entered: 09/10/2012)
09/24/2012	202	Brief/Memorandum in Support filed by The Inclusive Communities Project Inc re 201 Order, *Inclusive Communities Project, Inc.'s Brief in Support of Motion for Attorney Fees and Nontaxable Costs from TDHCA* (Daniel, Michael) (Entered: 09/24/2012)
09/24/2012	203	Appendix in Support filed by The Inclusive Communities Project Inc re 202 Brief/Memorandum in Support of Motion (Daniel, Michael) (Entered: 09/24/2012)
10/15/2012	204	RESPONSE filed by Leslie Bingham-Escareno, Tomas

		Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs re: 195 MOTION for Attorney Fees *and Nontaxable Costs from TDHCA* (Attachments: # 1 Exhibit(s) 1) (Eccles, James Beau) (Entered: 10/15/2012)
10/29/2012	205	REPLY filed by The Inclusive Communities Project Inc re: 195 MOTION for Attorney Fees *and Nontaxable Costs from TDHCA* (Daniel, Michael) (Entered: 10/29/2012)
11/08/2012	207	Memorandum Opinion and Order granting in part and denying in part 199 Motion to Alter or Amend Judgment or, Alternatively for New Trial. (Ordered by Chief Judge Sidney A Fitzwater on 11/8/2012) (axm) (Entered: 11/08/2012)
11/08/2012	208	AMENDED JUDGMENT: The remedial plan adopted by this judgment shall be effective for a period of five years after the first annual report is filed. During this period, the court shall retain jurisdiction. Defendants shall bear their own taxable costs of court. ICP shall recover 50% of its taxable costs

		of court, as calculated by the clerk of court, from defendants and shall bear the remaining 50% of its own taxable costs of court, as calculated by the clerk of court. (Ordered by Chief Judge Sidney A Fitzwater on 11/8/2012) (axm) (Entered: 11/08/2012)
12/04/2012	209	NOTICE OF APPEAL to the Fifth Circuit as to 208 Judgment, 194 Amended Judgment by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs. Filing fee $455, receipt number 0539-4983715. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. Copy of NOA to be sent US Mail to parties not electronically noticed. (Klusmann, Beth) Modified text and linkage on 12/5/2012 (axm). (Entered: 12/04/2012)
12/05/2012	210	NOTICE OF APPEAL to the Fifth Circuit as to 208 Judgment by Frazier Revitalization Inc. Filing fee $455, receipt number 0539-4986859. T.O. form to appellant electronically

		at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. Copy of NOA to be sent US Mail to parties not electronically noticed. (Rosenthal, Brent) (Entered: 12/05/2012)
12/05/2012	211	NOTICE of *Joint Submission on Proposed Contents of TDHCA Annual Report* re: 193 Memorandum Opinion and Order filed by The Inclusive Communities Project Inc, Frazier Revitalization Inc, Texas Department of Housing and Community Affairs, Leslie Bingham-Escareno, Thomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray. (Daniel, Michael) Modified filers on 12/6/2012 (axm). (Entered: 12/05/2012)
02/06/2013	213	ORDER re: Contents of TDHCA Annual Reports. (Ordered by Chief Judge Sidney A Fitzwater on 2/6/2013) (Chief Judge Sidney A Fitzwater) (Entered: 02/06/2013)
02/15/2013	214	MEMORANDUM OPINION AND ORDER granting 195 MOTION for Attorney Fees and Nontaxable Costs from TDHCA filed by The Inclusive Communities Project Inc.

		The court grants plaintiff's motion for attorney's fees and nontaxable costs in the amount of $1,869,577.00 in attorney's fees and $24,392.00 in nontaxable costs. (Ordered by Chief Judge Sidney A Fitzwater on 2/15/2013) (Chief Judge Sidney A Fitzwater) (Entered: 02/15/2013)
03/15/2013	215	NOTICE OF APPEAL to the Fifth Circuit as to 214 Memorandum Opinion and Order, by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs. Filing fee $455, receipt number 0539-5182112. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. (Klusmann, Beth) (Entered: 03/15/2013)
11/22/2013	218	STATUS REPORT filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs. (Attachments: # 1 Pages 1-163, # 2 Pages164-187, # 3 Pages 188-423, # 4 Pages 424-

484, # 5 Pages 485-570, # 6 Pages 571-644) (Klusmann, Beth) (Entered: 11/22/2013)

12/16/2013 219 MOTION to Amend/Correct *the Remedial Plan* filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs with Brief/Memorandum in Support. (Attachments: # 1 Proposed Order) (Klusmann, Beth) (Entered: 12/16/2013)

12/17/2013 220 Brief/Memorandum in Support filed by The Inclusive Communities Project Inc re 219 MOTION to Amend/Correct *the Remedial Plan Inclusive Communities Project, Inc.'s Brief in Support of Defendants' Motion to Amend the Remedial Plan* (Daniel, Michael) (Entered: 12/17/2013)

12/19/2013 221 ORDER: Defendants' 219 December 16, 2013 motion to amend the remedial plan is before the court for consideration. Plaintiff has filed a brief in support of the motion. Unless, no later than December 30, 2013 at noon, intervenors make a written filing that demonstrates

		good cause not to amend the remedial plan as requested, the court will enter no later than December 31, 2013 the proposed order submitted by defendants. (Ordered by Chief Judge Sidney A Fitzwater on 12/19/2013) (Chief Judge Sidney A Fitzwater) (Entered: 12/19/2013)
12/20/2013	222	RESPONSE filed by The Inclusive Communities Project Inc re: 218 Status Report, (Daniel, Michael) (Entered: 12/20/2013)
12/27/2013	223	RESPONSE filed by Frazier Revitalization Inc. re: 219 MOTION to Amend/Correct *the Remedial Plan* (Rosenthal, Brent) (Entered: 12/27/2013)
12/27/2013	224	NOTICE of Change of Address for Attorney Brent M Rosenthal on behalf of Frazier Revitalization Inc.. (Filer confirms contact info in ECF is current.) (Rosenthal, Brent) (Entered: 12/27/2013)
12/27/2013	225	ORDER granting 219 MOTION to Amend the Remedial Plan filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs. (Ordered by

		Chief Judge Sidney A Fitzwater on 12/27/2013) (Chief Judge Sidney A Fitzwater) (Entered: 12/27/2013)
01/17/2014	226	REPLY filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs re: 218 Status Report, (Klusmann, Beth) (Entered: 01/17/2014)
04/22/2014	227	Opinion of USCA in accordance with USCA judgment re 215 Notice of Appeal,, filed by Juan Sanchez Munoz, Michael Gerber, C Kent Conine, Leslie Bingham-Escareno, Gloria L Ray, Dionicio Vidal Flores, Texas Department of Housing and Community Affairs, Tomas Cardenas, 210 Notice of Appeal, filed by Frazier Revitalization Inc., 209 Notice of Appeal,, filed by Juan Sanchez Munoz, Michael Gerber, C Kent Conine, Leslie Bingham-Escareno, Gloria L Ray, Dionicio Vidal Flores, Tomas Cardenas, Texas Department of Housing and Community Affairs. (svc) (Entered: 04/22/2014)
04/22/2014	228	JUDGMENT/MANDATE of USCA as to 210 Notice of Appeal, filed by

		Frazier Revitalization Inc., 209 Notice of Appeal,, filed by Juan Sanchez Munoz, Michael Gerber, C Kent Conine, Leslie Bingham-Escareno, Gloria L Ray, Dionicio Vidal Flores, Texas Department of Housing and Community Affairs, Tomas Cardenas. Case remanded to the district court for further proceedings. Issued as Mandate: 4/15/14. (svc) (Entered: 04/22/2014)
04/22/2014	229	JUDGMENT/MANDATE of USCA as to 215 Notice of Appeal,, filed by Juan Sanchez Munoz, Michael Gerber, C Kent Conine, Leslie Bingham-Escareno, Gloria L Ray, Dionicio Vidal Flores, Texas Department of Housing and Community Affairs, Tomas Cardenas. Case remanded to the district court for further proceedings. Issued as Mandate: 4/15/2014. (svc) (Entered: 04/22/2014)
04/22/2014	230	USCA5 Bill of Costs. (Attachments: # 1 letter) (svc) (Entered: 04/22/2014)
04/22/2014	231	STATUS REPORT ORDER: Status Report due by 5/27/2014. Accordingly, no later than May 27, 2014, the parties must file a joint status report in which they propose

a procedure and schedule for how this case should be litigated on remand. If they differ in their proposed procedures or schedules, they must set forth the reasons for their differences. The joint status report may contain any other proposals, suggestions, or information that a party believes will assist the court and the parties in litigating the case on remand. (Ordered by Chief Judge Sidney A Fitzwater on 4/22/2014) (Chief Judge Sidney A Fitzwater) (Entered: 04/22/2014)

05/16/2014	233	MOTION to Stay *Proceedings Pending Disposition of Petition for Certiorari* filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs (Attachments: # 1 Proposed Order) (Eccles, James Beau) (Entered: 05/16/2014)
05/16/2014	234	Brief/Memorandum in Support filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs re

		233 MOTION to Stay *Proceedings Pending Disposition of Petition for Certiorari* (Eccles, James Beau) (Entered: 05/16/2014)
05/16/2014	235	Appendix in Support filed by Leslie Bingham-Escareno, Tomas Cardenas, C Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs re 234 Brief/Memorandum in Support of Motion, (Eccles, James Beau) (Entered: 05/16/2014)
05/20/2014	236	RESPONSE AND OBJECTION filed by The Inclusive Communities Project Inc re: 233 MOTION to Stay *Proceedings Pending Disposition of Petition for Certiorari* (Daniel, Michael) (Entered: 05/20/2014)
05/27/2014	238	Joint STATUS REPORT *On Proposed Procedure and Schedule on Remand* filed by C Kent Conine, Dionicio Vidal Flores, Frazier Revitalization Inc., Michael Gerber, Juan Sanchez Munoz, Gloria L Ray, Texas Department of Housing and Community Affairs, The Inclusive Communities Project Inc. (Daniel, Michael) (Entered: 05/27/2014)
06/23/2014	239	MEMORANDUM OPINION AND ORDER granting 233 MOTION to

		Stay Proceedings Pending Disposition of Petition for Certiorari filed by Juan Sanchez Munoz, Michael Gerber, C Kent Conine, Leslie Bingham-Escareno, Gloria L Ray, Dionicio Vidal Flores, Texas Department of Housing and Community Affairs, Tomas Cardenas. (Ordered by Chief Judge Sidney A Fitzwater on 6/23/2014) (Chief Judge Sidney A Fitzwater) (Entered: 06/23/2014)
10/02/2014	241	Order Continuing Stay and Administratively Closing Case for Statistical Purposes. (Ordered by Chief Judge Sidney A Fitzwater on 10/2/2014) (Chief Judge Sidney A Fitzwater) (Entered: 10/02/2014)
10/15/2014	242	Received letter from USCA5 that Supreme Court Granted Certiorari (svc) (Entered: 10/15/2014)

General Docket

United States Court of Appeals

for the 5th Circuit

THE INCLUSIVE COMMUNITES PROJECT, INCORPORATED,

Plaintiff-Appellee

v.

TEXAS DEPARTMENT OF HOUSEING AND COMMUNITY AFFAIRS; MICHAEL GERBER; LESLIE BINGHAM-ESCARENO; TOMAS CARDENAS; C KENT CONINE; DIONICIO VIDAL FLORES, Sonny; JUAN SANCHEZ MUNOZ; GLORIA L. RAY, In Their Official Capacities,

Defendants-Appellants

FRAZIER REVITALIZATION, INCORPORATED

Intervenor-Appellant

Cons. with 13-10306

THE INCLUSIVE COMMUNITIES PROJECT, INCORPORATED,

Plaintiff-Appellee

v.

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS; MICHAEL GERBER; LESLIE BINGHAM-ESCARENO; TOMAS CARDENAS; C. KENT CONNIE; DIONICIO VIDAL FLORES, Sonny; JUAN SANCHEZ MUNOZ; GLORIA L. RAY, In Their Official Capacities

Defendants-Appellants

12/07/2012	CIVIL RIGHTS CASE docketed. NOA filed by Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs [12-11211] (NFD)
12/10/2012	CASE CAPTION updated. Additional appeal filed. [7246417-2] Parties added: Appellant Frazier Revitalization, Incorporated. NOA filed by Appellant Frazier Revitalization, Incorporated. [7246417-1] [12-11211] (NFD)
12/13/2012	INITIAL CASE CHECK by Attorney Advisor complete, Action: Case OK to Process for notices of appeal filed 12/4/12 and 12/5/12 [7250480-2] Initial AA Check Due satisfied.. Transcript order due on 12/28/2012 for Appellants Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Frazier Revitalization, Incorporated, Michael Gerber, Juan Sanchez Munoz, Gloria L. Ray and Texas Department of Housing and Community Affairs [12-11211] (SAT)

02/21/2013	NOTICE RECEIVED FROM DISTRICT COURT. ROA Certified by DCt, FILED [12-11211] (Also Filed in 13-10306) (NFD)
02/25/2013	SUPPLEMENTAL NOTICE RECEIVED FROM DISTRICT COURT.Sup ROA Cert by DCt, FILEDCertified ROA due deadline satisfied. [12-11211] (Also Filed in 13-10306) (NFD)
02/25/2013	BRIEFING NOTICE ISSUED A/Pet's Brief Due on 04/08/2013 for Appellants Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Frazier Revitalization, Incorporated, Michael Gerber, Juan Sanchez Munoz, Gloria L. Ray and Texas Department of Housing and Community Affairs. [12-11211] (NFD)

04/22/2013	APPELLANT'S BRIEF FILED by Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs. Date of service: 04/22/2013 via email - Attorney for Appellants: Klusmann, Rosenthal; Attorney for Appellees: Beshara, Daniel [12-11211] REVIEWED AND/OR EDITED.. # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Paper Copies of Brief due on 04/29/2013 for Appellants Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L. Ray and Texas Department of Housing and Community Affairs and Appellee Inclusive Communities Project, Incorporated. [12-11211] (Beth Ellen Klusmann)

04/22/2013	RECORD EXCERPTS FILED by Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs. Date of service: 04/22/2013 via email - Attorney for Appellants: Klusmann, Rosenthal; Attorney for Appellees: Beshara, Daniel [12-11211] REVIEWED AND/OR EDITED.. # of Copies Provided: 0 Paper Copies of Record Excerpts due on 04/29/2013 for Appellants Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L. Ray and Texas Department of Housing and Community Affairs. [12-11211] (Beth Ellen Klusmann)
04/26/2013	NOTICE RECEIVED FROM DISTRICT COURT.Sup ROA Cert by DCt, FILED [12-11211] (RSM)

04/29/2013	APPELLANT'S BRIEF FILED by Frazier Revitalization, Incorporated. Date of service: 04/29/2013 via email - Attorney for Appellant: Klusmann; Attorney for Appellees: Beshara, Daniel [12-11211] REVIEWED AND/OR EDITED. . # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Paper Copies of Brief due on 05/06/2013 for Appellant Frazier Revitalization, Incorporated.. Appellee's Brief due on 06/03/2013 for Appellee Inclusive Communities Project, Incorporated [12-11211] (Brent M. Rosenthal)
04/29/2013	RECORD EXCERPTS FILED by Appellant Frazier Revitalization, Incorporated. Date of service: 04/29/2013 via email - Attorney for Appellant: Klusmann; Attorney for Appellees: Beshara, Daniel [12-11211] REVIEWED AND/OR EDITED. . # of Copies Provided: 0 Paper Copies of Record Excerpts due on 05/06/2013 for Appellant Frazier Revitalization, Incorporated. [12-11211] (Brent M. Rosenthal)
05/06/2013	Exhibits, 13 Boxes (Trial Exhibits), FILED [12-11211] ALSO FILED IN 13-10306 (RSM)

06/03/2013	APPELLEE'S BRIEF FILED by Appellee Inclusive Communities Project, Incorporated. Date of service: 06/03/2013 via email - Attorney for Appellants: Klusmann, Rosenthal; Attorney for Appellees: Beshara, Daniel [12-11211] REVIEWED AND/OR EDITED. APPELLEE'S BRIEF FILED # of Copies Provided: 0 E/Res's Brief deadline satisfied. Reply Brief due on 06/20/2013 for Appellants Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Frazier Revitalization, Incorporated, Michael Gerber, Juan Sanchez Munoz, Gloria L. Ray and Texas Department of Housing and Community Affairs. Paper Copies of Brief due on 06/11/2013 for Appellee Inclusive Communities Project, Incorporated. [12-11211] (Michael Maury Daniel)

06/03/2013	RECORD EXCERPTS FILED by Appellee Inclusive Communities Project, Incorporated. Date of service: 06/03/2013 via email - Attorney for Appellants: Klusmann, Rosenthal; Attorney for Appellees: Beshara, Daniel [12-11211] REVIEWED AND/OR EDITED. # of Copies Provided: 0 Paper Copies of Record Excerpts due on 06/11/2013 for Appellee Inclusive Communities Project, Incorporated. [12-11211] (Michael Maury Daniel)
06/12/2013	RECORD ON APPEAL REQUESTED FROM DISTRICT COURT. ROA due on 06/27/2013 [12-11211] (NFD)
06/20/2013	APPELLANT'S REPLY BRIEF FILED by Frazier Revitalization, Incorporated Date of service: 06/20/2013 via email - Attorney for Appellants: Klusmann, Rosenthal; Attorney for Appellees: Beshara, Daniel; Attorney for Not Party: Klein [12-11211] REVIEWED AND/OR EDITED. # of Copies Provided: 0 Reply Brief deadline satisfied. Paper Copies of Brief due on 06/25/2013 for Appellant Frazier Revitalization, Incorporated. [12-11211] (Brent M. Rosenthal)

06/20/2013	APPELLANT'S REPLY BRIEF FILED by Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs Date of service: 06/20/2013 via email - Attorney for Appellants: Klusmann, Rosenthal; Attorney for Appellees: Beshara, Daniel; Attorney for Not Party: Klein [12-11211] REVIEWED AND/OR EDITED.
06/27/2013	AMICUS CURIAE BRIEF FILED by National Association of Home Builders. Consent is Not Necessary as a Motion has been Granted. Brief is INSUFFICIENT: Caption Incorrect. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT. # of Copies Provided: 0 Sufficient Brief due on 07/02/2013 for Amicus Curiae National Association of Home Builders. [12-11211] (NFD)

06/27/2013	BRIEF MADE SUFFICIENT filed by Amicus Curiae National Association of Home Builders in 12-11211 [7398439-2]. Sufficient Brief deadline satisfied. Paper Copies of Brief due on 07/02/2013 for Amicus Curiae National Association of Home Builders. [12-11211] (NFD)
07/02/2013	RECORD ON APPEAL FILED. Electronic Pleadings, 28; ElectronicTranscript, 5; ROA deadline satisfied. [12-11211] (ALSO FILED IN 13-10306) (NFD)
07/02/213	1st SUPPLEMENTAL RECORD ON APPEAL FILED. Supp Electronic Pldg, 1; [12-11211] (ALSO FILED IN 13-10306) (NFD)
07/02/2013	2nd SUPPLEMENTAL RECORD ON APPEAL FILED. Supp Electronic Pldg, 1; [12-11211] (ALSO FILED IN 13-10306) (NFD)

07/31/2013	LETTER filed by Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs This letter is to advise the Court of counsel's Texas Supreme Court argument in order to avoid a conflicting argument setting.. Date of Service: 07/31/2013 via email Attorney for Amicus Curiae: Klein; Attorney for Appellants: Klusmann, Rosenthal; Attorney for Appellees: Beshara, Daniel [12-11211] (Beth Ellen Klusmann)
09/05/2013	CASE TENTATIVELY calendared for oral argument for the week of 11/04/2013. [12-11211] (GAM)
09/06/2013	TENTATIVE CALENDAR changed from week of 11/04/2013 to week of 12/02/2013. With Argument? Yes. [12-11211] (GAM)
10/21/2013	COURT DIRECTIVE ISSUED consolidating cases 12-11211 with 13-10306 for oral argument purposes. [12-11211, 13-10306] (MCS)

10/23/2013	CASE CALENDARED for oral argument on Tuesday, 12/03/2013 in New Orleans in the En Banc Courtroom -- PM session. In accordance with our policy, lead counsel only will receive via email at a later date a copy of the court's docket and an acknowledgment form. All other counsel of record should monitor the court's website for the posting of the oral argument calendars.. [12-11211, 13-10306] (SMH)
11/26/2013	LETTER filed by Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs in 12-11211, 13-10306 Advising the Court of a change in a relevant case from the United States Supreme Court.. Date of Service: 11/26/2013 via email - Attorney for Amicus Curiae: Klein; Attorney for Appellants: Klusmann, Rhodus, Rosenthal; Attorney for Appellees: Beshara, Daniel [12-11211, 13-10306] (Beth Ellen Klusmann)

12/03/2013	ORAL ARGUMENT HEARD before Judges Jones, Wiener, Graves. Arguing Person Information Updated for: Michael Maury Daniel arguing for Appellee Incorporated Inclusive Communities Project; Arguing Person Information Updated for: Michael Maury Daniel arguing for Appellee Incorporated Inclusive Communities Project; Arguing Person Information Updated for: Beth Ellen Klusmann arguing for Appellant Leslie Bingham-Escareno, Appellant Tomas Cardenas, Appellant C. Kent Conine, Appellant Dionicio Vidal Flores, Appellant Michael Gerber, Appellant Juan Sanchez Munoz, Appellant Gloria L. Ray; Arguing Person Information Updated for: Beth Ellen Klusmann arguing for Appellant Leslie Bingham-Escareno; Arguing Person Information Updated for: Brent M. Rosenthal arguing for Appellant Incorporated Frazier Revitalization [12-11211, 13-10306] (SMH)

03/24/2014	PUBLISHED OPINION FILED. [12-11211 Reversed and Remanded 13-10306 Reversed and Remanded] Judge: EHJ , Judge: JLW , Judge: JEG Mandate pull date is 04/14/2014 [12-11211, 13-10306] (DTG)
03/24/2014	JUDGMENT ENTERED AND FILED. [12-11211] (DTG)
03/24/2014	JUDGMENT ENTERED AND FILED. [13-10306] (DTG)
04/07/2014	BILL OF COSTS filed by Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs. [12-11211] (Beth Ellen Klusmann)
04/07/2014	BILL OF COSTS filed by Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs. [13-10306] (Beth Ellen Klusmann)

04/07/2014	BILL OF COSTS filed by Appellant Frazier Revitalization, Incorporated. [12-11211] (Brent M. Rosenthal)
04/15/2014	MANDATE ISSUED. Mandate pull date satisfied. The Bill of Costs is issued with the mandate. [12-11211, 13-10306] (NFD)
05/19/2014	SUPREME COURT NOTICE that petition for writ of certiorari [7637642-2] was filed by Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Frazier Revitalization, Incorporated, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs in 12-11211, Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs in 13-10306 on 05/13/2014. Supreme Court Number: 13-1371. [12-11211, 13-10306] (CAV)

10/06/2014	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellants Mr. C. Kent Conine, Texas Department of Housing and Community Affairs, Mr. Michael Gerber, Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. Dionicio Vidal Flores, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Frazier Revitalization, Incorporated, Appellants Mr. C. Kent Conine, Texas Department of Housing and Community Affairs, Mr. Michael Gerber, Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. Dionicio Vidal Flores, Mr. Juan Sanchez Munoz and Ms. Gloria L. Ray in 12-11211, 13-10306 on 10/02/2014. [7746275-1] [12-11211, 13-10306] (CAV)

General Docket

United States Court of Appeals

For the 5th Circuit

THE INCLUSIVE COMMUNITIES PROJECT, INCORPORATED,

Plaintiff - Appellee

v.

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS; MICHAEL GERBER; LESLIE BINGHAM-ESCARENO; TOMAS CARDENAS; C. KENT CONINE; DIONICIO VIDAL FLORES, Sonny; JUAN SANCHEZ MUNOZ; GLORIA L. RAY, In Their Official Capacities,

Defendants – Appellants

03/20/2013	CIVIL RIGHTS CASE docketed. NOA filed by Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs [13-10306] (MVM)

03/28/2013	INITIAL CASE CHECK by Attorney Advisor complete, Action: Case OK to Process. [7327691-2] Initial AA Check Due satisfied. Notice of Certified ROA due on 04/12/2013. [13-10306] (CNF)
03/28/2013	NOTICE RECEIVED FROM DISTRICT COURT. ROA Certified by DCt, FILED (ALSO FILED IN 12-11211) [13-10306] (CNF)
03/28/2013	NOTICE RECEIVED FROM DISTRICT COURT.1st Sup ROA Cert by DCt, FILED (ALSO FILED IN 12-11211) [13-10306] (CNF)
04/26/2013	NOTICE RECEIVED FROM DISTRICT COURT.Sup ROA Cert by DCt, FILEDCertified ROA due deadline satisfied. [13-10306] (RSM)
04/26/2013	BRIEFING NOTICE ISSUED A/Pet's Brief Due on 06/05/2013 for Appellants Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L. Ray and Texas Department of Housing and Community Affairs. [13-10306] (RSM)
05/06/2013	Exhibits, 13 Boxes (Trial Exhibits), FILED [13-10306] ALSO FILED

06/05/2013	APPELLANT'S BRIEF FILED by Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs. Date of service: 06/05/2013 via email - Attorney for Appellant: Klusmann; Attorney for Appellees: Beshara, Daniel [13-10306] REVIEWED AND/OR EDITED. # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Appellee's Brief due on 07/08/2013 for Appellee Inclusive Communities Project, Incorporated. Paper Copies of Brief due on 06/17/2013 for Appellants Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L. Ray and Texas Department of Housing and Community Affairs. [13-10306] (Beth Ellen Klusmann)
06/05/2013	RECORD EXCERPTS FILED by Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L.

	Ray and Texas Department of Housing and Community Affairs. Date of service: 06/05/2013 via email - Attorney for Appellant: Klusmann; Attorney for Appellees: Beshara, Daniel [13-10306] REVIEWED AND/OR EDITED. Record Excerpts NOT Sufficient as they are in excess pages. Optional contents exceed page limitations by 5 pages. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT. # of Copies Provided: 0 Sufficient Record Excerpts due on 06/19/2013 for Appellants Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L. Ray and Texas Department of Housing and Community Affairs [13-10306] (Beth Ellen Klusmann)
06/11/2013	RECORD EXCERPTS MADE SUFFICIENT filed by Appellants Mr. C. Kent Conine, Texas Department of Housing and Community Affairs, Mr. Michael Gerber, Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. Dionicio Vidal Flores, Mr. Juan Sanchez Munoz and Ms. Gloria L.

	Ray in 13-10306 [7380621-2]. Sufficient Record Excerpts deadline satisfied. Paper Copies of Record Excerpts due on 06/17/2013 for Appellants Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L. Ray and Texas Department of Housing and Community Affairs. [13-10306] (RSM)
07/02/2013	RECORD ON APPEAL FILED. Electronic Pleadings, 28; ElectronicTranscript, 5; [13-10306] (ALSO FILED IN 12-11211) (NFD)
07/02/2013	1st SUPPLEMENTAL RECORD ON APPEAL FILED. Supp Electronic Pldg, 1; [13-10306] (ALSO FILED IN 12-11211) (NFD)
07/02/2013	2nd SUPPLEMENTAL RECORD ON APPEAL FILED. Supp Electronic Pldg, 1; [13-10306] (ALSO FILED IN 12-11211) (NFD)
07/08/2013	APPELLEE'S BRIEF FILED by Appellee Inclusive Communities Project, Incorporated. Date of service: 07/08/2013 via email - Attorney for Appellant: Klusmann; Attorney for Appellees: Beshara, Daniel; US mail - Attorney for Appellant: Rhodus [13-10306]

	REVIEWED AND/OR EDITED. APPELLEE'S BRIEF FILED Brief NOT Sufficient as it requires an Appearance Form from counsel signing the brief (Daniel). Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT. # of Copies Provided: 0 E/Res's Brief deadline satisfied. Reply Brief due on 07/25/2013 for Appellants Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L. Ray and Texas Department of Housing and Community Affairs. Paper Copies of Brief due on 07/22/2013 for Appellee Inclusive Communities Project, Incorporated.. Sufficient Brief due on 07/22/2013 for Appellee Inclusive Communities Project, Incorporated. [13-10306] (Michael Maury Daniel)
07/25/2013	APPELLANT'S REPLY BRIEF FILED by Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs Date of service: 07/25/2013 via email

	Attorney for Appellant: Klusmann; Attorney for Appellees: Beshara, Daniel [13-10306] REVIEWED AND/OR EDITED. # of Copies Provided: 0 Reply Brief deadline satisfied. Paper Copies of Brief due on 08/05/2013 for Appellants Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Michael Gerber, Juan Sanchez Munoz, Gloria L. Ray and Texas Department of Housing and Community Affairs. [13-10306] (Beth Ellen Klusmann)
07/31/2013	LETTER filed by Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs This letter is to advise the Court of counsel's Texas Supreme Court argument in order to avoid a conflicting argument setting.. Date of Service: 07/31/2013 via email - Attorney for Appellant: Klusmann; Attorney for Appellees: Beshara, Daniel [13-10306] (Beth Ellen Klusmann)
10/18/2013	CASE TENTATIVELY calendared for oral argument for the week of

	12/02/2013. [13-10306] (GAM)
10/21/2013	COURT DIRECTIVE ISSUED consolidating cases 12-11211 with 13-10306 for oral argument purposes. [12-11211, 13-10306] (MCS)
10/23/2013	CASE CALENDARED for oral argument on Tuesday, 12/03/2013 in New Orleans in the En Banc Courtroom -- PM session. In accordance with our policy, lead counsel only will receive via email at a later date a copy of the court's docket and an acknowledgment form. All other counsel of record should monitor the court's website for the posting of the oral argument calendars.. [12-11211, 13-10306] (SMH)
11/26/2013	LETTER filed by Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs in 12-11211, 13-10306 Advising the Court of a change in a relevant case from the United States Supreme Court.. Date of Service: 11/26/2013 via email Attorney for Amicus Curiae: Klein;

	Attorney for Appellants: Klusmann, Rhodus, Rosenthal; Attorney for Appellees: Beshara, Daniel [12-11211, 13-10306] (Beth Ellen Klusmann)
12/03/2013	ORAL ARGUMENT HEARD before Judges Jones, Wiener, Graves. Arguing Person Information Updated for: Michael Maury Daniel arguing for Appellee Incorporated Inclusive Communities Project; Arguing Person Information Updated for: Michael Maury Daniel arguing for Appellee Incorporated Inclusive Communities Project; Arguing Person Information Updated for: Beth Ellen Klusmann arguing for Appellant Leslie Bingham-Escareno, Appellant Tomas Cardenas, Appellant C. Kent Conine, Appellant Dionicio Vidal Flores, Appellant Michael Gerber, Appellant Juan Sanchez Munoz, Appellant Gloria L. Ray; Arguing Person Information Updated for: Beth Ellen Klusmann arguing for Appellant Leslie Bingham-Escareno; Arguing Person Information Updated for: Brent M. Rosenthal arguing for Appellant Incorporated Frazier Revitalization [12-11211, 13-10306] (SMH)

03/24/2014	PUBLISHED OPINION FILED. [12-11211 Reversed and Remanded 13-10306 Reversed and Remanded] Judge: EHJ , Judge: JLW , Judge: JEG Mandate pull date is 04/14/2014 [12-11211, 13-10306] (DTG)
03/24/2014	JUDGMENT ENTERED AND FILED. [12-11211] (DTG)
03/24/2014	JUDGMENT ENTERED AND FILED. [13-10306] (DTG)
04/07/2014	BILL OF COSTS filed by Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs. [13-10306] (Beth Ellen Klusmann)
04/07/2014	BILL OF COSTS filed by Appellant Frazier Revitalization, Incorporated. [12-11211] (Brent M. Rosenthal)
04/15/2014	MANDATE ISSUED. Mandate pull date satisfied. The Bill of Costs is issued with the mandate. [12-11211, 13-10306] (NFD)
05/19/2014	SUPREME COURT NOTICE that petition for writ of certiorari [7637642-2] was filed by Appellants Ms. Leslie Bingham-Escareno, Mr.

	Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Frazier Revitalization, Incorporated, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs in 12-11211, Appellants Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. C. Kent Conine, Mr. Dionicio Vidal Flores, Mr. Michael Gerber, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Texas Department of Housing and Community Affairs in 13-10306 on 05/13/2014. Supreme Court Number: 13-1371. [12-11211, 13-10306] (CAV)
10/06/2014	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellants Mr. C. Kent Conine, Texas Department of Housing and Community Affairs, Mr. Michael Gerber, Ms. Leslie Bingham-Escareno, Mr. Tomas Cardenas, Mr. Dionicio Vidal Flores, Mr. Juan Sanchez Munoz, Ms. Gloria L. Ray and Frazier Revitalization, Incorporated, Appellants Mr. C. Kent Conine, Texas Department of Housing and Community Affairs, Mr. Michael Gerber, Ms. Leslie Bingham-

Escareno, Mr. Tomas Cardenas, Mr. Dionicio Vidal Flores, Mr. Juan Sanchez Munoz and Ms. Gloria L. Ray in 12-11211, 13-10306 on 10/02/2014. [7746275-1] [12-11211, 13-10306] (CAV)

IN THE UNITED STATES DISTRICT COURT
NORTHEN DISTRICT OF TEXAS
DALLAS DIVISION

808-CV-546-D

The Inclusive Communities Project, Inc., Plaintiff, v. The Texas Department of Housing and Community Affairs, and Michael Gerber, Leslie Bingham-Escareño, Tomas Cardenas, C. Kent Conine, Dionicio Vidal (Sonny) Flores, Juan Sanchez Muñoz, and Gloria L. Ray in their official capacities, Defendants.	*	Civil Action No.

COMPLAINT

Introduction

1. The State of Texas admits that its Low Income Housing Tax Credit program perpetuates racial segregation in Dallas and other large urban areas. The State admits that the segregation is a result of prior and

current funding decisions. The admission is set out in the following statement.[1]

> The Department's funding allocations, as well as the allocations under the Bond Review Board's (BRB) Bond Program should promote racial integration, however, the continued failure of these entities to evaluate the implications of prior and current funding decisions permits the Department and the BRB to disproportionately allocate federal low income housing tax credit funds and the tax-exempt bond funds to developments located in impacted areas (above average minority concentration and below average income levels).
>
> Furthermore, QAP provisions requiring multiple notifications to state and local political officials and neighborhood organizations are feared to enable "Not-In-My-Backyard" (NIMBY) opposition to developments that are proposed in non-impacted areas (above average minority concentration and below average income levels).

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[1] The "Department" referred to in the finding is the Texas Department of Housing and Community Affairs. The state's distribution of the credits is governed by the Department's Qualified Allocation Plan referred to as the QAP. The Bond Review Board is the State entity charged with the operation of the State's Private Activity Bond program. These tax-exempt bonds are often used in conjunction with Low Income Housing Tax Credits for affordable housing development.

> The vast majority of low income housing tax credits and tax-exempt bonds that fund developments in the Dallas, Fort Worth, Austin and Houston metropolitan areas have been placed in impacted areas.
>
> . . .
>
> The Department's funding decisions arise directly out of the QAP. In recent years, the QAP has continued to place low income individuals in impacted areas, further adding to the concentration problem in most cities today. House Committee On Urban Affairs Texas House of Representatives, "Interim Report 2006 A Report to the House of Representatives 80th Texas Legislature", December 6, 2006, Robert Talton, Chairman, Findings page 48.

2. Despite this admission, the entity operating the State's Low Income Housing Tax Credit program, the Texas Department of Housing and Community Affairs ("TDHCA"), has not taken the actions necessary to remedy the segregation. Instead, TDHCA continues to perpetuate the concentration of TDHCA's Low Income Housing Tax Credit assisted housing in low-income minority areas.

3. The Inclusive Communities Project, Inc. ("ICP") is a Dallas based fair housing and civil rights organization. ICP focuses on the issue of racial segregation and policies and practices that operate to exclude low income families from higher opportunity, predominately White or non-minority areas of the Dallas metropolitan area. The term "White" and the term "nonminority" are used in this complaint to refer to the 2000 U.S. Census

category for persons of the White race who are also not Hispanic or Latino. In furtherance of ICP's mission, ICP assists Black or African American Dallas Housing Authority Section 8 families in finding housing opportunities in the suburban communities in the Dallas area. The assistance includes efforts to make units in Low Income Housing Tax Credit assisted properties available for ICP's clients. The Low Income Housing Tax Credit projects cannot refuse to rent to Section 8 tenants because the tenants are on the Section 8 voucher program. Texas Government Code 2306.269(b). TDHCA's failure to correct the disproportionate allocation of housing tax credits to low income minority areas directly interferes with ICP's ability to find housing for its clients in the higher opportunity, predominately White areas of the Dallas metropolitan area.

4. ICP seeks injunctive relief for defendants' segregation of Low Income Housing Tax Credit assisted developments into low income and minority concentrated locations in the Dallas metropolitan area.

Jurisdiction

5. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 3613(a).

The Inclusive Communities Project, Inc plaintiff.

6. The plaintiff Inclusive Communities Project ("ICP") is a fair housing focused nonprofit organization which works with families seeking to obtain and retain housing in predominately non-minority areas of the Dallas metropolitan area. This is part of ICP's work to

break down barriers to the creation of racially and economically inclusive communities. Specifically, ICP works with Black or African American families participating in the Section 8 Housing Choice Voucher program (the "Section 8 program") administered by the Dallas Housing Authority ("DHA"). ICP assists DHA Section 8 program families who choose to lease dwelling units in non-minority areas with counseling and financial assistance. ICP's office is located in the City of Dallas, Dallas County, Texas.

Defendants

7. TDHCA is a corporate and political body established by the laws of the State of Texas. TDHCA is responsible for administering the federal Low Income Housing Tax Credit program in the state of Texas. The references to TDHCA in this complaint also include the actions of the Executive Director and the TDHCA board members in their official capacity.

8. Mr. Michael Gerber is the current Executive Director of TDHCA. Mr. Gerber is named as a defendant in this suit solely in his official capacity.

9. Ms. Leslie Bingham-Escareño, Mr. Tomas Cardenas, P.E., Mr. C. Kent Conine, Chair, Mr. Dionicio Vidal (Sonny) Flores, Dr. Juan Sanchez Muñoz, and Ms. Gloria L. Ray are the current members of the TDHCA Board. These individuals are named as defendants in this suit solely in their official capacity. The board members are responsible for adopting the Qualified Allocation Plan, setting TDHCA policy concerning the Low Income Housing Tax Credit program, and for making the decisions on which applications receive Low Income Housing Tax Credits.

The Low Income Housing Tax Credit program.

10. The Low Income Housing Tax Credit Program receives authority from the U.S. Treasury Department to provide tax credits to offset federal income taxes for investors in low income multifamily rental housing. The developers of the housing sell the credits to syndicators or investors. The sale of the tax credits provides the capital for the construction of the housing. The targeted beneficiaries of the program are very low and extremely low income families. The program was created in 1986 and is governed by the Internal Revenue Code, 26 U.S.C. § 42. While the amount of tax credits varies annually, Texas received an allocation of approximately $43 million in Low Income Housing Tax Credits in 2007. TDHCA approves approximately 6,000 to 7,000 additional units for Low Income Housing Tax Credits every year. TDHCA reports that there were at least 127,000 units in its Low Income Housing Tax Credit inventory as of May 2007. TDHCA is the only entity in the state with the authority to allocate tax credits under this program. TDHCA's procedures and standards for the allocation and distribution of the tax credits are contained in TDHCA's annual Qualified Allocation Plan (QAP).

11. TDHCA's annual QAP contains a complex set of requirements for establishing threshold eligibility and applying selection criteria to applications for housing tax credits. Under Texas law TDHCA's final decisions allocating tax credits are made as an exercise of TDHCA's discretion. TDHCA's discretion can take into account numerous factors not included in the QAP's threshold eligibility or selection criteria. QAP 50.10(a).

TDHCA's practice is to use its discretion in making the housing tax credit allocation decisions.

TDHCA uses race and ethnicity as one factor in its decision whether to award Low Income Housing Tax credits and this factor is a cause of the segregation and other discrimination.

12. The objective circumstantial evidence shows that the pattern found by the House Committee on Urban Affairs TDHCA's placement of the vast majority of urban low income housing tax credit housing in minority concentrated areas is the result of TDHCA decisions which take into account the race and ethnicity of the residents of the area in which the project is to be located and which take into account the race and ethnicity of the probable residents of the project. Those decisions are made in a manner that causes racial and ethnic segregation in the tax credit program in violation of the constitutional and statutory prohibitions against racial and ethnic segregation.

13. The House Committee On Urban Affairs Texas House of Representatives found that TDHCA disproportionately allocated urban area Low Income Housing Tax Credit funds to developments located in minority concentrated areas. House Committee On Urban Affairs Texas House of Representatives, "Interim Report 2006 A Report to the House of Representatives 80th Texas Legislature", December 6, 2006, Robert Talton, Chairman, Findings page 48. The distribution of the existing TDHCA Low Income Housing Tax Credit project unit inventory is disproportionately concentrated in minority areas as compared to the distribution of all renter occupied housing.

14. Texas has a segregated LIHTC housing program according to a U.S. Department of Housing and Urban Development report. Over 60% of LIHTC units in Texas are in U.S. Census tracts where more than 50% of the population is minority according to the report. Only Connecticut, California, New Mexico, Washington, D.C., and Hawaii are listed in the report with higher percentages of LIHTC units in census tracts with 50% or greater minority population than Texas. The state wide pattern is duplicated in the Dallas area. The report states that in the Dallas PMSA, 65% of the LIHTC units are in 50% or greater minority census tracts. Office of Economic Affairs, U.S. Department of Housing and Urban Development, Office of Policy Development and Research, "*Updating the Low-Income Housing Tax Credit (LIHTC) Database Projects Placed in Service Through 2003*," (2006) pages 76-78, 130.

15. Only 14.5% of TDHCA's Low Income Housing Tax Credit non-elderly units are located in 70% to 100% White census tracts throughout the State. Forty-eight percent, 48%, are located in 0% to 30% White Census tracts. The distribution of TDHCA's Low Income Housing Tax Credit project unit inventory in the City of Dallas and in Dallas County is more concentrated in minority areas than the state wide distribution and shows that race was at least one factor in the allocation of the tax credits.

16. While 19% of all renter occupied units in the City of Dallas are located in predominantly White 70% to 100% White census tracts, only 2.9% of TDHCA's Low Income Housing Tax Credit units in the City are in those 70% to 100% White census tracts. A corresponding disparate distribution is found in the City of Dallas

minority concentrated census tracts. While only 51 % of all renter occupied units in the City are in minority concentrated census tracts with a population of from 0% to 30% White, 85% of TDHCA's Low Income Housing Tax Credit units in the City are in those 0% to 30% White census tracts. While 14% of all renter occupied units in Dallas County are located in 70% to 100% White census tracts, only 2.8% of TDHCA's tax credit units in Dallas County are in 70% to 100% White census tracts. While only 38% of all renter occupied units in Dallas County are in 0% to 30% White census tracts, 71 % of TDHCA's tax credit units in Dallas County are in 0% to 30% White census tracts.

17. TDHCA is less likely to deny tax credits for a project in a predominantly White area if the population eligible for and likely to reside in that project is disproportionately White. Rural areas with a predominantly White population and a predominantly White eligible population are one example of areas where TDHCA will approve housing tax credits for projects in White areas. There are 29 Low Income Housing Tax Credit family - non-elderly - projects with a total of 1,439 units for which TDHCA has racial and ethnic occupancy data and which are in 90% or greater White census tracts in the State. The population in these TDHCA Low Income Housing Tax Credit projects in 90% or greater White census tracts is only 8% Hispanic or Latino and 6% Black or African American according to the data in TDHCA's 2007 Housing Sponsor Report and 07-PropertyInventory Report. All but two of the projects and 409 of the units are in small towns with less than 30,000 population. The population in these small towns averages 88% White.

18. An example of TDHCA awarding Low Income Housing Tax Credits in a predominantly White area where minority residents are unlikely to use the tax credit supported units is the town of Vidor. TDHCA has approved two Low Income Housing Tax Credit projects in the all White town of Vidor, one in 1994 and another in 2006. Vidor has a 2000 U.S. Census population of 11,440. The 2000 Census reports eight Black or African Americans in Vidor. There are no Blacks or African Americans in the TDHCA Vidor LIHTC project that was approved in 1994. There is no occupancy reported for the project approved in 2006. The likelihood of many Black or African American families seeking occupancy at either of these Low Income Housing Tax Credit projects in Vidor is small given the modern history of opposition to Blacks living in Vidor's low income housing. Federal attempts to desegregate the public housing in Vidor during the 1990s were met with and defeated by overt racial hostility and resistance by the Ku Klux Klan. *State of Tex. v. Knights of Ku Klux Klan*, 58 F.3d 1075, 1077 (5th Cir. 1995).

19. Elderly projects are another example of TDHCA approving Low Income Housing Tax Credits for units in predominantly White areas for which the probable residents are also predominantly White. The state wide population occupying Low Income Housing Tax Credit units for elderly tenants in 90% or greater White census tracts is only 1 % Hispanic or Latino and is less than 1 % Black or African American according to the data in TDHCA's 2007 Housing Sponsor Report and other reports.

20. TDHCA disproportionately refuses to approve Low Income Housing Tax Credit funding for non-elderly

projects in predominantly White census tracts compared to its approval rate for predominantly White elderly projects in predominantly White census tracts. From 1999 through 2006, TDHCA awarded tax credits for approximately 67% of the elderly units in applications for 90% or greater White census tracts. TDHCA awarded tax credits for only 32% of the non-elderly units in applications for 90% or greater White census tracts during the same period.

21. TDHCA disproportionately refuses to approve Low Income Housing Tax Credit funding for non-elderly projects in predominantly White census tracts compared to its approval rate for non-elderly projects in minority census tracts. From 1999 through 2006 TDHCA awarded tax credits for only 32% of the Non-elderly units in all applications for 90% or greater White census tracts. During the same period, TDHCA awarded tax credits for approximately 47% of the non-elderly units in all applications for 0% to 10% White census tracts. Approximately 2% of all approved non-elderly units were in 90% or greater White census tracts. Approximately 27% of all approved non-elderly units were in 0 to 10% White census tracts.

22. The Low Income Housing Tax Credit projects are racially and ethnically segregated by occupancy characteristics as well as by location. The total population in the units in TDHCA's Low Income Housing Tax Credit projects located in 90% or greater White census tracts is only 5% Hispanic or Latino and 4% Black or African Americanly occupied according to the data in TDHCA's 2007 Housing Sponsor Report. The units in TDHCA's Low Income Housing Tax Credit projects in the non-White, 0 to 10% White, census tracts

are 88% Black and Hispanic occupied 40% Hispanic or Latino and 48% Black or African American according to the data in TDHCA's 2007 Housing Sponsor Report.

23. The facts concerning the geographical distribution and occupancy of TDHCA's Low Income Housing Tax Credit projects as well as the results of the applications for the tax credits are based on TDHCA and other government reports. State law requires TDHCA to collect Fair Housing Sponsor Reports from the owners of the Low Income Housing Tax Credit assisted projects. Tex. Gov't. Code 2306.0624. However, the TDHCA reports are collected and maintained in a manner that inhibits and obstructs the accurate portrayal of the racial effects of TDHCA's decisions. TDHCA does not collect the information from all owners. Plaintiff has attempted to correct the information to the extent possible and practical.

The use of race as a factor subjects minority tenants to slum and blighted conditions.

24. TDHCA's use of race as a factor in its decisions to allocate Low Income Housing Tax Credits subjects the minority residents of those units in the City of Dallas to severe conditions of slum and blight. The Low Income Housing Tax Credit projects in the City of Dallas are located in minority neighborhoods with high crime and high poverty rates and that are blighted by industrial uses and obnoxious facilities such as illegal landfills. These neighborhoods are also subjected to unequal zoning and are already used for low-income housing as shown by the number of Section 8 Housing Choice Vouchers in those tracts.

25. There are 115 Low Income Housing Tax Credit projects listed in the TDHCA inventory in the City of Dallas. Thirty-two of the projects are located in tracts with heavy industrial zoning. Twenty-seven of the projects are located in tracts with other industrial zoning. Two Low Income Housing Tax Credit projects, the Villas of Sorrento at 3130 Stag Road and the Oakwood Place Apartments at 4950 Wadsworth are adjacent to the large illegal City demolition landfill known as the Curry site. There are five Low Income Housing Tax Credit projects within a half mile radius of the Deepwood Dump, the largest illegal dumpsite in the State of Texas.

26. Fifteen percent, 15%, of the Low Income Housing Tax Credit projects in the City of Dallas are in U.S. Census tracts with poverty rates equal to or greater than 40%. This is twice the national average of 7 .6% of all Low Income Housing Tax Credit units that are located in 40% or greater poverty census tracts. Thirty-six of the Dallas Low Income Housing Tax Credit projects are in census tracts with poverty rates equal to or greater than 30%. The average poverty rate for the Dallas census tracts with Low Income Housing Tax Credit projects is 28.44%. The Dallas PMSA average poverty rate is 11 %. The average median family income for the Dallas Low Income Housing Tax Credit census tracts is $29,641 which is 53% of the Dallas PMSA $55,854 median family income. Fifty-three of the housing tax credit projects in the City of Dallas are located in census tracts where the median family income is equal to half or less than half of the Dallas PMSA median family income. These low income and high poverty locations deny the Low Income Housing Tax Credit residents an equal opportunity for a

safe environment, quality education, and adequate public and private services.

27. TDHCA's use of race as a factor in its decisions to award Low Income Housing Tax Credits denies safe housing to the Dallas residents of Low Income Housing Tax Credit units. The average violent 2004 crime rate by census tract for tracts with Low Income Housing Tax Credit projects was 137 crimes per 1,000 persons. The city-wide rate was 35 crimes per 1,000 persons. There were nine Low Income Housing Tax Credit projects in census tracts with violent crime rates greater than 200. There were 14 Low Income Housing Tax Credit projects in census tracts with violent crime rates greater than 100. There were 37 Low Income Housing Tax Credit projects in census tracts with crime rates higher than the City average.

28. TDHCA's use of race as a factor in its decisions to award Low Income Housing Tax Credits causes the Low Income Housing Tax Credit affordable housing opportunities in the Dallas area to be disproportionately located in the slum and blighted neighborhoods in the City of Dallas. The Low Income Housing Tax Credit units in the City of Dallas are 79% of all Low Income Housing Tax Credit units in Dallas County and 64% of all Low Income Housing Tax Credit units in Collin, Dallas, and Denton counties.

ICP Standing.

29. ICP seeks to create and obtain affordable housing opportunities in non-minority concentrated areas for persons eligible for low rent public housing and to provide the counseling and other forms of assistance to Black families seeking to use their DHA Section 8

voucher to move into low-poverty, non-minority concentrated areas throughout the Dallas metropolitan area. ICP provides mobility counseling and mobility assistance to Black Section 8 families seeking housing opportunities in non-minority concentrated and non-poverty concentrated parts of the Dallas metropolitan area.

30. The counseling assistance provided by ICP to Black DHA Section 8 participants includes pre-move family counseling and related financial assistance to assist the families who want to make and sustain a desegregative housing move. The mobility assistance includes negotiating with landlords as necessary to obtain units in the eligible areas at rents that are affordable by the Section 8 families and eligible for the Section 8 subsidy. The financial assistance provided to these families by ICP includes the payment of application fees, security deposits and utility deposits to assist families moving into housing that provides desegregative housing opportunities in non-minority, non-poverty concentrated areas, where such assistance is necessary to make the desegregative move possible. ICP also makes landlord incentive bonus payments to landlords who agree to participate in DHA's Section 8 program and provide desegregative housing opportunities in non-minority, non-poverty concentrated areas when such incentives are necessary to secure housing for the Section 8 families. Section 8 families may also receive ICP assistance in the form of a contribution to their reasonable moving expenses in order to make a move in an eligible area.

31. ICP's clients are Black or African American families participating in the DHA's Section 8 Housing Choice Voucher Program.

32. The Low Income Housing Tax Credit units are important to ICP in its provision of integrated housing opportunities for its clients. The Low Income Housing Tax Credit projects cannot refuse to rent to an applicant based on the applicant's status as a Section 8 participant. A large percentage of non-tax credit projects in White, high opportunity areas do refuse to rent to Section 8 families. ICP's survey of 383 apartments in the predominantly White suburbs in the Dallas metropolitan area found only 70 that would accept Section 8 families. Twenty-six of those 70 were tax credit projects.

33. The Low Income Housing Tax Credit projects that take DHA Section 8 voucher participants are a significant source of units used in the DHA Section 8 program. However, the large majority of those tax credit projects are currently segregated in minority areas in the City of Dallas. The DHA March 2006 Section 8 occupancy report showed that:

A. 20% or 3,348 of the 16,190 DHA March 2006 Section 8 voucher households were in Low Income Housing Tax Credit units.

B. Only 80 of the 3,348, 2%, were in 70% or more White census tracts.

C. Over 2,375 of the 3,348, 71 %, were in 0 to 30% White tracts.

34. Since the Low Income Housing Tax Credit units cannot refuse to accept Section 8 and the units usually rent for amounts less than Section 8 maximum rents, it is

possible for ICP to obtain these units for its clients using fewer person hours of assistance and at a lower out of pocket cost. But most of the Low Income Housing Tax Credit units are in minority areas and thus are not eligible for ICP's assistance. As a result, ICP must rely on the private market in the predominantly White areas. The private market in those areas is reluctant to accept Section 8 and does so only at a higher cost to ICP and its clients. The lack of Low Income Housing Tax Credit units in White areas injures ICP in its capacity providing assistance to minority clients seeking housing in those areas.

35. There is a higher probability that economic and racial integration can be achieved in Low Income Housing Tax Credit projects. Because the tax credit projects can also rent to higher income tenants who are not Section 8 participants, there is a higher probability of economic and racial integration than in traditional project based subsidy program units. Tax credit projects are thus more likely to offer ICP's clients a housing opportunity that is affordable and integrated. ICP can obtain tax credit units for its clients at a lower cost in ICP resources because the tax credit projects cannot discriminate against Section 8 and the rents are likely to be less than the maximum rents for the Section 8 program.

36. By denying financial assistance for units that would located in non-minority areas and thus making standard quality, non-luxury rental housing unavailable in non-minority areas, TDHCA's Low Income Housing Tax Credit decisions to award or deny the credits have directly and adversely affected ICP by:

A. reducing the number of units that ICP can use to help its clients find housing in non-minority concentrated market areas,

B. increasing the amount of time per client that ICP must spend in order to help its clients find and retain modest rental housing in non-minority concentrated areas,

C. increasing the amount of financial assistance that ICP must spend because of the higher rents and other costs in the non-Low Income Housing Tax Credit units in order to help its clients find and retain modest rental housing in non-minority concentrated market areas, and

D. discouraging families with which ICP works from choosing dwelling units in market areas that offer racially integrated housing because of the cost factors involved in such a choice.

Claims for relief.

37. Defendants' actions make dwellings unavailable because of race, color, and national origin in violation of 42 U.S.C. § 3604(a).

38. Defendants' actions make financial assistance for constructing dwellings unavailable because of race, color, and national origin in violation of 42 U.S.C. § 3605(a).

39. Defendants' actions using race and ethnicity as one factor in their decisions concerning the allocation of Low Income Housing Tax Credits violates the 14th Amendment to the U.S. Constitution and is actionable under 42 U.S.C. § 1983.

40. Defendants' actions using race and ethnicity as one factor in their decisions concerning the allocation of

Low Income Housing Tax Credits violates 42 U.S.C. § 1982 that requires the defendants to give all citizens of the United States the same right as is enjoyed by White citizens to, lease real property.

Prayer for relief.

Plaintiff requests the following relief:

A. Injunctive relief requiring defendants to allocate Low Income Housing Tax Credits in the Dallas metropolitan area in a manner that creates as many Low Income Housing Tax Credit assisted units in non-minority census tracts as exist in minority census tracts. This relief shall not also prohibit the approval of units in minority census tracts if:

(i) the defendants' approval rates for Low Income Housing Tax Credit units in minority census tracts in the Dallas metropolitan area does not exceed the approval rate for Low Income Housing Tax Credit units in non-minority census tracts, and

(ii) the approved projects in the minority census tracts do not contain a higher percentage of low income residents than the percentage of low income residents in the projects approved in the non-minority census tracts.

B. Injunctive relief enjoining the defendants from causing or perpetuating racial and ethnic segregation in the Low Income Housing Tax Credit program by denying Low Income Housing Tax Credits to units in the Dallas metropolitan area when such denial is made by taking the race and ethnicity of the residents of the area in which the project is to be located and the race and ethnicity of the probable residents of the project into account.

C. Injunctive relief enjoining the defendants from approving financial assistance in the form of Low Income Housing Tax Credits to applications in the Dallas metropolitan area unless the site and neighborhoods in which the units will be located meet the following conditions:

(i) 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 and Title VIII of the Civil Rights Act of 1968.

(ii) 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.

(iii) 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, vehicular traffic, nearby industrial zoning and industrial uses, 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 such as high crime rates predominate, unless there is actively in progress a concerted program to remedy the undesirable conditions and those conditions will be eliminated before the housing is occupied.

(iv) 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.

D. Injunctive relief prohibiting defendants from administering the Low Income Housing Tax Credit program in a manner that causes or perpetuates racial and ethnic segregation.

E. Injunctive relief requiring defendants to comply with and implement reporting and monitoring requirements, including those imposed by state law, that demonstrate compliance with the obligation to make Low Income Housing Tax Credit units available in a manner that does not perpetuate segregation and in a manner that reduces the probability of future violations.

F. an award of litigation expenses, attorney fees, and court costs, and

G. any other appropriate relief.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES PROJECT, INC.,	§	
Plaintiff,	§	Civil Action No. 3:08-CV-0546-D
VS.	§	
THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

The questions presented by defendants' motion to dismiss are whether plaintiff has standing and whether it must join two additional parties-defendant. Concluding that plaintiff has standing and that it need not join additional parties, the court denies defendants' motion.

I

Plaintiff The Inclusive Communities Project, Inc. ("ICP") seeks injunctive relief against defendant the Texas Department of Housing and Community Affairs ("TDHCA")—a state entity that administers a federal program that promotes investment in low-income housing developments—and TDHCA's Executive Director and board members, in their official capacities,[1] under the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-3619, and 42 U.S.C. §§ 1982 and 1983. According to the complaint, ICP is a Dallas-based, not-for-profit organization that seeks to eliminate barriers to racial and socioeconomic integration in housing. To further this goal, ICP helps low-income African-American families eligible for the Dallas Housing Authority's Section 8 Housing Choice Voucher program ("Section 8") secure rental housing in predominantly Caucasian, suburban areas of Dallas. ICP provides its clients with move-related counseling and financial assistance, including payment of application fees, deposits, and reasonable moving expenses, and may negotiate with landlords on their behalf.

TDHCA is the state entity responsible for administering the federal Low Income Housing Tax Credit ("LIHTC") program in Texas. The LIHTC program is designed to encourage investment in low-income, multifamily rental housing by providing a tax

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[1]Unless the context indicates that TDHCA refers only to the Department itself, the court will refer to all defendants, collectively, as TDHCA.

credit that offsets an investor's federal income taxes. *See* I.R.C. § 42 (discussing "low-income housing credit"). Developers finance construction of a project by selling the credits. TDHCA administers varying amounts of LIHTC funds each year—$43 million in 2007–and has the authority to approve or deny tax credit applications for proposed housing developments. In evaluating applications, TDHCA follows an annual Qualified Allocation Plan ("QAP") that prescribes complex requirements relating to threshold eligibility and selection criteria. *See id.* § 42(m) (requiring allocation of tax credits according to a "qualified allocation plan").

ICP avers that despite the QAP's requirements, TDHCA is permitted under Texas law to exercise discretion in making final decisions regarding tax credit allocation and that TDHCA takes into account race and ethnicity, both of the geographical area that surrounds a proposed development and of its probable residents. ICP alleges that TDHCA perpetuates housing segregation by disproportionately allocating tax credits for proposed developments in low-income, predominantly minority areas and denying tax credits for proposed developments in higher-income, predominantly Caucasian areas. ICP contends that this practice makes it more difficult for low-income minority families to obtain rental housing in neighborhoods not plagued with high crime, widespread poverty, and industrial uses.

ICP avers that TDHCA's consideration of race in allocating tax credits violates two provisions of the FHA, the Fourteenth Amendment (actionable through 42 U.S.C. § 1983), and 42 U.S.C. § 1982. ICP seeks broad

equitable relief, including an injunction that prohibits TDHCA from using race or ethnicity as a factor in allocating tax credits; an injunction that requires TDHCA to allocate tax credits in a manner that creates as many LIHTC units in predominantly Caucasian areas as in minority-concentrated areas; and an injunction that prohibits TDHCA from allocating tax credits for proposed developments in areas with undesirable conditions, including high crime and industrial uses.

TDHCA moves under Fed. R. Civ. P. 12(b)(1) to dismiss ICP's claims for lack of standing based on failure to establish injury-in-fact. TDHCA also moves under Rule 12(b)(7) to dismiss this suit for failure to join as defendants the Internal Revenue Service ("IRS") and the City of Dallas ("City").

II

Because standing is a prerequisite to the exercise of federal jurisdiction, the court considers this issue first and evaluates each of ICP's claims in turn. *See Cole v. Gen. Motors Corp.*, 484 F.3d 717, 721 (5th Cir. 2007).

A

The doctrine of standing addresses the question of who may properly bring suit in federal court. It "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To satisfy the case-or-controversy requirement of Article III of the Constitution, the plaintiff must show that it has "suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be

redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). An injury in fact must be "concrete and actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted).[2] Moreover, "the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1.

In its prudential dimension, standing encompasses "several judicially self-imposed limits on the exercise of federal jurisdiction." *Allen v. Wright*, 468 U.S. 737, 751 (1984). These include:

> whether a plaintiff's grievance arguably falls within the zone of interests protected by the statutory provision invoked in the suit, whether the complaint raises abstract questions or a generalized grievance more properly addressed by the legislative branch, and whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties.

Ass'n of Cmty. Orgs. for Reform Now v. Fowler, 178 F.3d 350, 363 (5th Cir. 1999). Congress may, however, "by legislation, expand standing to the full extent

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[2]This tripartite test applies to all plaintiffs in federal court, whether individual or organizational. *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 356 (5th Cir. 1999).

permitted by Art. III," thus proscribing the judicial cognizance of prudential standing considerations. *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979); *accord Bennett*, 520 U.S. at 162.

As the party seeking to invoke federal jurisdiction, ICP bears the burden of proving its standing. *Lujan*, 504 U.S. at 561. Because TDHCA filed its motion to dismiss without supporting evidence, its attack on the court's jurisdiction is considered facial, rather than factual, and the court must presume that the allegations of ICP's complaint are true. *See Garcia v. Boyar & Miller, P.C.*, 2007 WL 2428572, at *2 (N.D. Tex. Aug. 28, 2007) (Fitzwater, J.) (citing *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. May 1981)). Further, "[t]he court must deny the motion if the allegations are sufficient to allege jurisdiction." *Id.* On a motion to dismiss for lack of standing, "'general factual allegations of injury resulting from the defendant's conduct may suffice'" because the court presumes that "'general allegations embrace those specific facts that are necessary to support the claim.'" *Bennett*, 520 U.S. at 168 (quoting *Lujan*, 504 U.S. at 561)).

B

ICP and TDHCA dispute whether ICP has sufficiently alleged injury in fact.[3] ICP pleads injury in that TDHCA's allocation of tax credits increases the time and money that ICP must spend to help its clients secure affordable, integrated housing. According to ICP, the landlords of LIHTC projects, unlike other landlords, cannot refuse to rent to Section 8 participants. Because TDHCA's tax credit allocation has allegedly resulted in fewer LIHTC units in predominantly Caucasian areas, ICP asserts that its staff must spend more time locating housing in these areas for its Section 8 clients. Further, it must provide them with greater financial assistance due to higher rents and must sometimes make "landlord incentive bonus payments" to landlords who agree to accept Section 8 tenants. P Compl. ¶ 30.

TDHCA counters that ICP does not allege any cognizable injury. It posits that ICP's alleged injury is merely an indirect consequence of putative injury to its clients. TDHCA maintains that such indirect injury is insufficient to support standing.

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[3]ICP asserts standing only on the basis of its own alleged injury. It does not allege that it has associational standing to sue on behalf of its clients in the absence of injury to itself. Therefore, the court does not consider this question. *See, e.g., Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587-88 (5th Cir. 2006) (discussing requirements for associational standing).

C

The court first evaluates ICP's standing under the FHA. ICP alleges that TDHCA's tax credit allocation violates the FHA because it makes both dwellings and financial assistance for constructing dwellings unavailable because of race. *See* 42 U.S.C. § 3604(a) (making it unlawful to "make unavailable" a dwelling to "any person because of race"); *id.* § 3605(a) (making it unlawful to "discriminate against any person in making available [a residential real estate-related] transaction" because of race).

The FHA affords a cause of action to an "aggrieved person," *id.* § 3613(a)(1)(A), and defines this term as any person who "claims to have been injured by a discriminatory housing practice" or who "believes that such person will be injured by a discriminatory housing practice that is about to occur," *id.* § 3602(i). Through these provisions, Congress has abrogated prudential standing under the FHA, thus extending standing to the limits of Article III. *See Lincoln v. Case*, 340 F.3d 283, 289 (5th Cir. 2003) ("The Supreme Court has held that the sole requirement for standing under the FHA is the Article III minima.") (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982)). On its FHA claims, therefore, ICP will have standing if it can establish injury in fact, causation, and redressability—without regard to any prudential limitations.

1

Havens Realty involved a claim of injury similar to that presented in the instant case. A fair housing

organization, Housing Opportunities Made Equal ("HOME"), contended that the defendant realty corporation had engaged in racial steering, a practice of guiding racial and ethnic groups to neighborhoods occupied predominantly by those same groups. *Havens Realty*, 455 U.S. at 366-67. HOME alleged that this practice frustrated "its efforts to assist equal access in housing through counseling and other referral services" and required it to "devote significant resources to identify and counteract the defendant's racially discriminatory steering practices." *Id.* at 379. The Supreme Court held that these allegations were sufficient to establish standing.

Id. It reasoned:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact.
>
> Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests, *see Sierra Club v. Morton*, 405 U.S. [727], 739 [(1972) (holding that environmental organization could not establish standing based only on

> a mere "bona fide special interest" in the subject matter of the suit)].

Id.; see also Fair Housing of Marin v. Combs, 285 F.3d 899, 904-05 (9th Cir. 2002) (holding that fair housing organization had standing under FHA based on frustration of mission and diversion of resources, and collecting similar cases).

The gravamen of the allegations in *Havens Realty* and of those in the instant case are analogous. Like the *Havens Realty* organization, ICP alleges that the challenged unlawful conduct has a segregative effect that frustrates its mission of promoting equal housing opportunities and requires it to spend more time and money in performing its activities than it otherwise would. These are more concrete allegations than a mere intangible setback to ICP's general interest in desegregation. Moreover, going a step beyond the *Havens Realty* organization, ICP pleads specific facts that support its claim of a drain on resources: that higher rents and reluctant landlords make it more difficult to place its Section 8 clients in non-LIHTC housing.[4]

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[4]The Fifth Circuit has held that an organization may not "bootstrap standing" by claiming a drain on its resources as a result of costs incurred for the particular lawsuit in which it claims standing. *See Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health and Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994). ICP does not allege standing based on the costs of the instant lawsuit, and in its brief it specifically disclaims reliance on them.

Therefore, ICP has established injury at the pleadings stage.[5]

This conclusion is not altered by TDHCA's contention that ICP's alleged injury is insufficient to establish standing because it is indirect. It is true that the injury is indirect in that TDHCA's alleged discrimination is directed not against ICP but against African-Americans, such as ICP's clients. Stated another way, the right to be free from discrimination based on race belongs to ICP's clients rather than to ICP. But the indirectness of ICP's injury does not render it irrelevant under the FHA. Rather, because under that statute Congress has abrogated the prudential standing rules, ICP "may have standing to seek relief on the basis of the

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[5]At a later stage of this litigation, of course, ICP must adduce evidence that shows a drain on its resources resulting from TDHCA's tax credit allocation. *See Fowler*, 178 F.3d at 360 (holding that organization failed to establish standing where there was no summary judgment evidence of any "concrete or identifiable resources that [it] could reallocate to other uses" if the defendant ceased its putatively unlawful conduct); *La. ACORN Fair Housing v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000) (holding that organization failed to establish standing where there was no evidence at trial that it was required to put any "specific projects" on hold or "re-double efforts" in response to the defendant's conduct); *cf. Lujan*, 504 U.S. at 561 ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.").

legal rights and interests of others"——so-called "third party standing." *Warth*, 422 U.S. at 501; *see also Gladstone, Realtors*, 441 U.S. at 103 n.9 (interpreting the FHA) ("[A]s long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed."); *Havens Realty*, 455 U.S. at 375-78 (holding that individual plaintiffs had standing under FHA based on alleged "indirect" injury of being deprived of living in an integrated community due to defendant's racial steering of other persons), *id.* at 375 ("The distinction [between "third-party" and "first-party" standing] is of little significance" under the FHA.).[6]

2

To satisfy the causation element of standing, ICP must establish that its putative injury is fairly traceable to TDHCA's allocation of tax credits. The injury must

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[6]TDHCA cites two cases to argue that ICP's indirect injury does not support standing. Both cases, however, are factually distinguishable. See *Audler v. CBC Innovis, Inc.*, 519 F.3d 239, 347-48 (5th Cir. 2008) (discussing the standing of a class representative under the "juridical link" doctrine); *Garzes v. Lopez*, 281 Fed. Appx. 323, 325-26 (5th Cir. June 9, 2008) (per curiam) (applying rule that constituent of corporation does not have standing based on economic harm that is merely a consequence of injury to corporation). Moreover, although these cases state the general rule that a litigant must assert his own rights rather than the rights of others, this rule has been abrogated under the FHA and, as will be discussed below, does not bar ICP's claims under §§ 1982 and 1983.

not be the result of the independent action of some third party not before the court. *Lujan*, 504 U.S. at 560. ICP alleges that TDHCA's disproportionate denial of tax credit applications for proposed developments in predominantly Caucasian areas causes a relative scarcity of LIHTC units there that makes it more difficult and expensive for ICP to secure integrative housing for its clients. ICP cites numerous statistics related to the location and occupancy of LIHTC developments that purportedly demonstrate that they are disproportionately located in census tracts with above-average minority populations. *See, e.g.*, P. Compl. ¶ 16 ("While 19% of all renter occupied units in the City of Dallas are located in predominantly [Caucasian] 70% to 100% [Caucasian] census tracts, only 2.9% of TDHCA's [LIHTC] units in the City are in those 70% to 100% [Caucasian] census tracts."). ICP also alleges that a committee of the Texas House of Representatives found that TDHCA's tax credit allocation compounded housing segregation.

Assumed true, ICP's allegations permit the reasonable inference that, absent TDHCA's consideration of race in tax credit allocation, there is a substantial probability that more LIHTC units would be available in predominantly Caucasian areas. This, in turn, would make it easier for ICP to secure housing for its clients in these areas. *Cf. Warth*, 422 U.S. at 504 (involving challenge to zoning regulations that allegedly excluded persons of low or moderate income) ("Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents'

restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in [the city]."). Because no facts alleged suggest the existence of any independent, race-neutral reasons why TDHCA would disproportionately deny tax credit applications for proposed developments in Caucasian neighborhoods, it is fair and not merely speculative to trace this imbalance to the alleged consideration of race. *Cf. Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976) (challenge to IRS regulations that allegedly encouraged hospitals to deny services to indigents) ("It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications."). Further, although granting tax credits for a proposed development may not guarantee that it ultimately will be constructed, the court reasonably may infer that an increase in tax credits allocated for proposed developments in predominantly Caucasian areas would over time increase the number of LIHTC units available in these areas. Therefore, the court holds that ICP sufficiently alleged the causation element of standing.

3

Finally, ICP must establish that it is likely, as opposed to merely speculative, that its injury will be redressed by a favorable decision. *See Lujan*, 504 U.S. at 561. Clearly, the broad relief that ICP requests, *e.g.*, an injunction that requires TDHCA to allocate tax credits so as to create as many LIHTC units in areas

predominantly Caucasian as there are in areas that are predominantly minority, would redress the injury. As suggested in the foregoing causation analysis, however, even more moderate relief—enjoining TDHCA from considering race—would likely lead to more LIHTC units in predominantly Caucasian areas. Therefore, ICP has established the redressability element of standing.

D

Having determined that ICP has standing under the FHA, the court now turns to ICP's claims under 42 U.S.C. §§ 1982 and 1983. ICP maintains that TDHCA's consideration of race violates § 1982 by denying non-Caucasian citizens an equal right to lease real property and violates the Fourteenth Amendment to the U.S. Constitution by denying non-Caucasian citizens the equal protection of the laws. *See* § 1982 (declaring that all citizens of the United States "shall have the same right as is enjoyed by white citizens" to lease real property, *inter alia*); § 1983 (providing cause of action for violation of constitutional and other federal rights).

The foregoing analysis of constitutional standing also applies to ICP's §§ 1982 and 1983 claims: ICP has sufficiently alleged increased resource costs that are both fairly traceable to TDHCA's alleged discriminatory tax credit allocation and judicially redressable. The critical question, however, is whether the prudential rule against asserting the rights of others—inapplicable under the FHA—bars ICP's standing under these statutes. *See Fowler*, 178 F.3d at 363; *Singleton v. Wulff*, 428 U.S. 106, 114 (1976) ("'Ordinarily, one may not claim

standing in this Court to vindicate the constitutional rights of some third party.'" (quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953))).

ICP's §§ 1982 and 1983 claims implicate its African-American clients' right to be free of race discrimination in housing opportunities. The limitation on "third-party standing" is not a constitutional mandate, however, but is merely a "salutary rule of self-restraint." *Craig v. Boren*, 429 U.S. 190, 193 (1976) (internal quotation marks omitted). As such, courts have carved out exceptions to the rule where its justifications lack force. *See Singleton*, 428 U.S. at 114 ("Like any general rule, however, [the rule against third-party standing] should not be applied where its underlying justifications are absent."); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 333 (Former 5th Cir. 1981) ("In cases where these justifications are inapplicable, the general rule should be excepted, and assertion of third party rights permitted."); *see generally* Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.4 (4th ed. 2003). Consideration of these justifications leads the court to conclude that prudential standing does not bar ICP from asserting its clients' rights under §§ 1982 and 1983.

1

The Supreme Court in *Singleton* discussed the two principles that animate the rule against third-party standing. *See Singleton*, 428 U.S. at 113-16. First, the rule prevents courts from unnecessary or undesired adjudication of rights. Two "factual elements" help resolve this question in a particular case: the relationship

between the litigant and the third party and the third party's ability to assert his own right. *Id.* at 114-16. If the litigant and the third party have a close relationship and the litigant is a part of the third party's exercise of the right, then the court's "construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit." *Id.* at 114-15. Moreover, if a genuine obstacle prevents the third party from asserting the right, then his absence from court "loses its tendency to suggest that his right is not truly at stake, or truly important to him." *Id.* at 116.

Second, the rule against third-party standing tends to ensure that the most effective advocate for the right is before the court, which relies on the vigorous argument of litigants. Generally, "third parties themselves will be the best proponents of their own rights." *Id.* at 114. This will not always be the case, however. Rather, "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Id.* at 115.

2

In the instant case, precluding ICP from asserting under §§ 1982 and 1983 its African-American clients' rights would not serve the purposes of the prudential rule against third-party standing. Taken as true, ICP's allegations indicate that it has a close, essentially representative relationship with its clients. It acts like their agent in locating integrated rental housing, and, at times, negotiating housing terms. ICP is therefore an

integral part of its clients' exercise of their equal housing-related rights. For this reason, the outcome of ICP's suit will not leave unaffected its clients' enjoyment of their rights. Rather, a decision in ICP's favor would increase its clients' ability to access equal housing opportunities. Further, although ICP, rather than a client, is the litigant before the court, the representative, advocacy-based relationship between them makes this logical and obviates any implication that ICP's clients do not wish to assert their rights. Therefore, the court's consideration of ICP's §§ 1982 and 1983 claims will not be an unnecessary or undesired adjudication of rights.

Moreover, ICP's relationship with its clients as well as its own organizational purpose suggest that it would be as effective as its clients in advocating their rights. ICP's mission is to achieve housing desegregation, eliminating the obstacles that confront African-Americans and other minorities in their pursuit of equal housing opportunities. The instant lawsuit is completely consistent with this mission and with ICP's advocacy-based relationship with its clients. Under these circumstances, ICP can be expected to be a vigorous proponent of its clients' rights. *Cf. Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982) (holding that not-for-profit theatrical corporation organized to reflect cultural interests of African-American and Hispanic communities had standing under § 1983, *inter alia*, as the most effective party to challenge denial of grant funds as discrimination based on race of its patrons) ("When a corporation meets the constitutional test of standing prudential

considerations should not prohibit its asserting that defendants, on racial grounds, are frustrating specific acts of the sort which the corporation was founded to accomplish."); *City of Evanston v. Baird & Wagner, Inc.*, 1990 WL 186575, at *4 (N.D. Ill. Nov. 15, 1990) (holding that fair housing organization established constitutional and prudential standing under § 1982 to challenge racial steering practices). *But see Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042, 1054 (E.D. Va. 1986).

III

The court now turns to TDHCA's motion to dismiss for failure to comply with Rule 19.

A

Rule 19 seeks to ensure that lawsuits are disposed of fairly and completely. *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1308 (5th Cir. 1986) (citing Rule 19 Advisory Committee's note). To this end, it establishes a two-part process to identify persons who are needed for just adjudication of the action. First, it provides that certain persons are required to be joined as parties, if feasible. These include persons who are subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction if "in that person's absence, the court cannot afford complete relief among existing parties." Rule 19(a)(1). This is a "highly practical, fact-based decision." *Pulitzer-Polster*, 784 F.2d at 1309. Second, if joinder is not feasible, the court must decide whether that person is indispensable. Specifically, considering certain non-exhaustive factors, the court "must determine whether, in equity and good conscience,

the action should proceed among the existing parties or should be dismissed." Rule 19(b).

B

ICP and TDHCA dispute whether the IRS and the City are parties required to be joined, if feasible, under Rule 19(a) in order for the court to provide complete relief to ICP, and whether failure to join them warrants dismissal. As to the IRS, TDHCA posits that the Tax Code provides certain incentives for developers of LIHTC housing to select low-cost land, which is primarily located in minority neighborhoods. TDHCA maintains that because developers select the land before submitting tax credit applications, it has no control over their decisions to build in predominantly minority areas. Therefore, TDHCA contends that the court cannot afford complete relief without amending the Tax Code to remove these incentives, requiring the joinder of the IRS.

ICP counters that joinder of the IRS is not necessary for complete relief. ICP argues that its claims are aimed at TDHCA's disproportionate approval of tax credits for proposed developments in minority neighborhoods compared to those in Caucasian neighborhoods, that this imbalanced approval rate can be remedied without any change to the Tax Code, and that recent amendments to the Tax Code have diminished certain incentives that TDHCA cites.

TDHCA also maintains that the City must be joined if the court is to afford complete relief. It posits that it cannot provide final approval for a tax credit application

unless the developer obtains a resolution from the City approving the project and receives permission from the zoning authority to build in the desired area, and that the Dallas City Council recently enforced a moratorium on new LIHTC developments.

ICP disputes this contention. It points out that the Dallas City Council is no longer enforcing the moratorium, and it maintains that there is adequate zoned land in Caucasian neighborhoods on which to build LIHTC units, arguing that the distribution of all rental units throughout Dallas is less segregated than that of LIHTC units.

C

The court holds that ICP's claims should not be dismissed for failure to join the IRS or the City because neither is a party required to be joined if feasible under Rule 19(a) for the court to afford complete relief. The gravamen of ICP's complaint is that TDHCA is unlawfully discriminating based on race in tax credit allocation——not merely that there are fewer LIHTC units in Caucasian neighborhoods. Assuming that ICP proves its claims, the court will be able to afford meaningful relief——enjoining TDHCA from considering race——without the presence of either the IRS or the City. *See* Rule 19 Advisory Committee's note (explaining that "complete relief" is relief that is not "partial" or "hollow"). The court is not persuaded that an injunction against the consideration of race would be rendered meaningless or hollow either by tax incentives favoring land in minority neighborhoods or by the City's

consistently blocking the construction of LIHTC housing in Caucasian neighborhoods. TDHCA does not dispute that, despite contrary tax incentives, there have been some LIHTC developments constructed in predominantly Caucasian areas, and it presents no evidence to suggest that the City will employ either its approval or zoning power so as to consistently exclude LIHTC housing from these areas.[7]

Because the court concludes that it will be able to afford complete relief in the absence of the IRS and the City, it does not reach the Rule 19(b) inquiry. Even assuming, however, that the IRS and the City are parties required to be joined if feasible, TDHCA has submitted no argument or evidence on whether they can be joined or, if not, on the equitable Rule 19(b) factors

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[7]Although TDHCA maintains that the Dallas City Council recently enforced a moratorium against new LIHTC developments in the City, it presents no evidence to support this assertion or to contradict ICP's proof that the Dallas City Council is now "willing to review applications on all tax credit transactions individually, based upon supply and demand in the project's submarket." P. App. 51 (quoting Dallas City Council Res. Jan. 23, 2008).

TDHCA also argues that the City must be joined because it offers bond programs that are a source of funding for low-income housing projects in addition to the tax credits available to developers. ICP's allegations, however, focus on TDHCA's alleged disproportionate approval of developers' tax credit applications, and the court can remedy this, if proved, without involving the City's bond programs.

the court should consider to decide whether the action should proceed in their absence. *Cf. Imperial v. Castruita*, 418 F.Supp.2d 1174, 1178 (C.D. Cal. 2006) (declining to dismiss action for nonjoinder where defendant did not present any evidence that certain persons were required to be joined under Rule 19(a) and, even if so, they "failed to even argue, much less prove, that [the persons] cannot be joined in the action"). Federal courts are reluctant to grant motions to dismiss based on nonjoinder, and the court declines to do so here. *See Teacher Retirement Sys. of Tex. v. Reilly Mortgage Group, Inc.*, 154 F.R.D. 156, 159 (W.D. Tex. 1994) (citing 7 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1609 (1986)).

* * *

Accordingly, for the reasons explained, the court denies defendants' June 27, 2008 motion to dismiss.

SO ORDERED.

December 11, 2008.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
CHIEF JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

The Inclusive Communities Project, Inc.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
The Texas Department of Housing and Community Affairs, and Michael Gerber, Leslie Bingham-Escareño, Tomas Cardenas, C. Kent Conine, Dionicio Vidal (Sonny) Flores, Juan Sanchez Muñoz, and Gloria L. Ray in their official capacities,	§	Civil Action No. 3:08-cv-00546-D
	§	
Defendants.	§	

DEFENDANTS' ORIGINAL ANSWER AND AFFIRMATIVE DEFENSES

TO THE HON. SIDNEY A. FITZWATER, CHIEF UNITED STATES DISTRICT JUDGE:

The Defendants, Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareño, Tomas Cardenas, C. Kent Conine, Dionicio Vidal (Sonny) Flores, Juan Sanchez Muñoz and Gloria L. Ray (hereinafter, the "Defendants"), hereby file their Answer and Affirmative Defenses to the Plaintiff's Complaint, and in support thereof would show the Court the following:

I.
ORIGINAL ANSWER

The paragraph numbers of this Answer track the numbering system in the Plaintiff's Complaint.

1. The Defendants deny the allegations contained in Paragraph 1 of the Plaintiff's Complaint.

2. The Defendants deny the allegations contained in Paragraph 2 of the Plaintiff's Complaint.

3. The Defendants admit so much of Paragraph 3 of the Plaintiff's Complaint that states: "The Low Income Housing Tax Credit projects cannot refuse to rent to Section 8 tenants because the tenants are on the Section 8 voucher program." However, the Defendants deny so much of Paragraph 3 of the Plaintiff's Complaint that states: "TDHCA's failure to correct the disproportionate allocation of housing tax credits to low income minority areas directly interferes with ICP's ability to find housing for its clients in the higher opportunity, predominantly White areas of the Dallas metropolitan area." With regard to the remaining allegations contained in Paragraph 3 of the Plaintiff's Complaint, the Defendants are without sufficient knowledge or

information to admit or deny the allegations contained in Paragraph 3 of the Plaintiff's Complaint, and out of an abundance of caution, must therefore deny the same.

4. The Defendants deny that the Plaintiff is entitled to injunctive relief based on the disputed allegations stated in Paragraph 4 of the Plaintiff's Complaint.

5. The contents of Paragraph 5 of the Plaintiff's Complaint are prefatory and do not require a response. However, to the extent a response is required, the Defendants assert Eleventh Amendment immunity and the sovereign immunity of the State of Texas as a bar to all or substantially all of the federal claims against them.

6. The Defendants are without sufficient knowledge or information to admit or deny the allegations contained in Paragraph 6 of the Plaintiff's Complaint, and out of an abundance of caution, must therefore deny the same.

7. The Defendants admit the allegations contained in the first sentence of Paragraph 7 of the Plaintiff's Complaint. The second sentence if this same paragraph makes no allegations to which a response is required, and, therefore, no response is provided.

8. The Defendants admit the allegations contained in Paragraph 8 of the Plaintiff's Complaint.

9. The Defendants admit the allegations contained in the first sentence of Paragraph 9 of the Plaintiff's Complaint. The second sentence if this same paragraph makes no allegations to which a response is required, and, therefore, no response is provided. Furthermore,

the Defendants admit the allegations contained in the third sentence of this paragraph.

10. The Defendants admit so much of Paragraph 10 of the Plaintiff's complaint that states the program is controlled by the Internal Revenue Code, 26 U.S.C. §42 and that Texas received an allocation of approximately $43 million in 9% tax credits for the Low Income Nousing Tax Credits based on the population of the state multiplied times a dollar amount established by the Federal Government and the TDHCA is the only entity within the state with the authority to allocate tax credits under this program. However, the Defendants deny so much of Paragraph 3 of the Plaintiff's Complaint that states that Defendant "TDHCA's procedures and standards for the allocation and distribution of the tax credits are contained in TDHCA's annual Qualified Allocation Plan (QAP)." The QAP is a compilation published as a rule for the program but subject to review based on statutory limitations for the statutory requirements found in Internal Revenue Code, 26 U.S.C.§42, the Texas Government Code, Chapter 2306, Subchapter DD, is based onsignificant public input and reflects policies approved by the Governing Board and the Governor of Texas. In addition, the QAP references TDHCA Real Estate Analysis Rules, the IRS Code, the Texas Government Code, Application packages, Texas Property Code, TDHCA Compliance Rules, the Internal revenue Service Guide for Completing Form 8823 Low Income Housing Credit Agencies Report of Non Compliance or Building Disposition and various Treasury Regulations and HUD pronouncements that

impact income, Qualified Census Tracts and other Federal Government Publications.

11. The Defendants deny the allegations contained in Paragraph 11 of the Plaintiff's Complaint in so far as the program must meet federal and state law, the tax credits awarded must meet the federal for calculating credits and the TDHCA can only award credits to applicants that have been presented to them in a manner that complies with all state and federal legal and regulatory requirements. The Defendants admit that within the boundaries of the state and Federal statutory requirements and the applications that have been presented, the Defendants have limited statutory discretion with just cause to modify the list of staff recommended applicants to award applicants out of order provided the applicant has been in the process and is financially feasible and meets all other statutory requirements.

12. The Defendants deny the allegations contained in Paragraph 12 of the Plaintiff's Complaint.

13. The Defendants deny the Plaintiff's characterization of the "Interim Report 2006 A Report to the House of Representatives 80th Texas Legislature, December 6, 2006, Robert Talton, Chairman, Findings page 48," as stated in the first sentence of Paragraph 13 of the Plaintiff's Complaint, and which speaks for itself. The Defendants further deny the allegations contained in the second sentence of this same paragraph.

14. To the extent the allegations contained in Paragraph 14 of the Plaintiff's Complaint characterize

the cited "Office of Economic Affairs, U.S. Department of Housing and Urban Development, Office of Policy Development and Research, '*Updating the Low-Income Housing Tax Credit (LIHTC) Database Projects Placed in Service Through 2003*,' (2006) pages 76-78, 130," the characterization is denied as the document speaks for itself.

15. The Defendants deny the allegation that race was a factor in consideration of the allocation of tax credits.

16. The Defendants are without sufficient knowledge or information to admit or deny the allegations contained in Paragraph 16 of the Plaintiff's Complaint, and out of an abundance of caution, must therefore deny the same.

17. The Defendants deny the allegations contained in the first and second sentences of Paragraph 17 of the Plaintiff's Complaint. The Defendants admit that the resident mix numbers could be achieved in reviewing the annual sponsor reports.

18. Paragraph 18 of the Plaintiff's Complaint asserts an example that the Defendants deny is applicable or relevant to this matter.

19. The Defendants deny the allegation contained in the first sentence of this paragraph. Furthermore, the Defendants are without sufficient knowledge or information to admit or deny the remaining allegations contained in Paragraph 19 of the Plaintiff's Complaint, and out of an abundance of caution, must therefore deny the same.

20. The Defendants deny the allegations contained in the first sentence of Paragraph 20 of the Plaintiff's Complaint. With regard to the remaining sentences of this paragraph of the Complaint, the Defendants are without sufficient knowledge or information to admit or deny the allegations, and out of an abundance of caution, must therefore deny the same.

21. The Defendants deny the allegations contained in the first sentence of Paragraph 21 of the Plaintiff's Complaint. With regard to the remaining sentences of this paragraph of the Complaint, the Defendants are without sufficient knowledge or information to admit or deny the allegations, and out of an abundance of caution, must therefore deny the same.

22. The Defendants deny the allegations contained in the first sentence of Paragraph 22 of the Plaintiff's Complaint. To the extent the remaining allegations in this paragraph characterize the cited "TDHCA's 2007 Housing Sponsor Report," such characterizations are denied as the document speaks for itself.

23. The Defendants admit the allegations contained in the first and second sentences of Paragraph 23 of the Plaintiff's Complaint, but deny the allegations contained in the remaining third, fourth and fifth sentences of the same paragraph.

24. The Defendants deny all the allegations contained in Paragraph 24 of the Plaintiff's Complaint.

25. The Defendants admit the information contained in the first sentence of this paragraph. The Defendants

are without sufficient knowledge or information to admit or deny the allegations contained in Paragraph 25 of the Plaintiff's Complaint, and out of an abundance of caution, must therefore deny the remainder of Paragraph 25. All zoning issues are local and were appropriately considered and addressed at the time of the award for the location.

26. The Defendants admit the allegations through the last sentence of Paragraph 26 of the Plaintiff's Complaint. The Defendants deny the last sentence in Paragraph 26.

27. The Defendants deny the allegations contained in the first sentence of Paragraph 27 of the Plaintiff's Complaint, but are without sufficient knowledge or information to admit or deny the remaining allegations contained in the same paragraph, and out of an abundance of caution, must therefore deny the same.

28. The Defendants deny the allegations contained in Paragraph 28 of the Plaintiff's Complaint.

29. The Defendants are without sufficient knowledge or information to admit or deny the allegations contained in Paragraph 29 of the Plaintiff's Complaint, and out of an abundance of caution, must therefore deny the same.

30. The Defendants are without sufficient knowledge or information to admit or deny the allegations contained in Paragraph 30 of the Plaintiff's Complaint, and out of an abundance of caution, must therefore deny the same.

31. The Defendants are without sufficient knowledge or information to admit or deny the allegations contained

in Paragraph 31 of the Plaintiff's Complaint, and out of an abundance of caution, must therefore deny the same.

32. The Defendants are without sufficient knowledge or information to admit or deny the allegations contained in the first sentence of Paragraph 6 of the Plaintiff's Complaint, and out of an abundance of caution, must therefore deny the same. Further, the Defendants admit the allegations contained in the second sentence of this paragraph, and deny the remaining allegations in this paragraph.

33. The Defendants are without sufficient knowledge or information to admit or deny the allegations contained in Paragraph 33 of the Plaintiff's Complaint, and out of an abundance of caution, must therefore deny the same.

34. With regard to the first, second and third sentences of Paragraph 34 of the Plaintiff's Complaint, the Defendants are without sufficient knowledge or information to admit or deny the allegations contained therein, and out of an abundance of caution, must therefore deny the same. Further answering, the Defendants deny the allegations contained in the fourth sentence of this same paragraph.

35. The Defendants are without sufficient knowledge or information to admit or deny the allegations contained in Paragraph 35 of the Plaintiff's Complaint, and out of an abundance of caution, must therefore deny the same.

36. The Defendants deny the allegations contained in Paragraph 36 of the Plaintiff's Complaint, including those allegations contained within subparts A through D.

37. The Defendants deny the allegations contained in Paragraph 37 of the Plaintiff's Complaint.

38. The Defendants deny the allegations contained in Paragraph 38 of the Plaintiff's Complaint.

39. The Defendants deny the allegations contained in Paragraph 39 of the Plaintiff's Complaint.

40. The Defendants deny the allegations contained in Paragraph 40 of the Plaintiff's Complaint.

Furthermore, the Defendants deny that the Plaintiff is entitled to the relief requested in its Prayer for Relief.

II.
AFFIRMATIVE DEFENSES

Pursuant to Fed. R. Civ. P. 8(c), the Defendants assert the following affirmative defenses:

1. Defendants assert that Plaintiff's Complaint fails to state a claim upon which relief can be granted.
2. Defendants raise Eleventh Amendment immunity as a bar to Plaintiff's claims.
3. Defendants assert the affirmative defense of statute of limitations for any claims outside the applicable limitations period.
4. Defendants reserve the right to raise additional affirmative defenses to the claims alleged against them as the development of the factual circumstances in this case may warrant.

III.
PRAYER FOR RELIEF

FOR THE FOREGOING REASONS, Defendants pray that this Court enter an Order in favor of the Defendants dismissing all claims with prejudice to the refiling of same, denying all relief sought by the Plaintiff against the Defendants, awarding costs of suit to the Defendants, and granting such other and further relief to the Defendants as to which they may be justly entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF FILING & SERVICE

I certify that on March 11, 2009, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case files system of the court, such that all counsel or record will be provided a "Notice of Electronic Filing" and access to this document. I further certify that a true and correct copy of this document sent by facsimile to the following:

Mr. Michael M. Daniel
Ms. Laura B. Beshara
Daniel & Beshara, P.C.
3301 Elm Street
Dallas, Texas 75226-1637.

/s/ Timothy E. Bray
TIMOTHY E. BRAY
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES PROJECT, INC.,	§	
Plaintiff,	§	Civil Action
	§	No. 3:08-CV-0546-D
VS.	§	
THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION
AND ORDER

In this action alleging that defendant Texas Department of Housing and Community Affairs ("TDHCA") perpetuates racial segregation and discrimination through the allocation of Low Income Housing Tax Credits ("LIHTC"), the court must decide whether plaintiff The Inclusive Communities Project, Inc. ("ICP") has standing and whether it has established prima facie cases under the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3604(a) and 3605(a), the Fourteenth Amendment (actionable under 42 U.S.C. § 1983), and 42 U.S.C. § 1982. Concluding that ICP has demonstrated its standing beyond peradventure, has established a prima facie case for each of its claims, and has

adduced evidence that would enable a reasonable jury to find in its favor on each of its claims, the court grants ICP's motion for partial summary judgment and denies defendants' motions for judgment on the pleadings and for summary judgment.[1]

I

The background facts and procedural history of this case are set out in the court's prior memorandum opinion and order. *See Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 2008 WL 5191935, at *1 (N.D. Tex. Dec. 11, 2008) (Fitzwater, C.J.) ("*ICP I*"). The court therefore adds to *ICP I* the facts and procedural history pertinent to the court's present decision.

ICP is a Dallas-based non-profit organization that assists low-income persons in finding affordable housing and seeks racial and socioeconomic integration in Dallas housing. In particular, ICP works with African-American families who are eligible for the Dallas Housing Authority's Section 8 Housing Choice Voucher program ("Section 8"). ICP assists Section 8 participants in

[1] Also pending is ICP's November 9, 2009 motion for leave to file supplemental appendix. The proposed appendix addresses a counterclaim——immunity under the Eleventh Amendment——subsequently withdrawn on November 20, 2009. Accordingly, the court denies ICP's motion as moot.

obtaining apartments in predominately Caucasian,[2] suburban neighborhoods[3] by offering counseling, assisting in negotiations with landlords, and providing financial assistance (for example, security deposits). At times, ICP must provide "landlord incentive bonus payments" to landlords to secure housing for Section 8 participants.

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[2]Throughout this memorandum opinion and order, the court uses the term "Caucasian" to refer to the 2000 U.S. Census category for white persons who are neither Hispanic nor Latino.

[3]ICP encourages its clients to obtain housing in areas that meet the criteria for "Walker Target Area Tracts," defined in the Settlement Stipulation and Order in *Walker v. U.S. Department of Housing and Urban Development*, No. 3:85-CV-1210-R, at 4 (N.D. Tex. Mar. 8, 2001) (Buchmeyer, C.J.). A qualifying census tract "according to the most recent decennial census, (i) has a black population at or below the average black population of the City of Dallas, (ii) has no public housing, and (iii) has a poverty rate at or below the average for the City of Dallas." *Id.* In addition, ICP looks for neighborhoods that (1) have a poverty population of 10% or less; (2) have a median family income of at least 80% of the 2000 U.S. Census Dallas Primary Metropolitan Statistical Area median family income; and (3) are in a public elementary school attendance zone for an elementary school that has either "Recognized" or "Exemplary" status.

TDHCA[4] is the state entity that administers the federal LIHTC program, granting tax credits under 26 U.S.C. § 42 to low-income housing developers to encourage investment in low-income, multifamily rental housing. Developers can sell their tax credits to finance housing construction. The tax credits are allocated according to the federal statute, which requires the state agency to act according to an annual "Qualified Allocation Plan" ("QAP") developed by the agency. *See* 26 U.S.C. § 42(m); 10 Tex. Admin. Code § 50.1 *et seq.* (2010) (setting forth QAP developed by TDHCA). TDHCA receives applications for proposed developments and has the sole authority to approve or deny tax credits for those developments.[5] The agency receives more applications than it can fund, and the exact amount of tax credits allocated to Texas varies each year (for example, $43 million in tax credits was allocated to Texas in 2007). Any developer who receives LIHTC must accept as tenants otherwise-eligible Section 8 participants who use Section 8 vouchers to help pay rent. *See* 26 U.S.C.

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[4]Unless the context otherwise requires, the term "TDHCA" includes TDHCA and its Executive Director and board members in their official capacities.

[5]According to Texas regulations, "Developments will be ineligible if the Development is located on a site that is determined to be unacceptable by the [TDHCA]. This determination will be made at the sole discretion of the [TDHCA] ." 10 Tex. Admin. Code § 50.6(j) (2010).

§ 42(h)(6)(B)(iv). According to ICP, Section 8 participants struggle to obtain housing in non-LIHTC developments.

ICP alleges that TDHCA has disproportionately approved tax credits for low-income housing in minority neighborhoods and has denied applications for non-elderly[6] low-income housing in predominately Caucasian neighborhoods; that 92% percent of all LIHTC units in the city of Dallas are in census tracts where more than one-half of the population is minority; that TDHCA has discretion in determining which proposed projects receive tax credits, and that TDHCA improperly takes race into account (both of the neighborhood and of potential residents), perpetuating racial segregation in Dallas housing; that defendants made housing and financial assistance for housing construction unavailable because of race, in violation of the FHA; and that defendants used race as a factor in their allocation of tax credits, in violation of the Fourteenth Amendment, actionable under § 1983, and § 1982, which requires that defendants give all United States citizens the same right to lease property as Caucasian citizens. ICP requests broad equitable relief, including, *inter alia*, an injunction requiring TDHCA to create as many LIHTC units in non-minority census tracts as in minority census tracts; forbidding TDHCA

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[6]The distinction between elderly and non-elderly units is salient because the potential tenants of non-elderly LIHTC units are more likely to be minority than the potential tenants of elderly LIHTC units.

from considering the racial composition of the area or potential residents; and enjoining TDHCA from perpetuating racial segregation.

ICP moves for partial summary judgment, asking the court to hold that ICP has standing to bring its claims, that it has established a prima facie case of racial discrimination based on a pattern of racial segregation in LIHTC units, and that, under the circumstantial evidence framework of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), defendants' actions have a greater effect on non-Caucasians than on Caucasians. Defendants move for judgment on the pleadings and for summary judgment, asserting that ICP lacks standing and that it is not entitled to relief on the merits.

II

The court begins by summarizing the standards under which the parties' motions are to be decided.

A

Defendants move under Rule 12(c) for judgment on the pleadings. A Rule 12(c) motion "is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Hebert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990) (per curiam) (internal citations omitted). The motion "should be granted only if there is no issue of

material fact and if the pleadings show that the moving party is entitled to prevail as a matter of law." *Greenberg v. Gen. Mills Fun Grp., Inc.*, 478 F.2d 254, 256 (5th Cir. 1973) (per curiam). The standard for deciding a motion under Rule 12(c) is the same as the one for deciding a motion to dismiss under Rule 12(b)(6). *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 n.8 (5th Cir. 2002) ("A number of courts have held that the standard to be applied in a Rule 12(c) motion is identical to that used in a Rule 12(b)(6) motion." (footnote and internal quotation marks omitted)).

B

ICP and defendants both move for summary judgment. Their summary judgment burdens depend on whether they are moving for summary judgment on a claim for which they will have the burden of proof at trial.

ICP moves for summary judgment on claims for which it will bear the burden of proof at trial. To be entitled to summary judgment, ICP "must establish 'beyond peradventure all of the essential elements of the claim[.]'" *Bank One, Tex., N.A. v. Prudential Ins. Co. of Am.*, 878 F. Supp. 943, 962 (N.D. Tex. 1995) (Fitzwater, J.) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)). "The court has noted that the 'beyond peradventure' standard is 'heavy.'" *Carolina Cas. Ins. Co. v. Sowell*, 603 F.Supp.2d 914, 923-24 (N.D. Tex. 2009) (Fitzwater, C.J.) (quoting *Cont'l Cas. Co. v. St. Paul Fire & Marine*

Ins. Co., 2007 WL 2403656, at *10 (N.D. Tex. Aug. 23, 2007) (Fitzwater, J.)).

Defendants move for summary judgment on claims for which they will not bear the burden of proof at trial.[7] They need only point to the absence of evidence of an essential element of ICP's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once defendants do so, ICP must go beyond its pleadings and designate specific facts showing there is a genuine issue for trial. *See id.* at 324; *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam). An issue is genuine if the evidence is such that a reasonable jury could return a verdict in ICP's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). ICP's failure to produce proof as to any essential element of a claim renders all other facts immaterial. *See Trugreen Landcare, L.L.C. v. Scott*, 512 F.Supp.2d 613, 623 (N.D. Tex. 2007) (Fitzwater, J.). Summary judgment is mandatory if ICP fails to meet this burden. *See Little*, 37 F.3d at 1076.

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[7]Insofar as defendants move for summary judgment on matters for which they bear the burden of proof at trial (e.g., in the content of ICP's FHA claim, the burden of proving that TDHCA's actions were in furtherance of a compelling government interest), they must satisfy the beyond-peradventure standard to obtain summary judgment. *See infra* note 18.

III

A

ICP and defendants both bring motions that require that the court decide whether ICP has standing to bring suit. In *ICP I* the court held that it does. *See ICP I*, 2008 WL 5191935, at *6, *9 (denying defendants' motion to dismiss ICP's claim for lack of standing). Defendants' Rule 12(c) and summary judgment motions essentially urge the court to reconsider the analysis of *ICP I*, which the court declines to do. But because ICP now moves for summary judgment establishing that it has standing, the court will decide the question under the summary judgment standard.

To determine whether ICP had standing in the context of a motion to dismiss, the court presumed that the allegations of ICP's complaint were true. *See ICP I*, 2008 WL 5191935, at *3 (citing *Garcia v. Boyar & Miller, P.C.*, 2007 WL 2428572, at *2 (N.D. Tex. Aug. 28, 2007) (Fitzwater, J.)). But at the summary judgment stage, "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The court therefore will consider evidence offered by ICP to support its summary judgment motion on standing.

B

The doctrine of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To satisfy the requirements of Article III of the Constitution, ICP must show, at an "'irreducible constitutional minimum,'" that it has "suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant[s], and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan*, 504 U.S. at 560-61). The injury in fact, moreover, must be "concrete and . . . actual or imminent, not conjectural or hypothetical," and "the injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 & 561 n.1 (citations omitted).

Only Article III standing is required to bring a claim under the FHA. *See ICP I*, 2008 WL 5191935, at *3 (quoting *Lincoln v. Case*, 340 F.3d 283, 289 (5th Cir. 2003) ("The Supreme Court has held that the sole requirement for standing under the FHA is the Article III minima.")). But ICP also asserts claims under 42 U.S.C. §§ 1982 and 1983, for which there are prudential limitations on standing. *See ICP I*, 2008 WL 5191935, at *6 ("The critical question, however, is whether the prudential rule against asserting the rights of others——inapplicable under the FHA——bars ICP's standing under these statutes."). Under the prudential limitations, "[o]rdinarily, one may not claim standing to vindicate the constitutional rights of

some third party." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976) (quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953)). In *ICP I* the court held that precluding ICP from asserting its §§ 1982 and 1983 claims would not serve the purposes of the prudential rule against third-party standing. *See ICP I*, 2008 WL 5191935, at *7. Because the court is not reconsidering that holding (and the parties do not urge the court to do so), it will only consider at the summary judgment stage whether ICP has established beyond peradventure that it has Article III standing.

C

1

To satisfy Article III standing, ICP must first establish injury in fact. In *ICP I* the court cited *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), in which the Supreme Court held if "[defendants'] steering practices have perceptibly impaired [a fair housing organization's] ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact." *Id.* at 379. The Court pointed specifically to the "consequent drain on the organization's resources" as evidence of that injury. *Id.* ICP seeks to place its clients in Walker Target Area Tracts, *see supra* note 3, or other high-opportunity (predominately Caucasian) areas. To place Section 8 participants in LIHTC housing, ICP spent an average of $491.00 per capita. To place clients in non-LIHTC housing, ICP expended an average of $993.00 per capita. ICP's

average cost to secure non-LIHTC housing is much greater than the cost to obtain LIHTC housing because ICP often must pay non-LIHTC landlords bonus payments to convince them to participate in Section 8 or to lower the rent, and it must make a larger security deposit. This cost difference is even greater than these numbers reflect, because ICP must expend more time and effort to find non-LIHTC units that will even accept Section 8 vouchers. ICP has presented evidence that 86.6% of LIHTC developments informed ICP they would accept Section 8 vouchers, while only 11.9% of non-LIHTC developments would accept them. ICP has thus presented uncontroverted summary judgment evidence that the unavailability of LIHTC units in Walker Target Area Tracts drains the organization's resources. This demonstrates that ICP suffered injury in fact due to TDHCA's allegedly disproportionate denial of tax credits for developments in those areas.

2

To establish causation, ICP presents evidence that TDHCA disproportionately denies tax credits to proposed developments in Caucasian neighborhoods, making it more difficult for ICP to find Section 8-participating housing in those areas.[8] Because TDHCA is the sole entity with authority to award tax credits to developers, its decisions directly affect the availability and geographical distribution of low-income housing.

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[8]*See supra* § III (C) (1).

Moreover, TDHCA need not be the sole cause of injury to be liable for that injury. *See, e.g., Gautreaux v. Romney*, 448 F.2d 731, 739 (7th Cir. 1971) (holding that defendant played "significant" role in Chicago's racially discriminatory housing system). The court held in *ICP I* that it could reasonably infer that "an increase in tax credits allocated for proposed developments in predominately Caucasian areas would over time increase the number of LIHTC units available in these areas." *ICP I*, 2008 WL 5191935, at *5. If ICP is injured by the existing distribution of low-income housing, and TDHCA's actions directly and significantly affect that distribution, it follows that ICP has established causation.

Defendants argue that TDHCA does not solely control the location of low-income housing in Dallas because the developers choose where to locate housing. But this argument misconstrues the nature of ICP's claims. ICP does not complain of the distribution of low-income housing in general; ICP challenges the allegedly discriminatory actions of TDHCA in disproportionately denying tax credits to proposed developments in Caucasian neighborhoods. TDHCA does control the approval or denial of applications actually submitted.

Defendants also point to *Jaimes v. Toledo Metropolitan Housing Authority*, 758 F.2d 1086 (6th Cir. 1985). In *Jaimes* the court held that plaintiffs (potential low-income housing tenants) could not establish causation sufficient for standing even though they were excluded from Toledo's suburbs, where there was no public housing.

See id. at 1096. But in *Jaimes* the court noted that, even if defendants had sought to build such public housing, it was "still a matter of speculation and conjecture as to whether [] third party, non-defendant [suburban town governments] would grant approval for construction of units that plaintiffs could afford, qualify for, or be eligible to obtain." *Id.* The court also emphasized that plaintiffs had pointed to "no specific proposed project, location or site that might have been approved[.]" *Id.*; *see also id.* at 1096-97 ("[C]ourts have looked to a particular project or housing site which may have been affected by particular actions or failures to act on the part of government entities or officials.").

In the present case, no government agencies other than TDHCA have the authority to grant or deny tax credits. Although TDHCA must follow the mandates of § 42, it has final discretion in allocating tax credits. In addition, ICP presents evidence that proposed developments in Caucasian areas were disproportionately denied tax credits. The direct actions of TDHCA in denying those tax credits, for reasons to be analyzed below, to *actual proposed developments* distinguishes this case from the more hypothetical injury presented in *Jaimes*.

Defendants point to this sentence in *ICP I*: "Because no facts alleged suggest the existence of any independent, race-neutral reasons why TDHCA would disproportionately deny tax credit applications for proposed developments in Caucasian neighborhoods, it is fair and not merely speculative to trace this

imbalance to the alleged consideration of race." *ICP I*, 2008 WL 5191935, at *5. Defendants argue that § 42's stated preference for development in low-income areas is a race-neutral explanation for the disproportionate denial of tax credit applications of proposed developments in predominately Caucasian neighborhoods. They assert that this race-neutral reason indicates that ICP cannot prove causation. But defendants' race-neutral explanation, and whether it is pretextual, goes to the merits of ICP's claim, not to standing. ICP has demonstrated beyond peradventure that TDHCA's approval or denial of tax credits to developers directly affects the distribution of low-income housing in Dallas, which injures ICP. The court holds that ICP has established the element of causation.

3

The third element is whether the injury to ICP will likely be redressed by a favorable decision. As discussed in *ICP I*, the broad equitable remedies available to this court would redress the alleged injury. *See ICP I*, 2008 WL 5191935, at *6. The court need not address any further evidence because its analysis in *ICP I* is sufficient.

Accordingly, the court holds ICP has established standing beyond peradventure, and it grants ICP summary judgment in this respect. The court denies defendants' Rule 12(c) motion and motion for summary judgment to the extent they seek dismissal based on ICP's alleged lack of standing.

IV

The court now turns to ICP's contention in its motion for partial summary judgment that it has established prima facie cases of discrimination under the FHA, § 1982, and § 1983.

A

As a threshold matter, the court notes that, in some instances, the existence of a prima facie case is not relevant. *See Arismendez v. Nightingale Home Health Care, Inc.*, 493 F.3d 602, 607 (5th Cir. 2007) ("Because this case was fully tried on the merits, the *McDonnell Douglas* burden-shifting framework drops from the case.... [T]he sufficiency of the prima facie case as such is no longer relevant." (internal quotation marks and citations omitted)); *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 575 (5th Cir. 2004) (noting that while prima facie case is irrelevant after trial on the merits, it is applicable in context of motions for judgment as a matter of law and summary judgment). The Supreme Court has held that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). But to evaluate the parties' summary judgment motions in this case, the court will consider ICP's motion for partial summary judgment as it relates to whether ICP has established prima facie cases. Under Fed. R. Civ. P. 56(d)(1), "the court should, to the extent practicable, determine what material facts

are not genuinely at issue." If ICP can establish a prima facie case in support of its FHA claim, the burden shifts to defendants to prove that TDHCA's actions furthered a compelling government interest. Moreover, the question whether ICP has established a prima facie case of intentional discrimination under §§ 1982 and 1983 is relevant to other disputed issues in defendants' motions, such as whether defendants' justification for TDHCA's actions is pretextual. The existence of the prima facie case, together with evidence that defendants' proffered explanation for its challenged conduct is pretextual, is sufficient to find intentional discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). Additionally, the strength of the prima facie case can be relevant in determining whether defendants' proffered explanation for their actions is in fact pretextual. *See, e.g., Prejean v. Radiology Assocs. of Sw. La. Inc.*, 342 Fed. Appx. 946, 950 (5th Cir. 2009) (per curiam). Therefore, the court will evaluate ICP's prima facie cases to decide defendants' motion for summary judgment. Because defendants essentially do not contest ICP's prima facie cases, the court will analyze this question in the context of ICP's partial summary judgment motion instead of considering it in the context of defendants' Rule 12(c) or summary judgment motions.

B

The court first turns to ICP's FHA claim. The FHA prohibits discrimination in the provision of housing. *See* 42 U.S.C. §§ 3604(a) and 3605(a).[9] "A plaintiff seeking recovery under [the FHA] may proceed under either a theory of disparate treatment or disparate impact."[10] *Arbor Bend Villas Hous., L.P v. Tarrant Cnty. Hous. Fin. Corp.*, 2005 WL 548104, at *12 (N.D. Tex. March 9, 2005) (Means, J.); *see also Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curiam) ("The [FHA's] stated purpose to end discrimination requires a

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[9]Section 3604(a) makes it unlawful, *inter alia*, to "make unavailable or deny, a dwelling to any person because of race[.]" 42 U.S.C. § 3604(a). Section 3605(a) makes it unlawful for "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race[.]" § 3605(a). A residential real estate-related transaction includes providing financial assistance for the construction of a dwelling. *See* § 3605(b).

[10]The court addresses only ICP's discriminatory impact claim under the FHA. ICP did not specifically plead in its complaint or request summary judgment on an intentional discrimination claim under the FHA. Defendants did not respond in their answer to an intentional discrimination claim brought under the FHA. The court will thus examine ICP's intentional discrimination claim under 42 U.S.C. §§ 1982 and 1983.

discriminatory effect standard; an intent requirement would strip the statute of all impact on de facto segregation.").

C

ICP maintains in its motion for partial summary judgment that it has established beyond peradventure a prima facie case of racial discrimination under the FHA. To establish a prima facie case of discriminatory impact (also referred to as discriminatory effect), ICP must show "adverse impact on a particular minority group" or "harm to the community generally by the perpetuation of segregation." *Huntington Branch*, 844 F.2d at 937; *see also Arbor Bend*, 2005 WL 548104, at *12. ICP need not show that TDHCA acted with discriminatory intent or motive. *See Arbor Bend*, 2005 WL 548104, at *12. ICP's prima facie burden is not a heavy one.[11] *See Tex.*

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[11]In determining whether a plaintiff has established a prima facie case of discrimination under the FHA, some courts have utilized factors set forth by the Seventh Circuit in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977). *See Huntington Branch, NAACP v. Town of Huntington*, 668 F. Supp. 762, 785-87 (E.D.N.Y. 1987) (considering (1) strength of plaintiff's showing of discriminatory effect, (2) whether there is some evidence of discriminatory intent, (3) defendant's interest in taking action complained of, and (4) whether plaintiff seeks to compel defendant to provide housing or restrain defendant from interfering with other property owners), *rev'd*, 844 F.2d 926 (2d Cir. 1988). But these factors are not properly part of plaintiff's prima facie case; instead, they

Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). ICP need only provide evidence that raises an inference of discrimination because "we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *See id.* at 254 (citations omitted). If ICP establishes its prima facie case of discriminatory effect, discrimination is presumed. *See id.*

ICP has established that its clients are African-Americans, members of a protected class, who rely on government assistance with housing, and that TDHCA has disproportionately approved tax credits for non-elderly developments in minority neighborhoods and, conversely, has disproportionately denied tax credits for non-elderly housing in predominately Caucasian neighborhoods. According to ICP's evidence, from 1999-2008, TDHCA approved tax credits for 49.7%[12] of

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should be considered as part of the "final determination on the merits." *Huntington Branch*, 844 F.2d at 935-36 ("[T]reating the four factors as steps necessary to make out a prima facie case places too onerous a burden on [plaintiffs]."). Accordingly, the court will not consider the *Village of Arlington Heights* factors when deciding whether ICP has demonstrated a prima facie case.

[12]"Statistical analysis is admissible to establish disparate impact." *Budnick v. Town of Carefree*, 518 F.3d 1109, 1118 (9th Cir. 2008). The disparate impact analysis will "of necessity, rely heavily on statistical proof." *Owens v. Nationwide Mut. Ins. Co.*, 2005 WL 1837959, at *13 (N.D. Tex. Aug. 2, 2005) (Sanders, J.).

proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas.[13] ICP also analyzed data produced by defendants in discovery that indicates that 92.29% of LIHTC units in the city of Dallas were located in census tracts with less than 50% Caucasian residents.

ICP's evidence is supported by the "Talton Report," a report of the House Committee on Urban Affairs prepared for the House of Representatives, 80th Texas Legislature, which found that TDHCA "disproportionately allocate[s] federal low income housing tax credit funds to developments located in [areas with above average minority concentrations]." P. Oct. 2, 2009 App. 95. The Talton Report notes that, as of 2006, 77% of LIHTC units in the city of Dallas were in above-average minority areas, leading to "concentration problems." *Id.* A study by the U.S. Department of Housing and Urban Development ("HUD") reached a similar conclusion. *See id.* at 435, 486 (reporting that, from 1995-2006, 67% of LIHTC units in Texas were in greater than 50% minority areas, as opposed to 47% of all units; similarly, 69% of all LIHTC units in the city of

[13]Although the table that contains this information is presented as part of Dr. Thompson's report, he did not compile this information, and none of defendants' objections to his report applies. Further, defendants have not objected to the reliability of this data.

Dallas were in greater than 50% minority areas, as opposed to 45% of all units).

This evidence establishes that TDHCA disproportionately approves applications for non-elderly LIHTC units in minority neighborhoods, leading to a concentration of such units in these areas. This concentration increases the burden on ICP as it seeks to place African-American Section 8 clients in LIHTC housing in predominately Caucasian neighborhoods. Other courts have held that actions that cause disproportionate harm to African-Americans and produce a segregative impact on the entire community create a strong prima facie case. *See, e.g., Huntington Branch*, 844 F.2d at 938 (holding that failure to re-zone Caucasian neighborhood for LIHTC apartments perpetuated segregation and had adverse impact on Section 8 participants who were disproportionately minorities); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977) (same); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1219-20 (2d Cir. 1987) (holding that city perpetuated racial segregation in housing, in violation of FHA, where 96.6% of subsidized housing was in areas with 40% or greater minority population); *see also Dews v. Town of Sunnyvale*, 109 F.Supp.2d 526, 565-68 (N.D. Tex. 2000) (Buchmeyer, C.J.). Because ICP has adduced evidence that is uncontested, it has established beyond peradventure its prima facie case of

discrimination under the FHA.[14] *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 n.3 (1993) (noting that prima facie case can be established as a matter of law where plaintiff's facts are uncontested). The court therefore grants partial summary judgment holding that ICP has made a prima facie showing that defendants violated the FHA.

D

The court turns next to ICP's intentional discrimination claim brought under 42 U.S.C. §§ 1982 and 1983. ICP may use direct or circumstantial evidence to establish its prima facie case of intentional discrimination under §§ 1982 and 1983. *See Vill. of Arlington Heights*, 429 U.S. at 266. ICP has presented no direct evidence of discrimination, so the burden-shifting method of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies. *See Arbor Bend*, 2005 WL 548104, at *6.

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[14] ICP also requests that the court grant summary judgment holding that defendants' actions bear more heavily on minorities than on Caucasians, one factor in the *Village of Arlington Heights* circumstantial evidence framework. Although the court has authority to enter a partial summary judgment determining that material facts are not genuinely at issue, *see* Rule 56(d), it declines to do so as to this single circumstantial-evidence factor.

E

ICP moves for summary judgment establishing its prima facie case of discrimination under § 1982 and the Fourteenth Amendment, actionable under § 1983.[15]

Section 1982 "prohibits 'all racial discrimination, private as well as public,' with respect to property rights." *Evans v. Tubbe*, 657 F.2d 661, 663 n.2 (5th Cir. Unit A Sept. 1981) (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968)). "To state a claim under § 1983, a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Moore v. Dallas Indep. Sch. Dist.*, 557 F.Supp.2d 755, 761 (N.D. Tex. 2008) (Fitzwater, C.J.) (quoting *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994)), *aff'd*, 370 Fed. Appx. 455 (5th Cir. 2010). ICP

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[15]The court uses the term "prima facie" to mean the establishment of a legally mandatory, rebuttable presumption in the *McDonnell Douglas* framework, recognizing that in the more general sense, "prima facie" is a phrase used to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. *See Burdine*, 450 U.S. at 254 n.7; *see also Askin v. Firestone Tire & Rubber Co.*, 600 F. Supp. 751, 755 (D. Ky. 1985) ("Even though the prima facie case may have been enough to shift the burden of production to the defendant, it is not necessarily enough to entitle the plaintiff to submit his or her case to the jury.").

alleges that defendants have violated the Equal Protection Clause of the Fourteenth Amendment, which prohibits intentional racial segregation in government-assisted housing. *See, e.g., Banks v. Dallas Hous. Auth.*, 119 F.Supp.2d 636, 638 n.3 (N.D. Tex. 2000) (Kaplan, J.).

To prove claims under § 1982 and the Equal Protection Clause, ICP must demonstrate discriminatory intent, not merely discriminatory effect. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S 188, 195 (2003) (quoting *Vill. of Arlington Heights*, 429 U.S. at 265 ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.")); *see also Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986) (noting that although FHA claim requires only showing of discriminatory effect, § 1982 claim requires finding of intentional racial discrimination); *Dews*, 109 F.Supp.2d at 570 ("In contrast to claims brought under the [FHA], plaintiffs suing under §§ 1981, 1982, 1983 and 2000d must prove discriminatory intent.").

ICP need only present enough evidence to give rise to an inference of discrimination. *See Kennedy v. City of Zanesville*, 505 F.Supp.2d 456, 493 (S.D. Ohio 2007). The prima facie case is not inflexible, and the specific facts required to be proved may vary depending on the factual situation. *See id.* at 493-94. "It is relatively easy.

. . for a plaintiff to establish a *prima facie* case[.][16] *Arbor Bend*, 2005 WL 548104, at *7 (quoting *Britt v. Grocers Supply Co.*, 978 F.2d 1441, 1450 (5th Cir. 1992)).

F

ICP has presented enough evidence to give rise to an inference that TDHCA discriminated on the basis of race. Evidence that may give rise to an inference of discrimination includes statistical proof, comparative evidence, proof of a suspect sequence of events, or evidence of a subjective decisionmaking process. *See Kennedy*, 505 F.Supp.2d at 493-94.

First, ICP has presented statistical and comparative evidence that may give rise to an inference of discriminatory intent. ICP alleges that TDHCA is more likely to approve LIHTC developments in Caucasian neighborhoods if the likely tenants are Caucasian. ICP highlights the fact that, in Caucasian neighborhoods, elderly LIHTC housing is approved more often than non-elderly LIHTC housing, and elderly residents are more likely to be Caucasian. According to TDHCA data, from

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[16]When a summary judgment motion on a discrimination claim is evaluated in the *McDonnell Douglas* framework, summary judgment is most appropriate at the pretext stage, not when addressing the plaintiff's prima facie case or the defendant's burden of producing evidence of a legitimate, nondiscriminatory reason. *See Arbor Bend*, 2005 WL 548104, at *7. It is thus relatively easy for ICP to establish a prima facie case and for TDHCA to meet its burden of production. *See id.*

1999 to 2008, TDHCA approved tax credits for 70.2% of the proposed elderly units in 90% or greater Caucasian census tracts. TDHCA approved just 37.4% of proposed non-elderly units in the same tracts.

ICP also presents evidence of a suspect sequence of events, and that TDHCA employs a subjective decisionmaking process. ICP relies on evidence that, from 1991-1993, TDHCA considered as one of its LIHTC selection criteria whether a development would provide desegregated housing opportunities. In 1994, TDHCA eliminated this criterion despite the concern about segregation in Dallas housing widely noted at the time due to the contemporaneous Dallas housing desegregation case. *See Walker v. City of Mesquite*, No. 3:85-CV-1210-R (N.D. Tex. Filed June 25, 1985) (Buchmeyer, C.J.). ICP suggests that the "repeal" of TDHCA's written desegregation preference in favor of TDHCA's discretion is related directly to TDHCA's intentional discrimination. P. Oct. 22, 2009 Br. 18.

For direct evidence of intent, ICP relies on contemporary statements made by TDHCA officials in board meetings as indications that race influenced defendants' actions. For example, at a February 2003 board meeting, TDHCA board member Shadrick Bogany ("Bogany") stated: "I'm tired of [these projects] being put in minority communities all the

time."[17] P. Oct. 2, 2009 App. 871. Later in the board meeting, he repeated, "And you know, it's just—— it's amazing to me how we constantly concentrate these all over——in just the minority communities." *Id.* at 873. Bogany also protested at a later meeting that the board was creating a "tax-credit city" in a minority neighborhood in Houston. He argued that the TDHCA should not approve a proposed development because the minority neighborhood already contained 17 LIHTC developments, and that the next QAP needed to address the concentration issue. He pointed to the underdevelopment and lack of retail in the area, and noted that the city representatives arguing for the development were not from the area. "[C]ontemporary statements by members of the decisionmaking body, minutes of its meetings, or reports" may be "highly relevant" in establishing discriminatory intent. *Vill. of Arlington Heights*, 429 U.S. at 267-68. Although Bogany's statements are not admissions of racial discrimination, the totality of the evidence presented by ICP gives rise to an inference of discriminatory intent.

The court holds that ICP has presented enough evidence to establish beyond peradventure an inference of discriminatory intent. The court thus

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[17]ICP points to other statements by board members, but the court's review indicates that they refer to the over-saturation of LIHTC units in some areas in Dallas; they express no concern that is specific to minority areas.

grants ICP summary judgment as to its prima facie case under §§ 1982 and 1983.

V

The court now turns to the remaining parts of defendants' Rule 12(c) motion and motion for summary judgment.

A

In their Rule 12(c) motion and motion for summary judgment, defendants request that the court hold that there is no genuine issue of material fact that their actions serve a compelling government interest, as required for ICP's FHA claim,[18] and that ICP has presented no evidence that defendants' actions are pretextual, as required for ICP's §§ 1982 and 1983 claims. Because, as explained below, the court holds that there are genuine issues of material fact as to whether defendants' reason is pretextual and as to whether TDHCA's actions serve a compelling government interest, the court denies defendants' Rule 12(c) motion for

[18]Although defendants' motion for summary judgment is styled a "no evidence" motion, under the applicable law, once ICP demonstrated a prima facie case of discrimination, the burden shifted to defendants to prove that their actions serve a compelling government interest. *See AHF Cmty. Dev., LLC v. City of Dallas*, 633 F.Supp.2d 287, 304 (N.D. Tex. 2009) (Fitzwater, C.J.). Therefore, to be entitled to summary judgment as to ICP's FHA claim, defendants must establish beyond peradventure that their actions further a compelling government interest.

judgment on the pleadings. The court must go beyond the pleadings and consider the evidence. The court will, however, consider defendants' arguments made in support of their Rule 12(c) motion in deciding their summary judgment motion.

B

The court considers first defendants' motion for summary judgment as to ICP's FHA claim. Because ICP has established its prima facie case of discriminatory impact under the FHA, the burden shifts to defendants to prove that TDHCA's actions were in furtherance of a compelling government interest. *See AHF Cmty. Dev., LLC v. City of Dallas*, 633 F.Supp.2d 287, 304 (N.D. Tex. 2009) (Fitzwater, C.J.); *see also Arbor Bend*, 2005 WL 548104, at *12; *Huntington Branch*, 844 F.2d at 939. This interest must be bona fide and legitimate, and there must be no less discriminatory alternatives. *See Huntington Branch*, 844 F.2d at 939 (holding that "[t]he *McDonnell Douglas* test, however, is an intent-based standard for disparate treatment cases inapposite to the disparate impact claim asserted here. No circuit, in an impact case, has required plaintiffs to prove that defendants' justifications were pretextual.").

Defendants concede for purposes of their summary judgment motion that ICP has established a prima facie case, and they maintain that their actions further a compelling government interest. Defendants argue that the concentration of LIHTC developments in inner-city areas serves a

compelling government interest; that 26 U.S.C. § 42, the statute that establishes low-income housing tax credits, compels defendants to locate developments in the most impoverished areas; that it is impossible for defendants to comply with § 42 and achieve ICP's request that 50% of LIHTC developments be located in the suburbs; and that to the extent they conflict, § 42 controls over the FHA and § 1982.

To determine whether defendants' justification rises to the level of a compelling government interest, the court will consider "(1) whether [TDHCA's actions] in fact further[] the governmental interest asserted; (2) whether the public interest served by [TDHCA's actions] is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it; and (3) whether less drastic means are available whereby the stated governmental interest may be attained." *See Arbor Bend*, 2005 WL 548104, at *12 (internal quotation marks omitted). The court holds that TDHCA has not established beyond peradventure that its actions furthered a compelling government interest.

Defendants have failed to establish that TDHCA cannot comply with § 42 in a way that has less discriminatory impact on the community. They offer as their justification TDHCA's compliance with § 42(m)(1)(B)(ii), which provides that a qualified allocation plan gives preference to projects serving lowest-income tenants and projects that are located in qualified census tracts (areas designated by HUD as low-income). Defendants have failed to establish without genuine dispute that TDHCA cannot comply with both

§ 42 and the FHA. Defendants in fact acknowledge that there is no conflict between § 42 and the FHA. The court therefore denies defendants' motion for summary judgment as to ICP's FHA claim. *See, e.g., Huntington Branch*, 844 F.2d at 941 (holding that defendant town violated the FHA, reversing district court, and entering judgment for plaintiff NAACP).[19]

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[19]In *Arbor Bend* the plaintiff housing development filed an application with the defendant housing finance corporation seeking to become a participant in a tax-credit low-income housing program. *Arbor Bend*, 2005 WL 548104, at *1. The defendant denied the plaintiff's application for funding. *See id.* at *3. The plaintiff sued, alleging that the defendant's decision not to fund the development was motivated by race and familial status of the likely tenants. *See id.* The court held that, regardless of the plaintiff's establishment of a prima facie case of discrimination, the defendant's actions furthered the compelling government interest of not increasing the burden on already-overcrowded schools in the area. *See id.* at *12. The court thus granted defendant's motion for summary judgment. *See id.* at *17.

But in *Dews* Chief Judge Buchmeyer held that the defendant town's justifications for its zoning plan, which had a discriminatory effect, were not bona fide, legitimate, or the least discriminatory means of accomplishing zoning objectives. *Dews*, 109 F.Supp.2d at 568-69. The defendant maintained that its "one-unit-per-acre" zoning was necessary to protect public health and comply with regional obligations of environmental protection, transportation, air quality, and agricultural protection. *See id.* Chief Judge Buchmeyer found that this justification was pretextual and

C

The court now considers defendants' motion for summary judgment as to ICP's §§ 1982 and 1983 claims. Because ICP has established its prima facie case of discriminatory effect under *McDonnell Douglas*, the burden shifts to defendants to articulate a legitimate, nondiscriminatory reason for their actions. *See St. Mary's Honor Ctr.*, 509 U.S. at 506-07 (addressing racial discrimination claim under Title VII). Defendants' burden is one of production, not proof, and involves no credibility assessments. *See, e.g., West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 385 (5th Cir. 2003) (age discrimination case). "It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant[s], '[t]he ultimate burden of persuading the trier of fact that the defendant[s] intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *St. Mary's Honor Ctr.*, 509 U.S. at 507 (quoting *Burdine*, 450 U.S. at 253) (emphasis in original); *see also Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1559 (5th Cir. 1996) (holding that plaintiff did not present sufficient evidence of discrimination to find a violation of the FHA). "It is relatively easy for a defendant to articulate a legitimate, non-

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that less discriminatory zoning plans were available. *See id.* He held that the plaintiff had established liability under the FHA. *See id.* at 569.

discriminatory reason for his decision." *Arbor Bend*, 2005 WL 548104, at *7 (quoting *Britt*, 978 F.2d at 1450).

Once defendants have produced a nondiscriminatory reason, the burden shifts back to ICP to prove that defendants' proffered reason is pretextual, which is circumstantial evidence of discrimination. *See West*, 330 F.3d at 385 ("It is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." (internal quotation marks omitted)); *St. Mary's Honor Ctr.*, 509 U.S. at 511 (Title VII case) (holding that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . But the [appellate court's] holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff" is incorrect). "[P]laintiffs must present evidence that would allow a rational factfinder to make a reasonable inference that race was a determinative reason for the housing decision." *Jim Sowell Constr. Co. v. City of Coppell*, 61 F.Supp.2d 542, 546 (N.D. Tex. 1999) (Fitzwater, J.) (citing *Simms*, 83 F.3d at 1556). But the Supreme Court has held that "discrimination may well be the most likely alternative explanation" for defendants' actions once the plaintiff offers evidence that defendants' reason is pretextual. *See Reeves*, 530 U.S. at 148 ("[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."); *see also Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 223 (5th Cir. 2000). The

Court cautioned, however, that there are instances where although plaintiff has established a prima facie case of discrimination and offered evidence that defendants' justification is false, no rational factfinder could conclude that defendants' actions were discriminatory. *See Reeves*, 530 U.S. at 148.

D

Defendants offer a nondiscriminatory reason for their actions by pointing to the statute establishing low-income housing tax credits, 26 U.S.C. § 42.[20] They argue that the statute specifically encourages awarding tax credits to developments in the most impoverished neighborhoods, which are often minority areas.[21] In

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[20]*See also supra* § V(B).

[21]Defendants suggest that this case should be resolved under principles of statutory construction. Because they maintain that they are simply following the mandates of § 42, they argue that their actions must be legal, even if they violate the FHA or § 1982, because § 42 is the most recent and specific statute. The court declines to evaluate this case on this basis.

First, ICP alleges violations of statutes and of the Fourteenth Amendment. Second, the FHA, § 1982, and § 42 are not in direct tension, and it is not clear that TDHCA could not comply with the three statutes. Nothing in § 42 requires that entities like TDHCA act in a discriminatory manner or in violation of the FHA or § 1982. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed

other words, they maintain that the concentration of LIHTC units in minority areas is the direct result of the mandate of § 42, which requires that defendants give preference to developments "serving the lowest income tenants" and "located in 'qualified census tracts.'" Ds. Oct. 2, 2009 Br. 13.[22] Because defendants have produced a nondiscriminatory reason for their actions, the court need not make any credibility assessment of this proffered reason at this time. *See Kretchmer v. Eveden, Inc.*, 374 Fed. Appx. 493, 495 (5th Cir. 2010) (per curiam). The court holds that defendants have met their burden of production as to the second step of *McDonnell Douglas*.

E

The court now turns to the third step and holds that ICP has presented sufficient evidence that defendants' proffered reason is pretextual to require a trial. *See, e.g., Britt*, 978 F.2d at 1450 (age discrimination case) ("In the context of summary judgment . ., the question is

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congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Therefore, the jury must decide whether defendants' actions violated the FHA, § 1982, and § 1983, even if they demonstrate that TDHCA followed § 42.

[22]In particular, §§ 42(d)(5)(B)(i) and (ii) specifically allow a proposed development in a "qualified census tract" (a low-income area) to receive 130% of the tax credits a LIHTC development not in such an area would receive.

not whether the plaintiff proves pretext, but rather whether the plaintiff raises a genuine issue of fact regarding pretext."). The following examples are illustrative.[23]

First, ICP has produced evidence that only 34% of all LIHTC units are in qualified census tracts, and that only 39.8% of all LIHTC units in qualified census tracts received the 130% bonus. Under TDHCA's QAP, applications are awarded points if they meet desirable selection criteria, and can receive over 200 points. *See* 10 Tex. Admin. Code § 50.9. A proposed location in a qualified census tract earns an application just one point, equal to the bonus given to developments with a gazebo. *See* 10 Tex. Admin. Code §§ 50.9(i)(25) and (h)(4)(A)(ii)(III). Thus ICP has presented evidence that TDHCA's primary justification, that its actions are required by § 42, is relevant to only 34% of TDHCA's developments.

Second, ICP points again to the evidence of discriminatory intent discussed *supra* at § IV(F). Circumstantial evidence of discriminatory intent allows a jury to make a reasonable inference that race was a determinative reason for the housing decision. *See Vill. of*

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[23]When this court denies rather than grants summary judgment, it typically does not set out in detail the evidence that creates a genuine issue of material fact. *See, e.g., Swicegood v. Med. Protective Co.*, 2003 WL 22234928, at *17 n.25 (N.D. Tex. Sept. 19, 2003) (Fitzwater, J.).

Arlington Heights, 429 U.S. at 266-68; *Jim Sowell Constr. Co.*, 61 F.Supp.2d at 546-47 (listing non-exhaustive guiding factors, including (1) the discriminatory effect of the official action, (2) the historical background of the decision, (3) the specific sequence of events leading up to the challenged decision, (4) departures from the normal procedure, (5) departures from the normal substantive factors, and (6) the legislative or administrative history of the decision). ICP has presented evidence of the discriminatory effect of TDHCA's tax credit allocation. ICP has also produced minutes from TDHCA board meetings in which tax credits for minority-area developments were approved even though the areas had a high concentration of low-income housing developments and despite some board members' objections.

Considering all of this evidence together, the court holds that ICP has raised a genuine issue of material fact as to the pretextual nature of defendants' proferred justification. ICP has presented some evidence that defendants' QAP and actual practices do not corroborate their contention that building in qualified census tracts is a true priority. Instead, the disproportionate approval of units in Caucasian areas when the likely tenants are Caucasian allows a reasonable jury to infer that defendants' reason is pretextual. Because there are genuine issues of material fact, the court denies defendants' motion for summary judgment as to ICP's §§ 1982 and 1983 claims.

* * *

ICP's October 2, 2009 motion for partial summary judgment is granted. Defendants' October 2, 2009 motion for judgment on the pleadings and their October 2, 2009 motion for summary judgment are denied. ICP's November 9, 2009 motion for leave to file supplemental appendix is denied as moot.

SO ORDERED.

September 28, 2010.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES PROJECT, INC.,	§	
Plaintiff,	§	
	§	Civil Action No.
	§	3:08-CV-0546-D
VS.	§	
THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION
AND ORDER

This lawsuit challenging the Texas Department of Housing and Community Affairs' ("TDHCA's") allocation of Low Income Housing Tax Credits ("LIHTC") in the Dallas metropolitan area requires the court to decide whether plaintiff has proved that TDHCA intentionally discriminated based on race, in violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1982, or that TDHCA's allocation decisions had a disparate racial

impact, in violation of §§ 3604(a) and 3605(a) of the Fair Housing Act ("FHA"). Following a summary judgment decision and a bench trial, and for the reasons that follow,[1] the court finds that plaintiff has proved its disparate impact claim under the FHA, but it otherwise finds in favor of defendants.

I

A

This is an action by plaintiff The Inclusive Communities Project, Inc. ("ICP") against defendants TDHCA and its Executive Director and board members in their official capacities under the FHA, the Fourteenth Amendment (actionable under 42 U.S.C. § 1983), and 42 U.S.C. § 1982. ICP is a non-profit organization that seeks racial and socioeconomic integration in the Dallas metropolitan area. In

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[1] The court sets out in this memorandum opinion and order its findings of fact and conclusions of law. *See* FED. R. CIV. P. 52(a)(1). Although the court has carefully considered the trial testimony and exhibits, this memorandum opinion and order has been written to comply with the level of detail required in this circuit for findings of fact and conclusions of law. *See, e.g., Century Marine Inc. v. United States*, 153 F.3d 225, 231 (5th Cir. 1998) (discussing standards). The court has not set out its findings and conclusions in punctilious detail, slavishly traced the claims issue by issue and witness by witness, or indulged in exegetics, parsing or declaiming every fact and each nuance and hypothesis. It has instead written a memorandum opinion and order that contains findings and conclusions that provide a clear understanding of the basis for the court's decision. *See id.*

particular, ICP assists low-income, predominately African-American families who are eligible for the Dallas Housing Authority's Section 8 Housing Choice Voucher program ("Section 8") in finding affordable housing in predominately Caucasian,[2] suburban neighborhoods. Because under the LIHTC program a development that receives tax credits cannot refuse housing solely because a person is using a Section 8 voucher, it is important to ICP where the developments are located in the Dallas metropolitan area.

This lawsuit arises from TDHCA's allocation of LIHTC in the Dallas metropolitan area. Under § 42 of the Internal Revenue Code ("I.R.C."), the government provides tax credits that a state distributes to developers through a designated state agency. *See id.* TDHCA is the agency designated by the Texas Legislature to administer the program in Texas. *See* Tex. Gov't Code Ann. § 2306.053(b)(10) (West 2008) ("The department may ... administer federal housing, community affairs, or community development programs, including the low income housing tax credit program."). Developers apply to TDHCA for tax credits, which can be sold to finance construction of a housing project.

TDHCA issues two types of LIHTC: 4% tax credits[3] and 9% tax credits. The 9% tax credits are distributed on

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[2] In this memorandum opinion and order, the term "Caucasian" means white persons who are neither Hispanic nor Latino.

[3] It appears that the actual name of 4% tax credits is "Tax-Exempt Bond." *See* Tr. 2:12 (referring to P. Ex. 125 at 60 and noting that

an annual cycle and are generally oversubscribed. Certain federal and state laws dictate, at least in part, the manner in which TDHCA can select the applications that will receive 9% tax credits. First, I.R.C. § 42 requires that the designated state agency adopt a "Qualified Allocation Plan" ("QAP") that prescribes the "selection criteria." See id. at § 42(m)(1)(A)-(B).[4] The QAP must include, *inter alia*, certain selection criteria, *see id.* at § 42(m)(1)(C),[5] and preferences, *see id.* at

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the term "Tax-Exempt Bond Developments" is "4% tax credits."); P. Ex. 1 at 19; P. Ex. 125 at 28. The court will use the terms "4% tax credit" and "4% tax credits" because the parties and TDHCA appear to do so. See P. Ex. 490 at 17 ("[T]he non-competitive, or the 4 percent credits, as you'll normally hear us refer to them in the Board meetings . . . [are] allocated with private activity bonds."); *see also, e.g.*, Tr. 4:11-15.

[4] ICP also calls the selection criteria the 9% point scoring and ranking system. This may result from the fact that Texas law obligates TDHCA to score and rank applications against selection criteria that prioritize certain criteria. *See* Tex. Gov't Code Ann. § 2306.6710(b) (West 2001).

[5] I.R.C. § 42(m)(1)(C) provides, in relevant part:

> The selection criteria set forth in a qualified allocation plan must include—
>
> (i) project location,
>
> (ii) housing needs characteristics,
>
> (iii) project characteristics, including whether the project includes the use of existing housing as part of a community revitalization plan,
>
> (iv) sponsor characteristics,

§ 42(m)(1)(B);[6] otherwise, "zero" housing credit dollars will be provided, *see id.* at § 42(m)(1)(A). Second, the Texas Government Code regulates how TDHCA administers the LIHTC program. The Code requires

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(v) tenant populations with special housing needs,

(vi) public housing waiting lists,

(vii) tenant populations of individuals with children,

(viii) projects intended for eventual tenant ownership,

(ix) the energy efficiency of the project, and

(x) the historic nature of the project.

Id.

[6] I.R.C. § 42(m)(1)(B) provides, in relevant part:

> [T]he term "qualified allocation plan" means any plan— . . which . . . 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[.]

Id.

TDHCA to adopt annually a QAP and corresponding manual. *Id.* at § 2306.67022.[7]

It also sets out how TDHCA is to evaluate applications. TDHCA must first "determine whether the application satisfies the threshold criteria" in the QAP. *Id.* at § 2306.6710(a). Applications that meet the threshold criteria are then "score[d] and rank[ed]" by "a point system" that "prioritizes in descending order" ten listed statutory criteria (also called "above-the-line criteria"), which directly affects TDHCA's discretion in creating the "selection criteria" in each QAP. *Id.* at § 2306.6710(b).[8] The Texas Attorney General has

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[7] Section 2306.67022 was amended in 2011. It now requires TDHCA to adopt a QAP and corresponding manual only biennially, with the discretion to do so annually. *See* Tex. Gov't Code Ann. § 2306.67022 (West 2011). The court refers to the 2001 version, instead of the 2011 amended version, because the parties rely on the 2001 version. And the court is primarily relying on the statute to provide a basic understanding of the Texas LIHTC program during the period that preceded the filing of this lawsuit. As of the date of this memorandum opinion and order, it appears that it is still the TDHCA's practice to adopt a QAP annually. *See* Ds. Dec. 7, 2011 Br. 13 ("The TDHCA administers its LIHTC program through a unique, legislatively-mandated QAP re-written each year.").

[8] The ten statutory criteria are:

> (A) financial feasibility of the development based on the supporting financial data required in the application that will include a project underwriting pro forma from the permanent or construction lender;

interpreted this provision to obligate TDHCA to "use a point system that prioritizes the [statutory] criteria in that specific order." Tex. Att'y Gen. Op. No. GA-0208, 2004 WL 1434796, at *4 (2004). Although the Texas Government Code does not mandate the points to be

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> (B) quantifiable community participation with respect to the development, evaluated on the basis of written statements from any neighborhood organizations on record with the state or county in which the development is to be located and whose boundaries contain the proposed development site;
>
> (C) the income levels of tenants of the development;
>
> (D) the size and quality of the units;
>
> (E) the commitment of development funding by local political subdivisions;
>
> (F) the level of community support for the application, evaluated on the basis of written statements from the state representative or the state senator that represents the district containing the proposed development site;
>
> (G) the rent levels of the units;
>
> (H) the cost of the development by square foot;
>
> (I) the services to be provided to tenants of the development; and
>
> (J) whether, at the time the complete application is submitted or at any time within the two-year period preceding the date of submission, the proposed development site is located in an area declared to be a disaster under Section 418.014[.]

Tex. Gov't Code Ann. § 2306.6710(b) (West 2007).

accorded each statutory criterion, "the statute must be construed to require [TDHCA] to assign more points to the first criterion than to the second, and so on, in order to effectuate the mandate that the scoring system 'prioritiz[e the criteria] in descending order.'" *Id.* (quoting Tex. Gov't Code Ann. § 2306.6710(b)(1) (West 2004)). And while TDHCA can consider other criteria and preferences (also called "below-the-line" criteria), it "lacks discretionary authority to intersperse other factors into the ranking system that will have greater points than" the statutory criteria. *Id.* at *6 (citation and internal quotation omitted). Once TDHCA adopts a QAP, it submits the plan to the Governor, who can "approve, reject, or modify and approve" it. Tex. Gov't Code Ann. § 2306.6724(b)-(c) (West 2001). Once approved, TDHCA staff review the applications in accordance with the QAP, underwrite applications in order "to determine the financial feasibility of the development and an appropriate level of housing tax credits," *id.* at § 2306.6710(b)(1)(A) & (d), and submit their recommendations to TDHCA. *See id.* at § 2306.6724(e). TDHCA then reviews the staff recommendations and issues final commitments in accordance with the QAP. *See id.* at § 2306.6724(e)-(f).

The 4% tax credit, on the other hand, is a non-competitive program, available to applicants on a year-round basis. *See* P. Ex. 1 at 19, 46. The federal government provides states private activity bonds, *see* I.R.C. §§ 42 and 142, that are distributed in Texas by several issuers, including TDHCA. Developers can apply to TDHCA for a 4% tax credit to be allocated in addition

to a bond, particularly the multifamily housing bond. In awarding the tax credit, TDHCA "reviews the application for threshold, eligibility and then the development is underwritten." P. Ex. 1 at 20; *see also* Tex. Gov't Code Ann. § 2306.67021 (West 2001) (providing that, with the exception of § 2306.6703 regarding eligibility, subchapter 2306 DD (i.e., from § 2306.6701-.6723) "does not apply to the allocation of housing tax credits to developments financed through the private activity bond program"). In particular, applications for the 4% tax credit are not subject to scoring under the selection criteria. *See* P. Ex. 125 at 64 (the 2008 QAP, for example, relieves 4% tax credit applications or "Tax-Exempt Bond Developments" from certain sections of the QAP, including § 50.9(I) regarding "Selection Criteria."); *see also* Tr. 4:12 ("[4% applications] do[] [not] go through a competitive scoring model where the Board makes a decision on a particular group of projects at any given time.") If a developer seeks a multifamily bond allocation from TDHCA, it applies to TDHCA, which reviews the application and submits it to the Bond Review Board ("BRB"), a separate agency, for the final determination of whether to issue an underlying bond.

B.

ICP alleges that, despite federal and state laws governing the QAP, TDHCA is permitted under Texas law to exercise discretion in making final decisions regarding the allocation of both 4% and 9% tax credits. It maintains that TDHCA uses this discretion to make housing and financial assistance for housing construction

unavailable because of race, in violation of §§ 3604(a) and 3605(a) of the FHA. ICP also alleges that TDHCA has used race as a factor in allocating tax credits under the LIHTC program, in violation of the Fourteenth Amendment and of § 1982, which requires that defendants give all United States citizens the same right to lease property as Caucasian citizens.

In a prior opinion in this case, the court addressed the parties' cross-motions for summary judgment. *See Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 749 F.Supp.2d 486 (N.D. Tex. 2010) (Fitzwater, C.J.) ("*ICP II*"). It held that ICP was entitled to partial summary judgment establishing the prima facie case component of its claims under the FHA, § 1982, and the Fourteenth Amendment (actionable through § 1983). *Id.* at 500 (FHA) and 502 (§ 1982 and Fourteenth Amendment (actionable through § 1983)).

Because ICP had met this burden, defendants were obligated with respect to ICP's FHA claim (which was limited to a disparate impact claim, *id.* at 498 n.10) to prove that TDHCA's actions were in furtherance of a compelling government interest that was bona fide and legitimate, and that there were no less discriminatory alternatives. *Id.* at 503. The court held that defendants had not met their summary judgment burden of establishing that TDHCA's actions furthered a compelling government interest. In particular, they did not establish that TDHCA could not comply with both I.R.C. § 42 and the FHA. *Id.* at 504.

Concerning ICP's intentional discrimination claims under § 1982 and the Fourteenth Amendment (§ 1983), the court held that defendants had met their burden of producing evidence of a nondiscriminatory reason for their actions, *id.* at 506, but that ICP had "presented sufficient evidence that defendants' proffered reason is pretextual to require a trial." *Id.*

The parties presented this case in a bench trial that commenced on August 29, 2011 and concluded on September 1, 2011. The court granted the parties' requests that they present their closing arguments by written submissions. The final submissions were filed on December 21, 2011.[9]

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[9] The parties have lodged numerous objections to the testimony and exhibits. Many objections are immaterial because the court did not rely on the evidence in question when making its decisions on the merits, or the court relied on the evidence for a limited purpose that is unaffected by whether the objection is well taken. In a bench trial, it is permissible for the court to hear evidence that it later determines is inadmissible or immaterial to its decisions on the merits. *See Harris v. Rivera*, 454 U.S. 339, 346 (1981) (holding that, in a bench trial, the court is presumed capable of hearing otherwise inadmissible evidence and disregarding that evidence when making decisions). Regarding the evidence on which the court did rely in reaching its decision, the principal objections appear to challenge the relevance of certain evidence and the qualifications of certain witnesses to give expert testimony. The court overrules the relevance objections that are related to the evidence on which the court has relied in reaching its decision. The court concludes that the evidence is relevant, within the meaning of Fed. R. Evid. 401, to whether defendants' actions violated the FHA, the Fourteenth Amendment, and/or § 1982. To the extent the parties challenge the

II

The court considers together ICP's claims for intentional discrimination under the Equal Protection Clause of the Fourteenth Amendment (actionable under § 1983) and § 1982.

A

The Equal Protection Clause of the Fourteenth Amendment "prohibits intentional racial segregation in government-assisted housing." *ICP II*, 749 F.Supp.2d at 501 (citing *Banks v. Dall. Hous. Auth.*, 119 F.Supp.2d 636, 638 n. 3 (N.D. Tex. 2000) (Kaplan, J.)). "To state a claim under § 1983, a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Id.* (quoting *Moore v. Dall. Indep. Sch. Dist.*, 557 F.Supp.2d 755, 761 (N.D. Tex. 2008) (Fitzwater, C.J.), *aff'd*, 370 Fed. Appx. 455 (5th Cir. 2010)). Section 1982 "prohibits all racial discrimination, private as well as public, with respect to property rights." *Id.* (quoting *Evans v. Tubbe*, 657 F.2d 661, 663 n. 2 (5th Cir. Unit A Sept. 1981)) (internal quotation marks omitted). "To prove claims under § 1982 and the

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admissibility of witnesses who were offered as experts, the court holds that the party offering the testimony has either satisfied the requirements for expert testimony under Fed. R. Evid. 702 or that the witness was testifying based on personal knowledge as a fact witness rather than offering scientific, technical, or other specialized knowledge.

Equal Protection Clause, ICP must demonstrate discriminatory intent, not merely discriminatory effect." *Id.* (citing *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 195 (2003)); *see also Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986) (noting that although FHA claim requires only showing of discriminatory effect, § 1982 claim requires finding of intentional racial discrimination).

ICP has not introduced direct evidence of intentional discrimination. Discriminatory intent can be proved, however, by circumstantial evidence. *See Vill. of Arlington Heights v. Metro. Hous. Dep't*, 429 U.S. 252, 266-68 (1977); *Jim Sowell Constr. Co. v. City of Coppell*, 61 F.Supp.2d 542, 546-47 (N.D. Tex. 1999) (Fitzwater, J.) (listing non-exhaustive guiding factors, including (1) the discriminatory effect of the official action, (2) the historical background of the decision, (3) the specific sequence of events leading up to the challenged decision, (4) departures from the normal procedure, (5) departures from the normal substantive factors, and (6) the legislative or administrative history of the decision). When a plaintiff does not present direct evidence of discrimination, the burden-shifting method of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies. *ICP II*, 749 F.Supp.2d at 500. The court granted partial summary judgment in *ICP II*, holding that ICP had established a prima facie case of discriminatory intent. *Id.* at 502. The court recognizes that the "*McDonnell Douglas* formula is applicable only in a directed verdict or summary judgment situation, and is not the proper vehicle for evaluating a

case that has been fully tried on the merits." *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 575 (5th Cir. 2004) (internal quotation marks omitted) (quoting *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279, 285 (5th Cir. 1986)). But the court as trier of fact can consider ICP's prima facie showing, and defendants' explanation for their challenged conduct, when deciding whether ICP has proved intentional discrimination. "The existence of the prima facie case, together with evidence that defendants' proffered explanation for its challenged conduct is pretextual, is sufficient to find intentional discrimination." *ICP II*, 749 F.Supp.2d at 498 (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000)). And "the strength of the prima facie case can be relevant in determining whether defendants' proffered explanation for their actions is in fact pretextual." *Id.* (citing *Prejean v. Radiology Assocs. of Sw. La. Inc.*, 342 Fed. Appx. 946, 950 (5th Cir. 2009) (per curiam)).

B

ICP alleges that TDHCA intentionally discriminates based on race by disproportionately approving LIHTC in predominantly minority neighborhoods and disproportionately denying LIHTC in predominantly Caucasian neighborhoods. As noted, ICP has not offered direct evidence of discriminatory intent; instead, it relies on circumstantial proof, including evidence that TDHCA's justifications for the discriminatory impact of its LIHTC decisions are pretextual.

ICP failed to prove by a preponderance of the evidence that TDHCA intentionally discriminates based on race in its LIHTC decisions. Without discussing the trial evidence in punctilious detail, *see supra* note 1, the court finds that TDHCA offered evidence of its obligation to create the selection criteria of each QAP in accordance with governing federal and state law. TDHCA also introduced proof that its staff are responsible for initially scoring applications according to the QAP and presenting recommendations for TDHCA's approval or denial. Multiple witnesses credibly testified that, in making decisions, TDHCA does not act with intent to discriminate.

Moreover, ICP did not prove that TDHCA intentionally discriminates when exercising its limited discretion. ICP asserts that TDHCA can in its discretion ignore the selection criteria made mandatory by the Texas Legislature by issuing forward commitments to 9% tax credit applications and by approving 4% tax credit applications, and that this discretion is used to intentionally discriminate. The court finds that TDHCA offered credible evidence of nondiscriminatory reasons for approving or denying every application that ICP alleges was improperly approved or denied.[10] For example, ICP maintains that

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[10] Although the court finds below, *see infra* § III(C), that TDHCA could have used its discretion to issue forward commitments in order to decrease the disparate impact of its decisions, ICP did not prove by a preponderance of the evidence that TDHCA intentionally

TDHCA intentionally discriminated in denying a 4% tax credit to the Primrose at Stonebrook project located in a majority Caucasian area. The court finds that TDHCA denied this application because the proposed project consisted of only three-bedroom units, and that in 2004 TDHCA was using its limited 4% tax credit allocations for projects that had a mix of different size units so that, among other reasons, single mothers could afford units in the development.[11]

ICP also failed to prove that TDHCA withheld its discretionary authority with the intent to perpetuate a disparate impact. In fact, there are several instances when the TDHCA Board attempted to use its limited discretion to deconcentrate LIHTC developments in high-minority areas and encourage development in "high opportunity areas" preferred by ICP and other

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discriminates on the basis of race when deciding whether to make a forward commitment.

[11] The court finds that other challenged examples were also approved or denied for nondiscriminatory reasons. For instance, the Chaparral Townhomes project was a 9% tax credit applicant that scored well enough to receive LIHTC, but TDHCA denied the application because the developer was a former TDHCA board member who had in the past received four LIHTC allocations. In response to recent criminal charges against a former TDHCA board member and pressure from the Texas Legislature to spread tax credits among developers, TDHCA determined that it should avoid the appearance of impropriety and adhere to the Legislature's request by not awarding tax credits to a former board member who had received LIHTC on four prior occasions. The credits were given instead to a developer who had never received LIHTC.

organizations. For example, in 2003, TDHCA board member Shadrick Bogany stated during a Board meeting that he was "tired" of the Board's approving LIHTC projects in a manner that led to the concentration of LIHTC projects in high-minority areas. Shortly thereafter, the Texas Legislature responded to concerns about the concentration of LIHTC in high-minority areas by amending the statutes that governed the LIHTC program, and those changes were implemented by TDHCA in the 2004 QAP. The new rules sought to deconcentrate housing by imposing certain limitations on LIHTC project concentrations, such as the one mile/one year rule, the one mile/three year rule, and the twice per capita rule. The one mile/one year rule prevents TDHCA from approving two LIHTC projects within one linear mile of each other within the same allocation year in counties with populations exceeding one million. The one mile/three year rule prevents TDHCA from approving an LIHTC project that is within one linear mile of the same type of LIHTC project built within three years preceding the new project application, unless the local government votes specifically to allow the construction. And the twice per capita rule requires developers who propose a project in a municipality or county that contains more than twice the state average of units per capita supported by LIHTC to obtain a resolution from the municipality or county approving the new development.

Moreover, TDHCA independently took steps to deconcentrate LIHTC projects in high-minority areas. After ICP's President testified before TDHCA in 2004

and requested that, as part of the selection criteria, TDHCA give four additional points to projects that further fair housing goals, TDHCA changed the 2005 QAP to include the granting of points to projects in "high opportunity areas," and it increased from four to seven the requested points for certain "high opportunity area" categories.[12] These changes, along with evidence of other TDHCA attempts to deconcentrate LIHTC projects in high-minority areas, demonstrate that TDHCA did not intentionally discriminate by withholding its discretionary authority to perpetuate a discriminatory impact. And there are other examples of how TDHCA attempted to address the concentration issue, such as the 130% basis boost given for projects in high opportunity areas. *See* Ds. Nov. 9, 2011 Br. 23-28 (addressing trial evidence regarding several examples).

ICP has failed to prove that TDHCA used the inclusive capture rate[13] to intentionally discriminate by steering developers to propose LIHTC projects in high-minority areas. The inclusive capture rate is not part of the 9% selection criteria, but is instead used during the

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[12] In response to a complaint to the Governor by Representative Robert Talton that granting seven points for developments in certain high opportunity areas encouraged development in high-income areas rather than low-income areas where the housing was needed, the Governor rejected the 2005 QAP. After TDHCA lowered the seven point categories to four points, the Governor approved the QAP.

[13] TDHCA no longer uses the term "inclusive capture rate." It renamed and simplified the formula.

underwriting process to ensure that projects are financially feasible.[14] The inclusive capture rate is calculated by comparing the supply of units in a given area to tenant demand for low-income housing in the area. ICP alleges that the use of the inclusive capture rate leads to concentrations of LIHTC projects in high-minority areas because that is where a disproportionate number of low-income housing tenants live; thus if a developer wants to increase the chances of passing the underwriting analysis, it will propose a project in a high-minority area. The court finds that TDHCA uses the inclusive capture rate to measure the financial feasibility of a proposed development, not to intentionally discriminate based on race. Financial feasibility is of great concern to TDHCA because LIHTC allocated to projects that fail are largely lost; those lost credits in most instances cannot be allocated to other projects. Thus if a LIHTC project fails, Texas loses low-income housing units that would otherwise have been constructed and available.

Finally, ICP failed to prove that TDHCA's justifications for the prima facie showing of disparate impact are pretextual. Again, the court need not explain its reasoning for rejecting each of ICP's arguments. *See supra* note 1. These two are illustrative.

ICP posits that one of TDHCA's asserted justifications for the disparate impact—that TDHCA

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[14] A project will not be allocated LIHTC until it passes the underwriting analysis.

does not control the locations of LIHTC projects because developers choose them—is pretextual because TDHCA, through the use of the inclusive capture rate, steers developers to propose projects in high-minority neighborhoods. According to ICP, the inclusive capture rate has this effect because the rate TDHCA requires for a project to pass the underwriting analysis effectively dictates that a high number of low-income tenants must live in the area of the proposed development. As the court has already discussed, however, TDHCA uses the inclusive capture rate during the underwriting process as a measurement of a project's financial feasibility. ICP has therefore failed to prove that TDHCA's justification that developers choose the LIHTC sites is pretextual.[15]

ICP also maintains that TDHCA's justification that developers choose project sites is pretextual because TDHCA uses a less demanding inclusive capture rate for elderly projects, which typically have fewer minority residents, than for non-elderly projects, which typically have more minority residents. ICP contends that this results in steering only non-elderly projects into high-minority areas. The court finds from the credible evidence, however, that TDHCA used different rates because, *inter alia*, the turnover rate in elderly units is much lower than in non-elderly units, thus requiring a

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[15] TDHCA does influence the locations of the LIHTC projects by selecting which projects are awarded LIHTC. To the extent TDHCA's contention that developers choose the location of LIHTC projects is not in all respects precise, this inaccuracy does not belie an attempt by TDHCA to conceal discriminatory intent.

lower inclusive capture rate to ensure the financial feasibility of the project. Accordingly, the court finds that TDHCA's justification that developers choose project sites is not pretextual.

Because ICP has failed to prove by a preponderance of the evidence that TDHCA intentionally discriminates on the basis of race when allocating LIHTC, the court finds that it has failed to prove its intentional discrimination claims under the Fourteenth Amendment (actionable under § 1983) and § 1982.

III

ICP also alleges that defendants are liable under §§ 3604(a) and 3605(a) of the FHA based on a claim for disparate impact.

A

"The [FHA] prohibits discrimination in the provision of housing." *Artisan/Am. Corp. v. City of Alvin*, Tex., 588 F.3d 291, 295 (5th Cir. 2009). Section 3604(a) of the FHA makes it unlawful, *inter alia*, to "make unavailable or deny, a dwelling to any person because of race[.]" Section 3605(a) provides that it is unlawful, *inter alia*, "for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race[.]" A "residential real estate-related transaction" includes providing financial assistance for the construction of a dwelling. *Id.* § 3605(b).

In *ICP II* the court held that ICP was entitled to summary judgment establishing that it had made a prima facie showing of disparate impact. *See ICP II*, 749 F.Supp.2d at 499-500. In particular, the court relied on evidence that, "from 1999–2008, TDHCA approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas." *Id.* at 499.[16] Because ICP has made this showing, the burden has shifted to defendants to prove by a preponderance of the evidence that their actions were in furtherance of a legitimate governmental interest. *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988) (citing *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977)), *aff'd in part*, 488 U.S. 15 (1988); *Rizzo*, 564 F.2d at 149.[17] To meet this burden, defendants must

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[16] The court relied on other evidence as well, including the "Talton Report," a report of the House Committee on Urban Affairs prepared for the House of Representatives, 80th Texas Legislature, and a study by the U.S. Department of Housing and Urban Development. *See ICP II*, 749 F.Supp.2d at 500.

[17] The Fifth Circuit has not yet adopted a standard and proof regime for FHA-based disparate impact claims. The circuits that have done so have adopted at least three different standards and proof regimes. In *ICP II* this court essentially followed the approach of the Second Circuit in *Huntington Branch*, 844 F.2d 926, although, unlike *Huntington Branch*, the court did not engage in a process of balancing factors identified in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977). *See ICP II*, 749 F.Supp.2d at 503. The approach taken in *ICP II* was consistent with that found in other decisions of this court. *See, e.g.*,

AHF Cmty. Dev., LLC v. City of Dallas, 633 F.Supp.2d 287, 304 (N.D. Tex. 2009) (Fitzwater, C.J.) ("Once the plaintiff has made out a prima facie case of discriminatory effect . the burden shifts to the defendant to prove a compelling government interest.") (internal quotation omitted) (citing *Dews v. Town of Sunnyvale*, Tex., 109 F.Supp.2d 526, 532 (N.D. Tex. 2000) (Buchmeyer, C.J.)).

It appeared that the Supreme Court might clarify this unsettled area of the law. After this case was tried, and while the parties were making post-trial submissions, the Court granted certiorari in *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 132 S.Ct. 548 (U.S. Nov. 7, 2011) (No. 10-1032), *and cert. dism'd*, ___ S.Ct. ____, 2012 WL 469885 (U.S. Feb. 14, 2012), to decide two questions: "Are disparate impact claims cognizable under the Fair Housing Act?" and "If such claims are cognizable, should they be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test?" Petition for Writ of Certiorari at i, *Magner v. Gallagher*, 2011 WL 549171 (Feb. 14, 2011) (No. 10-1032). On February 14, 2012 this court entered an order deferring its decision in this case until *Magner* was decided. Feb. 14, 2012 Order at 1. But the Supreme Court dismissed the petition the same day this court entered its order. *Magner v. Gallagher*, ___ S.Ct. ____, 2012 WL 469885 (Feb. 14, 2012).

Absent controlling authority of the Supreme Court or the Fifth Circuit, the court will apply the law of the case, as set out in *ICP II*, and allocate to defendants the burden of proof regarding ICP's disparate impact claim because ICP has satisfied its burden of establishing a prima facie case. The court will not, however, require that defendants prove a *compelling* governmental interest rather than a *legitimate* governmental interest, despite the use of the *compelling* standard in *ICP II*. *See ICP II*, 749 F.Supp.2d at 503; *see also AHF Cmty. Dev.*, 633 F.Supp.2d at 304 ("Once the plaintiff has made out a prima facie case of discriminatory effect the burden shifts to the defendant to prove a compelling government interest.") (internal quotation omitted). Because defendants

prove two essential elements. First, they must prove that their interest is bona fide and legitimate. Second, they must prove there are no less discriminatory alternatives, meaning that "no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *See Dews v. Town of Sunnyvale*, Tex., 109 F.Supp.2d 526, 565, 568 (N.D. Tex. 2000) (Buchmeyer, C.J.); *see also Huntington Branch*, 844 F.2d at 939; *Rizzo*, 564 F.2d at 149. "[In] the end there must be a weighing of the adverse impact against the defendant's justification." *Huntington Branch*, 844 F.2d at 936; *see also Gashi v. Grubb & Ellis Prop. Mgmt. Servs., Inc.*, 801 F.Supp.2d 12, 16 (D. Conn. 2011) ("After the defendant presents a legitimate justification, the court must weigh the defendant's justification against the degree of adverse effect shown by the plaintiff.").[18]

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maintain that the court should apply a *legitimate* governmental interest standard absent Fifth Circuit precedent that requires the higher *compelling* governmental interest, and because the result of today's case is the same under the *legitimate* governmental interest standard, the court opts to decide the claim under the lower standard.

[18] Some courts balance objectives in order to determine whether a discriminatory impact violates the FHA. *See, e.g., Vill. of Arlington Heights*, 558 F.2d at 1290 (examining "(1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who

Defendants assert that they acted in furtherance of a compelling, or at least legitimate, governmental interest: the awarding of tax credits in an objective, transparent, predictable, and race-neutral manner, in accordance with federal and state law.[19] Defendants point out that the

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wish to provide such housing"). This court has not adopted this approach. *See Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 51 (1st Cir. 2000) (rejecting balancing approach adopted by *Village of Arlington Heights* because "we do not think that the courts' job is to 'balance' objectives, with individual judges deciding which seem to them more worthy" and "to have federal judges make such policy choices is essentially to impose on them the job of making decisions that are properly made by Congress or its executive-branch delegates; and the balancing approach is in tension with the course taken by the Supreme Court and Congress under Title VII where a *standard* of justification is constructed and applied") (emphasis in original).

[19] As one of their asserted interests, defendants contend that they seek to award tax credits in a race-neutral manner. But a disparate *impact* claim does not require proof of discriminatory *intent*. *See, e.g., Homebuilders Ass'n of Miss. v. City of Brandon*, Miss., 640 F.Supp.2d 835, 841 (S.D. Miss. 2009); *Arbor Bend Villas Hous., L.P. v. Tarrant Cnty. Hous. Fin. Corp.*, 2005 WL 548104, at *12 (N.D. Tex. Mar. 9, 2005) (Means, J.). And although facially neutral, a policy or practice can still violate the FHA because of its discriminatory impact. *See Homebuilders Ass'n*, 640 F.Supp.2d at 841 ("[A] discriminatory effect claim challenges neutral policies that create statistical disparities which are equivalent to intentional discrimination".); *Luckett v. Town of Bentonia*, 2007 WL 1673570, at *6 (S.D. Miss. June 7, 2007) ("To succeed on [an FHA disparate impact claim], the plaintiff must identify a policy or practice that is

Texas Legislature, likely in response to the indictment and conviction of a TDHCA board member for bribery in connection with the LIHTC program, amended the Texas Government Code in 2001 and 2003 to provide the now-existing mandatory statutory requirements for the issuance of tax credits under the LIHTC program. According to TDHCA, these amendments were adopted for the purpose of creating an objective and transparent system, and TDHCA acts with these goals in mind. Although defendants rely principally on the foregoing interests, they also posit that the public interest is served by ensuring that tax credits are awarded to developments that will provide quality, sustainable housing for low-income individuals, and by providing the public an opportunity to participate in creating the QAP in an open and transparent manner, thereby enabling the LIHTC program to represent different policy viewpoints, in compliance with public expectations.

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facially neutral in its treatment of different groups but that in fact falls more harshly on one group than another and cannot be justified by business necessity.") (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)); *Owens v. Nationwide Mut. Ins. Co.*, 2005 WL 1837959, at *13 (N.D. Tex. Aug. 2, 2005) (Sanders, J.) ("To establish a [*prima facie*] case supporting a disparate impact or effect claim related to the discriminatory provision of insurance under § 3604 [of the FHA], a plaintiff must prove that a specific facially neutral policy or practice created statistical disparities so great as to be 'functionally equivalent to intentional discrimination,' thereby disadvantaging members of a protected group.") (citing cases).

Defendants also maintain that, because of the strict requirements of federal and state law, TDHCA has only limited discretion, found in its ability (1) to modify strictly the below-the-line criteria, and not the statutory above-the-line criteria, and (2) to "forward commit" by awarding tax credits from the following year's allocation of tax credits to a 9% tax credit application that would not otherwise succeed due to its low score under the selection criteria.[20] According to defendants, forward commitments have been used sparingly, with only three made in 2003 to 2007 in the region that includes Dallas. Defendants also maintain that this discretion cannot be used in a manner that subverts federal and state law; otherwise, it would render meaningless the intent of the Legislature in creating an objective, transparent, and predictable system.

Defendants also note TDHCA's actions in response to the Housing and Economic Recovery Act of 2008 ("HERA"). Before the enactment of HERA, states were limited to awarding 30% basis boosts only to developments located in qualified census tracts or

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[20] To the extent defendants are arguing that their discretion is limited because they do not select the location of their projects, defendants are misconstruing the issue in this case. As the court noted in *ICP II*, "ICP does not complain of the distribution of low-income housing in general; ICP challenges the allegedly discriminatory actions of TDHCA in disproportionately denying tax credits to proposed developments in Caucasian neighborhoods. TDHCA does control the approval or denial of applications actually submitted." *ICP II*, 749 F.Supp.2d at 496.

difficult development areas. But after HERA, states were permitted to choose the developments to receive the boost. TDHCA exercised this authority in the 2009 QAP to target developments in "high opportunity areas." A "high opportunity area" is defined as:

> an area that includes:
>
> (A) existing major bus transfer centers and/or regional or local commuter rail transportation stations that are accessible to all residents including Persons with Disabilities; or
>
> (B) a census tract which has an [Area Median Gross Income ("AMGI")] that is higher than the AMGI of the county or place in which the census tract is located; or
>
> (C) a school attendance zone that has an academic rating of "Exemplary" or "Recognized" rating (as determined by the Texas Education Agency) as of the first day of the Application Submission Acceptance Period; or
>
> (D) a census tract that has no greater than 10% poverty population according to the most recent census data (these census tracts are designated in the 2010 Housing Tax Credit Site Demographic Characteristics Report).

P. Ex. 127 at 6-7. Defendants suggest that this change "is likely to have a positive effect in increasing the number of LIHTC developments in [high opportunity areas]." *See* Ds. Dec. 21, 2011 Reply Br. 3.

In addressing the second prong—which requires proof of no less discriminatory alternatives—defendants assert that "[t]here is no alternative that would serve the interest[s] with less discriminatory effect than the racially-neutral objective scoring system that is now in effect (and has been since 2003)." Ds. Dec. 21, 2011 Reply Br. 6. They criticize ICP's requested relief of establishing a set-aside for projects in high opportunity areas, suggesting that this remedy cannot qualify as a less discriminatory alternative because it would conflict with governing law and contravene *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

Defendants next compare the justification against the resulting harm. They assert that ICP's claim of injury is diminished by evidence that over 5,600 affordable, Section 8 housing units, although not necessarily LIHTC units, are available; a significant number of LIHTC units are located in Walker Target Area Tracts;[21]

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[21] The term "Walker Target Area Tracts" is defined in the Settlement Stipulation and Order in *Walker v. U.S. Department of Housing and Urban Development*, No. 3:85-CV-1210-R, at 4 (N.D. Tex. Mar. 8, 2001) (Buchmeyer, C.J.). A qualifying census tract "according to the most recent decennial census, (i) has a black population at or below the average black population of the City of Dallas, (ii) has no public housing, and (iii) has a poverty rate at or below the average for the City of Dallas." *Id.*

developments in high opportunity neighborhoods have suffered high vacancy rates, such as 9.5% and 14.28%; and if the court were to broaden its comparison of approval rates from 0% to 9.9% and 90% to 100% Caucasian areas, as relied upon in its summary judgment opinion, *see ICP II*, 749 F.Supp.2d at 499-500, it would better illustrate the alleged impact, since TDHCA approved tax credits for 42.5% of proposed non-elderly units in 0% to 19.9% Caucasian areas and 50.0% for 80% to 100% Caucasian areas, and approved tax credits for 39.8% of the 0% to 29.9% and 48.6% for 70% to 100% Caucasian areas. Thus they argue that the harm to ICP cannot outweigh the substantial interests served by TDHCA.

2

ICP contends that defendants are presenting only interests that are furthered by the application of the Texas Legislature's mandatory statutory requirements, in particular the selection criteria that apply only to the 9% tax credits. It asserts that the action that must be justified is the *disproportionate approval* of tax credits for non-elderly developments in minority neighborhoods, the issue giving rise to the FHA discriminatory impact claim. ICP also posits that the Texas Legislature's mandatory selection criteria cannot be the cause of the discriminatory impact because the impact did not significantly increase after the implementation of the framework in 2003, and the 4% tax credits, which are not subject to the mandatory selection criteria, nonetheless contribute to the discriminatory impact. Last, ICP argues that defendants have not presented evidence

regarding whether there are less discriminatory alternatives and, therefore, have failed to satisfy their burden.

C

The court will assume that defendants' proffered interests are bona fide and legitimate. *See Huntington Branch*, 844 F.2d at 939 (deciding to consider second prong first "[f]or analytical ease"). The court will therefore focus on whether defendants have met their burden of proving the second of the two essential elements: that there are no other less discriminatory alternatives to advancing their proffered interests, i.e., that "no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *Dews*, 109 F.Supp.2d at 532.

Defendants have not presented arguments regarding the second element. Instead, they rely on the conclusory assertion that "[t]here is no alternative that would serve the interest[s] with less discriminatory effect." Ds. Dec. 21, 2011 Reply Br. 6. They then criticize ICP's requested set-aside remedy. But even assuming that defendants' criticism of this remedy is correct, the fact that *one* possible alternative course of action is not viable does not prove that there are *no* other less discriminatory alternatives that could be adopted that would enable the interest to be served with less discriminatory impact.

Defendants have also failed to prove by a preponderance of the evidence that allocating tax credits in a nondiscriminatory and nonsegregative manner would impair any of the asserted interests. *Cf.*

Huntington Branch, 844 F.2d at 940 (noting that two of town's reasons for refusing to rezone plaintiff's site were that it was inconsistent with defendant's housing assistance plan and zoning ordinance, and rejecting these interests because the town simply relied on the existence of the plan and zoning ordinance without presenting evidence indicating why building the project would impair the interests sought to be advanced by the plan and zoning ordinance). Nor is there a basis for finding that TDHCA cannot allocate LIHTC in a manner that is objective, predictable, and transparent, follows federal and state law, and furthers the public interest, without disproportionately approving LIHTC in predominantly minority neighborhoods and disproportionately denying LIHTC in predominantly Caucasian neighborhoods.[22]

TDHCA also retains certain limited types of discretion that can be relied on to address the discriminatory impact. Defendants have not proved that, in using this discretion, TDHCA has adopted the least discriminatory alternative to further the legitimate governmental interest. Regarding the selection criteria of each QAP, which applies only to the 9% tax credits,

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[22] Similarly, at the summary judgment stage, the court held in *ICP II* that defendants' proffered compelling governmental interest—adherence to I.R.C. § 42—was insufficient because "[d]efendants . . . failed to establish that TDHCA cannot comply with § 42 in a way that has less discriminatory impact on the community" and that "TDHCA cannot comply with both § 42 and the FHA." *ICP II*, 749 F.Supp.2d at 504.

defendants maintain that TDHCA has discretion only in modifying below-the-line criteria. They posit that this discretion is limited in that the points accorded to below-the-line criteria cannot exceed the lowest-ranked statutory above-the-line criterion, and the Governor must approve of the QAP Although TDHCA contends that it has added certain below-the-line criteria with the purpose of affirmatively furthering fair housing goals (e.g., providing a score enhancement for projects located in a "high opportunity area," *see* Ds. Nov. 9, 2011 Br. 25), defendants have not proved that these criteria are the least discriminatory alternatives, and that TDHCA cannot add other below-the-line criteria that will effectively reduce the discriminatory impact while still furthering its interests.[23] For example, in the 2010 QAP, an application could receive four points under the "Development Location" below-the-line criterion if its proposed development site was located within one of six geographical areas: (1) "an Economically Distressed

[23] The "Talton Report," a report of the House Committee on Urban Affairs prepared for the House of Representatives, 80th Texas Legislature, also concluded that TDHCA and the BRB"disproportionately allocate federal [LIHTC] funds and the tax-exempt bond funds to developments located in impacted areas (above average minority concentration and below average income levels)" and similarly recommended that TDHCA, BRB, and the legislature, among other things, "consider adding provisions to the QAP and the bond rules that give significant point scoring and/or set-aside of credits for affirmatively furthering assimilation outside of impacted areas." P. Ex. 1 at 48-49.

Area; a Colonia; or a Difficult Development Area";[24] (2) a county that has received an award within the last three

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[24] An "Economically Distressed Area" is defined as:

> an Area in which:
>
> (A) Water supply or sewer services are inadequate to meet minimal needs of residential users as defined by Texas Water Development Board rules;
>
> (B) Financial resources are inadequate to provide water supply or sewer services that will satisfy those needs; and
>
> (C) An established residential subdivision was located on June 1, 1989, as determined by the Texas Water Development Board.

P. Ex. 127 at 6. A "Colonia" is defined as:

> A geographic Area that is located in a county some part of which is within 150 miles of the international border of this state, that consists of 11 or more dwellings that are located in close proximity to each other in an area that may be described as a community or neighborhood, and that: (§2306.581)
>
> (A) Has a majority population composed of individuals and families of low-income and very low income, based on the federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed Area under §17.921, Texas Water Code; or
>
> (B) Has the physical and economic characteristics of a colonia, as determined by the Department.

Id. at 5. A "Difficult Development Area" is an area "specifically designated by the Secretary of HUD at the time of Application submission." *Id.* at 52.

years from the Texas Department of Agriculture's Rural Municipal Finance Program or Real Estate Development and Infrastructure Program; (3) "a census tract which has a median family income . . . that is higher than the median family income for the county in which the census tract is located"; (4) "an elementary school attendance zone of an elementary school that has an academic rating of 'Exemplary' or 'Recognized,' or comparable rating" and "[t]he Development will serve families with children"; (5) a "census tract which has no greater than 10% poverty population" and "the development will expand affordable housing opportunities for low-income families with children outside of poverty areas"; and (6) "an Urban Core."[25] P. Ex. 127 at 52-53. In other words, the "Development Location" criterion is a "menu option" where an applicant need only fulfill *one* of the six to receive the four points; fulfilling more than one would still result in

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[25] An "Urban Core" is defined as

> [a] compact and contiguous geographical area that is located in a Metropolitan Statistical Area within the city limits of a city with a population of no less than 150,000 composed of adjacent block groups in which at least 90% of the land not in public ownership is zoned to accommodate a mix of medium or high density residential and commercial uses and at least 50% of such land is actually being used for such purposes based on high density residential structures and/or commercial structures already constructed.

P. Ex. 127 at 12.

four points. Thus even assuming that the third, fourth, and fifth options could reduce the asserted discriminatory impact, as suggested by defendants,[26] an applicant could instead opt for the first one, which covers "Economically Distressed" locations and could further exacerbate the discriminatory impact. Further, even if an applicant satisfied the third, fourth, or fifth option, it could receive four points at most because the QAP does not permit the award of four points for each option. Similar to how TDHCA made the below-the-line criterion "Developments in Census Tracts with No Other Existing Same Type Developments Supported by Tax Credits" its own criterion worth six points, TDHCA can further reduce the discriminatory impact by converting the types of development locations suggested to reduce the discriminatory impact into its own scoring items.[27]

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[26] This is based on defendants' underlying assumption that "there's a known association between race and income and poverty levels in Texas," as Mary Whiteside, Ph.D. testified at trial and stated in her initial and second reports. *See, e.g.*, Tr. 2:161; Ds. Ex. 224 at 1-4; Ds. Ex. 225 at 4. ICP raised numerous objections against the use of her testimony and reports. *See, e.g.*, P. Nov. 9, 2011 at 20-22; Tr. 2:162. Because the court relies on her testimony and expert reports to *support* ICP's disparate impact claim (i.e., to suggest that the evidence supports the existence of less discriminatory alternatives), it need not resolve ICP's objections before relying on this evidence in this context.

[27] To the extent defendants argue that TDHCA's discretion in reducing the discriminatory impact is restricted by the requirement of gubernatorial approval of QAP changes, and they rely on a specific instance when the Governor in fact rejected a QAP change, there is no evidence that the Governor would decline to approve a

Moreover, although defendants maintain that TDHCA's discretion in creating the selection criteria is limited to adopting below-the-line criteria, it appears that this discretion is actually broader. It appears to extend to the authority to choose the number of points to be accorded each above- and below-the-line criterion, so long as the priority of statutory above-the-line criteria is maintained and the Governor approves. This suggests that TDHCA can accord more points to below-the-line criteria that reduce the discriminatory impact, as long as the points do not exceed the lowest above-the-line criterion, while still furthering TDHCA's interests. For example, given that the lowest above-the-line criterion, "Declared Disaster Areas," was worth seven points in the 2010 QAP, below-the-line critiera that assisted in reducing the discriminatory impact could have been allotted six points while respecting the priority of the statutory above-the-line criteria. A proposed development that falls within the guidelines of one of the "Development Location[s]" that could reduce the discriminatory impact is worth only *four* points. *See* P. Ex. 127 at 52-53. In comparison, the "Community Revitalization" below-the-line criterion awards six points. *See id.* at 51. To satisfy the "Community Revitalization" criterion, the proposed development must "use an Existing Residential Development" and "propose[] any Rehabilitation or any Reconstruction that is part of a Community Revitalization Plan." *Id.*

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change necessary for TDHCA to comply with a federal court order directing defendants to remedy a violation of the FHA.

Because "Rehabilitation, (which includes reconstruction) or Adaptive Reuse" serves as its own below-the-line criterion separate from the "Community Revitalization" criterion and is worth three points, an applicant fulfilling the "Community Revitalization" criterion appears to be eligible for a total of *nine* points. *See id.* Given the trial evidence of the connection between race and income, communities seeking revitalization are potentially high-minority areas. Thus the criteria "Community Revitalization" and "Rehabilitation (which includes reconstruction) or Adaptive Reuse" may exacerbate the discriminatory impact, especially since the "Development Location" criterion is only worth four points and barely offsets nine points. Additionally, despite questioning from ICP concerning how more points could be allocated to above-the-line statutory criteria so that below-the-line criteria (in particular, criteria that would reduce the discriminatory impact) could also be given more points and result in greater weight in comparison to total points available, defendants do not address this area of discretion. Thus defendants have failed to prove that TDHCA has adopted the least discriminatory alternative that will still advance its interests.

Defendants have also failed to prove that forward commitments could not have been used in a less discriminatory manner while still advancing TDHCA's legitimate governmental interests.[28] Defendants contend

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[28] Defendants maintain that Governor Rick Perry ("Governor Perry") modified the 2012 QAP to eliminate forward commitments.

that forward commitments are sparingly used and suggest that this is so because TDHCA must be careful not to use them in a way that would thwart legislative intent that the system be objective, transparent, and predictable. The fact that this authority is granted to TDHCA and that it has used it in certain circumstances suggests that it can be applied while still advancing TDHCA's interests. And even if it is sparingly used, this does not address the disputed issue whether forward commitments have been used in the least discriminatory manner. For example, Fairway Crossing, one of the three applications that defendants state received a forward commitment from 2003 to 2007, is alleged by ICP to be located in a 0% to 9.9% Caucasian area. *See* P. Ex. 157 at 3. Although defendants assert that "[t]his project scored high enough to be awarded credits," *see* Ds. Nov. 9, 2011 Br. at 10 n.8, it is not necessary for the development to score well under the selection criteria for it to be awarded a forward commitment. And it remains unclear whether a forward commitment to another application that year could have reduced the discriminatory impact while advancing TDHCA's interests.

Although TDHCA selected "high opportunity areas" to be the recipient of the 30% basis boost, the definition of "high opportunity areas" suggests that further steps

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Assuming *arguendo* that this is true, defendants have still failed to prove that, during the time when forward commitments were available, TDHCA approved them in the least discriminatory manner, while still advancing its proffered interests.

can be taken to reduce the discriminatory impact while still promoting TDHCA's legitimate governmental interests. A high opportunity area includes an area that has a major bus or rail station, a census tract with a higher AMGI than the tract's county or place, a school attendance zone with an academic rating of "Exemplary" or "Recognized," *or* a census tract with no greater than 10% poverty rate. *See* P. Ex. 127 at 6-7. As an example, were TDHCA to require an applicant to meet all four criteria rather than just one to receive a basis boost, this would appear to reduce the discriminatory impact.

TDHCA also has discretion under at least one QAP that can be used to reduce the discriminatory impact of LIHTC. Section 50.10(a)(2) of the 2008 QAP authorized TDHCA, in considering staff recommendations for both 4% and 9% tax credits, to "not rely solely on the number of points scored by an Application" under the QAP and to "take into account, as it deem[ed] appropriate," certain listed discretionary factors, including location, proximity to other low-income housing developments, and other good causes as determined by TDHCA.[29] *See* P. Ex. 125 at 60-61; Ds. Ex. 14 at 60-61; *see also* Tr. 2:10,

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[29] It is unclear whether Governor Perry eliminated this authority in the 2012 QAP. *See* Ds. Dec. 7, 2011 Br. 6-7 (noting that Governor Perry eliminated TDHCA's ability to "waive internal rules," without clarifying which internal rules). Even assuming that Governor Perry eliminated this area of discretion, the court concludes, at it does *supra* at note 28, that defendants have failed to prove that TDHCA used this discretion, when it was available, in the least discriminatory manner, while still advancing its proffered interests.

12.[30] This suggests that, despite an application's score under the selection critiera, TDHCA was authorized

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[30] Section 55.10(a)(2) of the 2008 QAP provided, in relevant part:

> In making a determination to allocate tax credits, the Board shall be authorized to not rely solely on the number of points scored by an Application. It shall in addition, be entitled to take into account, as it deems appropriate, the discretionary factors listed in this paragraph.... If the Board disapproves or fails to act upon an Application, the Department shall issue to the Applicant a written notice stating the reason(s) for the Board's disapproval or failure to act. In making tax credit decisions , the Board, in its discretion, may evaluate, consider and apply any one or more of the following discretionary factors: ...
>
> (A) The Developer market study;
>
> (B) The location;
>
> (C) The compliance history of the Developer;
>
> (D) The financial feasibility;
>
> (E) The appropriateness of the Development's size and configuration in relation to the housing needs of the community in which the Development is located;
>
> (F) The Development's proximity to other low-income housing Developments;
>
> (G) The availability of adequate public facilities and services;
>
> (H) The anticipated impact on local school districts;
>
> (I) Zoning and other land use considerations;

under the 2008 QAP to take into account factors such as "location" of developments or "other good causes" in the award of tax credits. Because defendants have not addressed whether TDHCA used the least discriminatory means while still furthering its interests in exercising this discretion, the question remains whether it has been used in a manner that would reduce the discriminatory impact.[31]

> (J) Any matter considered by the Board to be relevant to the approval decision and in furtherance of the Department's purposes; and
>
> (K) Other good cause as determined by the Board.

P. Ex. 125 at 60-61; Ds. Ex. 14 at 60-61.

[31] Although ICP contends that the allocation of 4% tax credits also results in a discriminatory impact, defendants do not address whether TDHCA has adopted the least discriminatory alternative to further its legitimate governmental interests as to the 4% tax credits. Defendants stress their limited discretion in changing the mandatory selection when the 4% tax credits are not bound to scoring under that criteria. Four percent tax credits are non-competitive and reviewed solely for "threshold, eligibility, and then . . . underwrit[ing]," P. Ex. 1 at 20. And unlike the mandatory selection criteria, it does not appear that the Texas Government Code similarly limits TDHCA's discretion in choosing the threshold criteria. *Cf.* Tex. Gov't Code Ann. § 306.6702(a)(15) (West 2003) (defining "Threshold criteria" as "criteria used to determine whether the development satisfies the minimum level of acceptability for consideration established in the department's qualified allocation plan"); *id.* at § 306.6710(a) (requiring TDHCA to "determine whether the application satisfies the threshold criteria required by the board in the qualified allocation plan"). This leaves

Accordingly, because defendants have failed to meet their burden of proving that there are no less discriminatory alternatives, meaning that no alternative course of action could be adopted that would enable TDHCA's interest to be served with less discriminatory impact, the court finds in favor of ICP on its discriminatory impact claim under the FHA.

IV

The court considers next defendants' contention that ICP's FHA claim is barred by the statute of limitations.

A complaint under the FHA is timely when it is filed within two years after the occurrence or termination of an alleged discriminatory housing practice. *See* 42 U.S.C. § 3613(a)(1)(A). If a plaintiff challenges "an unlawful practice that continues into the limitations period, the complaint is timely if filed within [two years] of the *last asserted occurrence* of that practice." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) (emphasis added); § 3613(a)(1)(A); *see also Pecan Acres Ltd. P'ship I v. City of Lake Charles*, 54 Fed. Appx. 592, 2002 WL 31730433, at *1 (5th Cir. 2002) (per curiam).

ICP's FHA claim is founded on an unlawful practice: TDHCA's disproportionate approval of tax credits for non-elderly developments in minority neighborhoods, and, conversely, its disproportionate denial of tax credits for non-elderly housing in predominantly Caucasian

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TDHCA greater discretion in adding criteria that could reduce the discriminatory impact.

neighborhoods. ICP has presented evidence from 1999 to 2008 to support this unlawful practice. Thus even assuming that the violation terminated in 2008, it is clear that ICP's lawsuit was timely filed on March 28, 2008. Defendants have failed to prove their limitations defense by a preponderance of the evidence.

V

Finally, TDHCA relies on the affirmative defense of Eleventh Amendment immunity. TDHCA asserts that it is an arm of the State of Texas and is therefore entitled to Eleventh Amendment immunity.

TDHCA bears the burden of proving that it is entitled to Eleventh Amendment immunity. *See Skelton v. Camp*, 234 F.3d 292, 297-98 (5th Cir. 2000). Such immunity is proper if "a suit is really against the state itself." *Id.* at 297 (citing *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982)). To make this determination courts weigh numerous factors, such as:

> (1) whether state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

Vogt v. Bd. of Comm'rs Orleans Levee Dist., 294 F.3d 684, 689 (5th Cir. 2002) (citations omitted). "The most

significant factor in assessing an entity's status is whether a judgment against it will be paid with state funds." *Id.* (brackets and citations omitted).

The Fifth Circuit has previously held that a predecessor agency of TDHCA—the Texas Housing Agency—is not an arm of the state. *See Tex. Dep't of Hous. & Cmty. Affairs v. Verex Assur., Inc.*, 68 F.3d 922, 926-28 (5th Cir. 1995), *overruled on other grounds by Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 413 n.19 (5th Cir. 2009).[32] TDHCA does not specifically address any of the *Vogt* factors or argue that the factors relied upon in *Verex* should be assessed differently. Thus much of the analysis in *Verex* is uncontested. For example, TDHCA can sue and be sued in its own name, *see* Tex. Gov't Code Ann. § 2306.053(b), has the right to hold and use property, *see* § 2306.174, and is funded primarily by the federal government and by borrowing private capital that is not debt against the State of Texas, *see* P. Ex. 162 at 78-83; P. Ex. 381 at 13. Moreover, TDHCA's funds, excluding appropriations for the Texas Legislature, are maintained outside of the state treasury. *See* Tex. Gov't Code Ann. § 2306.071. Even though two factors weigh in TDHCA's favor (TDHCA is concerned with statewide problems rather than local problems and does not have local autonomy), the court finds that these factors do not

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[32] Although the analysis in *Vogt* and *Verex* is not identical, the Fifth Circuit relies on many of the same factors when determining whether an agency is an arm of the state for the purposes of Eleventh Amendment immunity. *Compare Vogt*, 294 F.3d at 692-96 *with Verex*, 68 F.3d at 926-28.

outweigh the ones that favor finding that TDHCA is not an arm of the state. *See Verex*, 68 F.3d at 928 (holding that even though Texas Housing Agency was concerned with statewide rather than local issues, it was not an arm of the state). The court therefore finds that TDHCA has not met its burden of proving that it is entitled to Eleventh Amendment immunity.

VI

As ICP recognizes in the Pretrial Order, it is appropriate to afford TDHCA an opportunity to present a plan to remedy its violation of the FHA. Accordingly, TDHCA must submit a remedial plan that sets out how it will bring its allocation decisions into compliance with the FHA. This remedial plan need be no "more intrusive than is necessary to remedy proved [FHA] violations." *Rizzo*, 564 F.2d at 149 (holding that Supreme Court's admonitions that federal equitable belief be carefully tailored to proven constitutional violations is "no less forceful" when applied to statutory violations). The court encourages the parties to work cooperatively in formulating a remedial plan so that as many potential objections as possible can be resolved before the plan is submitted to the court for consideration and approval.

* * *

For the reasons explained, the court finds in favor of ICP on its disparate impact claim under the FHA and otherwise finds in favor of defendants. Within 60 days of the date this memorandum opinion and order is filed, defendants must file their remedial plan. ICP may submit objections within 30 days after the remedial plan

is filed. If objections are filed, the court will establish any necessary additional procedures by separate order.

SO ORDERED.

March 20, 2012.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES PROJECT, INC.,	§	
Plaintiff,	§	
	§	Civil Action
	§	No. 3:08-CV-0546-D
VS.	§	
THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION
AND ORDER

Frazier Revitalization Inc. ("FRI") moves to intervene in this action as of right or permissively. For the reasons that follow, the court grants the motion.

I

This action is the subject of two prior opinions;[1] therefore, the background facts and procedural history need not be discussed at length. On March 20, 2012 the court found in favor of plaintiff The Inclusive Communities Project, Inc. ("ICP") on its disparate impact claim under §§ 3604(a) and 3605(a) of the Fair Housing Act ("FHA"). *See Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, ___ F.Supp.2d ____, 2012 WL 953696, at *1 (N.D. Tex. Mar. 20, 2012) (Fitzwater, C.J.). The court directed that defendant Texas Department of Housing and Community Affairs ("TDHCA") submit a remedial plan, and it permitted ICP to present objections to TDHCA's proposal. *See id.* at *13. On April 30, 2012, before TDHCA filed the remedial plan, FRI filed the instant motion to intervene under Fed. R. Civ. P. 24(a)(2) and (b)(2). FRI seeks intervention to assist in developing a remedy for the FHA violation and, if necessary, to assert objections and pursue an appeal of the court-ordered remedy. ICP opposes FRI's motion. The court concludes

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[1] *See Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, ___ F.Supp.2d ____, 2012 WL 953696 (N.D. Tex. Mar. 20, 2012) (Fitzwater, C.J.); *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 749 F.Supp.2d 486 (N.D. Tex. 2010) (Fitzwater, C.J.).

that FRI has established that it is entitled to intervene as of right under Rule 24(a)(2).[2]

II

A party is entitled to an intervention of right under Rule 24(a)(2) if (1) the motion to intervene is timely, (2) the interest asserted by the potential intervenor is related to the action, (3) that interest may be impaired or impeded by the action, and (4) that interest is not adequately represented by the existing parties. *See, e.g., In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 247 (5th Cir. 2009); *Sierra Club v. Espy*, 18 F.3d 1202, 1204-05 (5th Cir. 1994) (citing *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F2d 452, 463 (5th Cir. 1984) (en banc)).

III

The first element—timeliness—is determined by examining (1) the length of time between the potential intervenor's learning that its interest is no longer protected by the existing parties and its motion to intervene, (2) the extent of prejudice to the existing parties from allowing late intervention, (3) the extent of prejudice to the potential intervenor if the motion is denied, and (4) any unusual circumstances. *See, e.g., Lease Oil Antitrust Litig.*, 570 F.3d at 247-48.

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[2] Because the court holds that FRI is entitled to intervene as of right, it need not reach the question whether FRI should be allowed to intervene permissively under Rule 24(b)(2).

A

Regarding the first element, although ICP asserts that FRI should have learned of this lawsuit based on publicity that commenced in 2008 and from TDHCA reports and documents, the first element of timeliness focuses on when the intervenor "became aware that its interests would no longer be protected by the original parties," not "the date on which the would-be intervenor became aware of the pendency of the action." *Sierra Club*, 18 F.3d at 1206 (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264 (5th Cir. 1977)). The earliest FRI could have learned that its interest was no longer protected by TDHCA was on March 20, 2012, when the court issued its decision and TDHCA transitioned from defending its allocation of Low Income Housing Tax Credits ("LIHTC") to presenting a remedial plan to address the disparate impact violation of the FHA: a plan that could impair LIHTC applications by FRI. *See Inclusive Cmtys. Project*, 2012 WL 953696, at *13. FRI moved to intervene 41 days later, which is not unreasonable. *Cf. Edwards v. City of Hous.*, 78 F.3d 983, 1000-01 (5th Cir. 1996) (en banc) (collecting cases in support of proposition that delays of 37 and 47 days were not unreasonable).

B

Concerning the second element—the extent of prejudice to the existing parties from allowing late intervention—the court holds that the existing parties will not suffer prejudice on this basis. TDHCA does not oppose FRI's intervention, and ICP does not present any meritorious grounds for finding prejudice. FRI

moved to intervene soon after it became aware that its interest was no longer protected and before TDHCA filed its remedial plan. *Cf. John Doe # 1 v. Glickman*, 256 F.3d 371, 378 (5th Cir. 2001) (finding no prejudice under this element because potential intervenor filed motion approximately one month after it became aware of stake, which was before trial and final judgment). And while ICP asserts that FRI is attempting to relitigate issues decided at trial, "no prejudice can come from [this] because an [intervenor] must accept the proceedings as [it] finds them." *Id.* (quoting *Sierra Club*, 18 F.3d at 1206 n.3) (internal quotation marks omitted).

C

As to the third element—the extent of prejudice to the potential intervenor if the motion is denied—the court concludes that FRI will incur prejudice if intervention is denied. As a nonparty, FRI will be affected by the court-ordered remedy when TDHCA implements it against LIHTC applicants, but FRI will not be able to participate in developing the remedy or to appeal the ruling. *See id.* at 379 (citing *Edwards*, 78 F.3d at 1002-03); *see also Lease Oil Antitrust Litig.*, 570 F.3d at 249-50 ("Intervening in the existing federal lawsuit is the most efficient, and most certain, way for [the potential intervenor] to pursue its claim.").

D

The fourth element of timeliness—the presence of any unusual circumstances—does not warrant denying FRI's motion.

IV

The second element for assessing a motion to intervene as of right considers whether the interest asserted by FRI is related to this lawsuit.

FRI has a direct, substantial, legally protectable interest in the subject of this action, which involves the allocation of LIHTC. FRI is authorized to apply for LIHTC from TDHCA. *Cf. Edwards*, 78 F.3d at 1004 (holding that potential interference with promotion opportunities could justify intervention, and that vested interest in promotion was not required) (quoting *Black Fire Fighters Ass'n of Dall. v. City of Dall., Tex.*, 19 F.3d 992, 994 (5th Cir. 1994); *Howard v. McLucas*, 782 F.2d 956, 959 (11th Cir. 1986)); *Sierra Club*, 18 F.3d at 1207 ("[T]he 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process[.]") (quoting *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 n.10 (5th Cir. 1992)).

V

The third factor assesses whether FRI's interest may be impaired or impeded by the action. FRI's interest may be impaired by this lawsuit because, if FRI is denied leave to intervene, it will be bound by the court-ordered remedy once TDHCA implements it, and this may impair FRI's ability to obtain LIHTC for its projects. *See, e.g., Edwards*, 78 F.3d at 1005; *Sierra Club*, 18 F.3d at 1207. Although ICP contends that FRI is not impacted because FRI's 2012 LIHTC application will likely receive an award, FRI's interest is

considerably broader than a single application in a single application cycle; FRI seeks a court-ordered remedy that will not unnecessarily hinder the award of LIHTC to developments that revitalize low-income areas, even if located in predominately minority areas.

VI

The fourth element evaluates whether FRI's interest is adequately represented by the existing parties. Contrary to ICP's contentions, FRI is not adequately represented by the existing parties. TDHCA is a governmental agency that must represent the general public interest, not the private interests of FRI. *See John Doe #1*, 256 F.3d at 381. And, as ICP and FRI recognize, they are asserting competing claims to the distribution of LIHTC.

* * *

Accordingly, for the reasons explained, the court grants FRI's April 30, 2012 motion to intervene.

SO ORDERED.

June 12, 2012.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
CHIEF JUDGE

ERIC JOHNSON

DISTRICT 100
HOUSE OF REPRESENTATIVES

3:08CV0546-D

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July 6, 2012

Mr. Tim Irvine
Executive Director, TDHCA
P.O. Box 13941
Austin, TX 78711-3941

Dear Mr. Irvine:

I am writing once again to express my concern that Low Income Housing Tax Credits (LIHTCs) are not being properly awarded to projects in Qualified Census Tracts (QCTs) as mandated by the Internal Revenue Code.

Currently, TDHCA's 2012 Qualified Action Plan (QAP) favors projects in High Opportunity Areas (HOAs) including neighborhoods and communities with the highest income, lowest poverty, and best public education opportunities, leaving those with the greatest need for LIHTCs out of luck.

As a result of the ICP/TDHCA lawsuit, the Proposed Remedial Plan that was ordered by Judge Fitzwater recognizes that it must give preference to projects which are located in QCTs that are part of a concerted community revitalization effort. However, the Proposed Remedial Plan is still in violation of the Internal Revenue Code, as it restates that "the Department is committed to continuing and strengthening the criteria for locating developments within HOAs".

Revitalization developments in our inner cities should be entitled to procedural safeguards that are, at a *minimum*, in pari passu with prospective developments in Central Business Districts or HOAs. In fact, the Internal Revenue Code mandates that revitalization developments in QCTs be afforded *preference* over those in HOAs. Not only is the QAP and Proposed Remedial Plan in violation of the Internal Revenue Code, it is forcing low income people in our inner cities to face the dire reality of a future without the possibility of community revitalization, the end result of the department's policies being the de facto forced relocation of low income people.

I urge you to recognize the impact the current QAP and Proposed Remedial Plan has on an already marginalized

population. If the Proposed Remedial Plan submitted by the Department is approved, there will likely be no 4% or 9% tax credits available for low income communities. Unless the lawsuit is resolved with a plan for redistributing LIHTCs that properly allocates projects in QCTs that are a part of a concerted revitalization effort in accordance with existing law, then we urge the department to appeal the resolution.

Sincerely,

/s/ Eric Johnson
Eric Johnson
State Representative
District 100

Cc: Chief District Judge Sidney A. Fitzwater, US District Court Northern District of Texas

COMMITTEES:

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JOINT OVERSIGHT COMMITTEE ON HIGHER EDUCATION GOVERNANCE, EXCELLENCE & TRANSPARENCY

STATE OF TEXAS
HOUSE OF REPRESENTATIVES
DISTRICT 103

3:08-CV-546-D

RAFAEL ANCHIA

MEMBER

July 17, 2012

Mr. Tim Irvine
Executive Director
Texas Department of Housing and Community Affairs
P.O. Box 13941
Austin, TX 78711-3941
Tim.irvine@tdhca.state.tx.us

Dear Mr. Irvine:

I write on behalf of my constituents in District 103 to express my concern that the Qualified Action Plan (QAP) and Proposed Remedial Plan, ordered by Judge Fitzwater in the ICP/TDHCA lawsuit, does not properly award Low-Income Housing Tax Credits (LIHTCs) to projects in Qualified Census Tracts (QCTs) as mandated by the Internal Revenue Code (IRC). Currently,

TDHCA's 2012 QAP favors projects in High Opportunity Areas (HOAs). However, to achieve true community revitalization we must be mindful of overlooking those areas with the greatest need, while remaining cautious of over concentrating low-income housing projects in any one area, whether HOA or QCT.

By discontinuing the use of forward commitments of low income housing tax credits (LIHTCs) and narrowing the governing board's discretion to approve waivers, the 2012 QAP has made significant strides toward ensuring that transparency and parity is achieved in the context of economic development in Texas. However, the Proposed Remedial Plan fails to adequately consider the very communities that benefit from the modifications to the 2012 QAP — low-income communities — by "providing maximum permissible incentives for areas that *truly* reflect the greatest opportunity, namely those areas with the highest income, lowest poverty, and best public education opportunities."

Revitalization efforts in our low-income neighborhoods should be entitled to procedural safeguards that are, at a minimum, on equal footing with prospective developments in Central Business Districts or HOAs. The Department's plan to allocate extra points to those projects in low-income neighborhoods that are part of a comprehensive revitalization is a step toward achieving such balance. However, without greater elucidation of the requirements for proving up revitalization, that plan can have only minimal effect.

The Internal Revenue Code mandates that revitalization developments in QCTs be afforded *preference*. Thus, by prioritizing HOAs over QCTs, the 2012 QAP and the Proposed Remedial Plan run counter to the Internal Revenue Code, and effectively limit the development of projects that contribute to a concerted community revitalization plan. If the Proposed Remedial Plan submitted by the Department is approved, 4% or 9% tax credits will likely be eliminated.

As you consider this issue, I urge you to continue to be mindful of the state's commitment to revitalization in low-income communities and the impact the QAP and Proposed Remedial plan may have on an already marginalized population.

I am available to answer any questions you may have with regard to this issue. Please free to contact me at 214-943-6081.

Sincerely,

/s/ Rafael Anchia
Rafael Anchia

Cc: Chief District Judge Sidney A. Fitzwater, US District Court Northern District of Texas 1100 Commerce Street, Rm. 1528; Dallas, TX 75242| phone 214-753-2333

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES PROJECT, INC.,	§	
	§	
Plaintiff,	§	
	§	Civil Action No.
	§	3:08-CV-0546-D
VS.	§	
	§	
THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, et al.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION
AND ORDER

Having found in favor of plaintiff The Inclusive Communities Project, Inc. ("ICP") on its disparate impact claim under §§ 3604(a) and 3605(a) of the Fair Housing Act ("FHA"), the court now addresses the appropriate remedy for awarding Low Income Housing Tax Credits ("LIHTC") in the Dallas metropolitan area.

I

As directed, defendants Texas Department of Housing and Community Affairs and its Executive Director and board members in their official capacities (collectively, ("TDHCA"), have submitted a proposed remedial plan ("Plan"). According to TDHCA, operating under the constraints of federal and state law, the Plan does the following:

> focuses on: (1) according proposed developments located in defined high opportunity areas the greatest incentives allowed by state law; and, (2) according developments in Qualified Census Tracts (QCTs) that are part of true concerted revitalization plans co-equal incentives in order to provide the preference created by Internal Revenue Code §42(m). It is envisioned that the revitalization incentive will set a very high threshold, making it unlikely to yield a number of successful applicants in QCTs such that would perpetuate any discriminatory patterns found to have occurred unintentionally.

Ds. Plan 4. The Plan contains the following twelve-points:

1. TDHCA states that Governor Perry, in approving the 2012 Qualified Allocation Plan ("QAP"), determined that forward commitments were not desirable and that waivers should only be granted when "necessary to

further a purpose or policy enunciated in Tex. Gov't Code, Chapter 2306." *Id.*

2. TDHCA proposes to further strengthen the definition of a high opportunity area ("HOA") by adopting the following "Opportunity Index":

Points	Population Served	Poverty Factor	Income Factor	School Quality Factor
7	General	<15% for all individuals	Top quartile of median household income for county or top quartile for Metropolitan Statistical Area ("MSA")	Exemplary or recognized
5	General	<15% for all individuals	Top 2 quartiles of median household income for county or top 2 quartiles for MSA	Exemplary or recognized
5	Any	<15% for all individuals	Top quartile of median household income for county or top quartile for MSA	Exemplary or recognized

3	Any	<15% for all individuals	Top quartile of median household income for county or top quartile for MSA	n/a
1	Any	<15% for all individuals	Top 2 quartiles of median household income for county or top 2 quartiles for MSA	n/a

Id. at 6-7.

TDHCA also suggests adding certain below-the-line criteria, which it maintains are "indicative of educational quality and opportunity or lack of affordable housing." *Id.* at 7. Moreover, it offers to remove all other "Development Location" options in the below-the-line criterion unless the option is required by statute so that it will maintain high incentives to target HOAs.

3. TDHCA proposes to continue including a 130% basis boost for applications proposing development sites located in HOAs.

4. In order to effectuate the preference in I.R.C. § 42(m) for developments located in QCTs and which contribute to a concerted community revitalization plan, TDHCA proposes the following "Revitalization Index":

Points	Population Served	Criteria
7	Any	The proposed development site is located in a QCT in which there is in effect a concerted revitalization plan consistent with the elements described in § 5 and the non-housing costs, as reflected in the local government certified plan budget, exceed $25,000 per unit in the proposed development.
3	Any	The proposed development site is located in a QCT in which there is in effect a concerted revitalization plan consistent with the elements described in § 5 and the non-housing costs, as reflected in the local government certified plan budget, exceed $10,000 per unit but are less than $25,000 per unit

2	Any	The proposed development site is not located in a QCT but there is in effect a concerted revitalization plan consistent with the elements described in § 5 and the non-housing costs, as reflected in the local government certified plan budget, exceed $10,000 per unit.

Id. at 10-11.

5. TDHCA offers to continue including criteria for disqualifying proposed sites that have undesirable features. It also proposes to require an applicant to obtain pre- clearance if the proposed development is located at or within 1000 feet of certain negative site features.

6. In line with the "Revitalization Index," TDHCA proposes to strengthen the requirements to establish a concerted revitalization plan in order to insure that "true community revitalization is occurring." *Id.* at 15.

7. TDHCA proposes to promulgate by rule a fair housing choice disclosure to advise prospective tenants of alternative housing and fair housing rights. TDHCA also proposes to maintain a website with relevant information.

8. TDHCA proposes to conduct an annual analysis, which will be made public, of the "effects of its prior QAP to determine if that QAP... contribut[es] to a disparate impact[,]" in order to "take appropriate and lawfully permitted measures to amend the next and subsequent QAPs to avoid [the] present and potentially developing disparate impact." *Id.* at 18.

9. TDHCA proposes adding a mechanism to challenge the grounds for public comments that could lead to the negative scoring of 9% applications or constitute opposition to proposed 4% developments. Additionally, applications in HOAs receiving statements of support or neutrality from a neighborhood organization that previously opposed a development, causing it to lose points, will receive two additional points. TDHCA must also amend its debarment rules so that if any applicant attempts to create opposition to an application, they will be subject to debarment.

10. TDHCA proposes that "[i]n the event of a tie in scoring, the tie breaker will be a preference for the developments that are located the greatest distance from the nearest development that is assisted by either 4% or 9% [LIHTCs]." *Id.* at 20.

11. TDHCA proposes to "continue to make available on its website proposed and final QAPs with comments and responses, applications, underwriting reports, application and award logs, scoring logs by subject, inventories, and appeal materials." *Id.* at 20. It also proposes to "post market studies, Phase I

Environmental Site Assessments and property condition assessments on its website." *Id.*

12. TDHCA acknowledges that it is subject to statutory constraints, including "adherence to the Texas Administrative Procedures Act; the Texas General Appropriations Act; Chapter 2306 of the Texas Government Code; and adherence to various federal requirements regarding the administration of other sources of funding impacting [TDHCA's] ability to address such matters." *Id.* at 20.

ICP and intervenor Frazier Revitalization Inc. ("FRI") object to components of the Plan.[66]

II

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). This power, however, is not plenary and may be exercised only on the basis of the violation. *See, e.g., Dayton v. Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419-20 (1977); *Swann*, 402 U.S. at 16. The scope of the remedy must be

[66] On August 3, 2012 FRI filed a motion for leave to file supplement to objections to defendants' proposed remedial plan, which the court has granted today. Although the court has considered the supplement to objections and brief in adopting the remedial plan, because nothing in them changes the reasoning or decisions of this memorandum opinion and order, the court will not separately discuss the supplement to objections and brief.

tailored to fit "the nature of the violation" and cannot be "broader than that necessary to remove the violation and its effects." *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 145 (3d Cir. 1977) (quoting *Brinkman*, 433 U.S. at 419). "A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation." *Freeman v. Pitts*, 503 U.S. 467, 489 (1992). Moreover, "the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Spallone v. United States*, 493 U.S. 265, 276 (1990) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977)).

It is within the court's authority to "order[] such affirmative action as may be appropriate" in order to remedy a FHA violation. 42 U.S.C. § 3613(c)(1). "Appropriate relief for violations of the [FHA] is to be determined on a case-by-case basis with relief tailored in each instance to the needs of the particular situation." *United States v. Jamestown Center-in-the-Grove Apartments*, 557 F.2d 1079, 1080 (5th Cir. 1977) (citations omitted). "Relief should be aimed toward twin goals insuring that no future violations of the [FHA] occur and removing any lingering effects of past discrimination." *See id.* (collecting cases).

III

A

As proposed by TDHCA, the court adopts by judgment filed today the following remedy for TDHCA's violation of the FHA. Pending further order of this

court, TDHCA must apply the following remedy as to the Dallas metropolitan area in accordance with TDHCA's proposal:[67]

1. include in the QAP the additional below-the-line criteria provided by the "Opportunity Index";

2. include in the QAP the additional below-the-line criteria regarding the quality of public education and anti-concentration, and remove all other "Development Location" criteria set forth;

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[67] Although TDHCA functions on a statewide basis, its obligation under this remedy extends only to the Dallas metropolitan area because ICP's disparate impact claim is founded solely on that region. *See Brinkman*, 433 U.S. at 420 ("[O]nly if there has been a systemwide impact may there be a systemwide remedy."); *see also Horne v. Glores*, 557 U.S. 433, 129 S.Ct. 2579, 2607 (2009) (because violation was proved only as to single district, vacating statewide injunction to extent it extended beyond district on grounds that "a statewide injunction . . . intruded deeply into the State's budgetary processes" and "obscured accountability for the drastic remedy" since the state legislature or state courts have the authority to decide this issue and not the lower court). The court concludes that the remedy ordered by this court does not apply statewide. *Cf.* Ds. Plan 19 ("[TDHCA] will endeavor to apply the principles and objectives in this Plan on a statewide basis."). This does not bar TDHCA from following its usual processes to apply this remedy to areas outside of the Dallas metropolitan area. The court, however, cannot order a statewide remedy, which would circumvent TDHCA's usual processes, because it must be careful to minimize federal intrusion and to decree a remedy only to the extent it will cure the violation. *See, e.g.*, *Brinkman*, 433 U.S. at 420; *Jamestown*, 557 F.2d at 1081; *United States v. W. Peachtree Tenth Corp.*, 437 F.2d 221, 228-29 (5th Cir. 1971).

3. continue to provide a 130% basis boost for developments in HOAs;

4. continue to include in the QAP criteria for disqualifying proposed development sites that have undesirable features and incorporate the more robust process to identify and address other potentially undesirable site features;

5. promulgate by rule a fair housing choice disclosure for prospective tenants and maintain a website providing information as to tax-credit assisted properties;

6. conduct an annual disparate impact analysis;

7. provide a mechanism to challenge public comments that cause proposed developments to receive negative points and include in the QAP the additional two-point below-the-line criterion regarding support or neutrality from a neighborhood organization that previously opposed a development and an associated debarment rule; and

8. in the event of a tie in scoring a 9% application, adopt a tie breaker in favor of an application proposing development in an HOA.

B

TDHCA must also submit an annual report to the court so that the court can evaluate whether, during the reporting period, TDHCA has "insur[ed] that no future violations of the [FHA] occur[red] and remov[ed] any lingering effects of past discrimination." *See id.*

No later than 90 days after the date the judgment is filed, the parties must confer regarding what information the report should contain. No later than 120 days after the date the judgment is filed, the parties must make a joint submission to the court stating (1) whether they agree to the contents of the report, and, if they do not agree in all respects to the contents, (2) their specific agreements and disagreements and their reasons for disagreement. The court will then issue an order prescribing the contents of the annual report.

Each calendar year, no later than 120 days after the TDHCA Board of Directors ("Board") issues final commitments for allocations of LIHTC, TDHCA must file the annual report with the clerk of court.[68] Within 30 days of the date TDHCA files the annual report, any other party may comment on the report by filing the comments with the clerk of court and serving all other parties. TDHCA may file a reply to a comment no later than 30 days after the comment is filed. TDHCA may include in an annual report, and another party may include in a comment, a request to modify a provision of the remedial plan. The request must set forth why the provision is no longer necessary or is insufficient to "insur[e] that no future violations of the [FHA] occur and remov[e] any lingering effects of past

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[68] Based on Tex. Gov't Code Ann. § 2306.6724(f) (West 2008), the court anticipates that the 120-day deadline will occur 120 days after July 31 of the calendar year in question. If that date falls on a day when the clerk's office is closed, the report will be due the next day that the office is open.

discrimination." *Id.*; *see also Brown v. Plata*, ___ U.S. ___, 131 S.Ct. 1910, 1946 (2011) (quoting *N.Y. State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 967 (2d Cir. 1983)) ("The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible.").

For the reasons explained *infra* at § VII, the annual reporting procedure shall remain in effect during the period during which the court retains jurisdiction over this case.

IV

The court turns first to the proper interpretation of § 42(m)(1)(B)(ii)(III) of the Internal Revenue Code ("I.R.C."), 26 U.S.C. § 42(m)(1)(B)(ii)(III). FRI objects to the Plan, contending that it violates § 42(m)(1)(B)(ii) by failing to give preference to developments that contribute to a concerted community revitalization plan. FRI Objs. 3. And in the Plan, TDHCA may be interpreting § 42(m)(1)(B)(ii) to impose a project selection preference. *See* Ds. Plan 15 (stating that "Consistent with § 42(m) of the Internal Revenue Code, the 2012 QAP offers incentives for applications in qualified census tracts and for applications in areas where the housing is a necessary component of a community revitalization plan.").

A

FRI contends that the Plan violates § 42(m)(1)(B)(ii) because it does not give preference to developments that are located in QCTs and that contribute to a concerted community revitalization plan. FRI maintains that the

Plan fails in several respects to give preference to such projects. First, FRI argues that the most recent QAP already gives preference to developments to be located in an HOA rather than to developments focused on revitalization, and that the Plan only strengthens that preference. FRI contends that this preference is in part demonstrated by the fact that, following the most recent QAP, TDHCA provided data showing the "virtual curtailment of QCT [applications]." FRI Objs. 6 (quoting Ds. Plan 9).[69] Second, FRI argues that TDHCA does not give preference to revitalization developments because, in order to curtail revitalization development, it has intentionally established "high thresholds" that must be met for revitalization developments to qualify for available additional points. Third, FRI argues that TDHCA's proposed remedy alters the scoring system by making additional points available to HOA developments without making similar points available to revitalization developments, and this demonstrates that revitalization developments are not given preference by the QAP. In summary, FRI's objections are based on concerns that the Plan will significantly decrease the number of revitalization projects that are awarded LIHTC, and FRI contends that such a plan fails to give preference to revitalization projects, in violation of § 42(m)(1)(B)(ii).

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[69] TDHCA itself expressed a concern that these data were not consistent with the expressed preferences of Congress set forth in § 42. This concern was at least one reason why TDHCA included the revitalization index in its proposed remedy.

B

In *Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, 749 F.Supp.2d 486 (N.D. Tex. 2010) (Fitzwater, C.J.), the court held that TDHCA had failed to demonstrate that it could not comply with both the FHA and § 42. *Id.* at 506 n.21. FRI argues that, despite this conclusion, § 42 governs the allocation of LIHTC and the Plan cannot require that TDHCA violate § 42, which FRI maintains the Plan does. The court agrees with FRI that the remedy in this case must comply with both the FHA and § 42. But the court holds that the Plan *can* comply with the FHA without violating § 42(m)(1)(B)(ii)(III). This conclusion follows from a correct interpretation of I.R.C. § 42.

1

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The court's "inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Id.* (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992)). "Unless exceptional circumstances dictate otherwise, '[w]hen [the court] find[s] the terms of a statute unambiguous, judicial inquiry is complete.'" *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987) (quoting *Rubin v. United States*, 449 U.S.

424, 430 (1981)). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)).

2

LIHTC are a type of general business credit. *See* I.R.C. § 38(b)(5). Section 42 sets forth the eligibility requirements for those seeking LIHTC, the method for calculating the amount of the credit, and the requirements of state housing agencies, such as TDHCA, in allocating their state's LIHTC. One such requirement is that state housing agencies must allocate all LIHTC dollar amounts pursuant to a QAP. *See* I.R.C. § 42(m)(1)(A)(i). Under I.R.C. § 42(m)(1)(B), a QAP

> 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.

I.R.C. § 42(m)(1)(B).

Both Frazier and TDHCA interpret § 42(m)(1)(B)(ii)(III) as requiring TDHCA to give preference to projects located in QCTs that contribute to a concerted community revitalization plan by providing such projects with additional points in the QAP's competitive scoring system. But § 42(m)(1)(B)(ii)(III) requires that the QAP "give[] preference in allocating housing credit dollar amounts *among selected projects* to— 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[.]" *Id.* at § 42(m)(1)(B)(ii)(III) (emphasis added). The dictionary

definition of "selected" is "[s]ingled out in preference: chosen." Webster's II New Riverside University Dictionary 1057 (1984).[70] Because "selected" is in the past tense, the statute mandates that the preference given to QCTs in allocating LIHTC dollar amounts occur *after* the projects have been selected. In other words, § 42(m)(1)(B)(ii)(III) does not require that the QAP award additional points so that projects located in QCTs and the development of which contribute to a concerted community revitalization plan are preferred over other projects.[71] Instead, § 42(m)(1)(B)(ii)(III) provides that, *after* projects have been selected, projects located in QCTs, and the development of which contributes to a concerted community revitalization plan, must be given preference in allocating LIHTC dollar amounts among the projects that have already been selected.

This interpretation of § 42(m)(1)(B)(ii)(III) is supported by § 42(m)(1)(C), which specifies selection criteria that a QAP must include. One selection criterion is the "project characteristics, including whether the project includes the use of existing housing as part of a

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[70] "When a term goes undefined in a statute, [it is given] its ordinary meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.*, ___ U.S. ___, 132 S. Ct. 1997, 2002 (2012) (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)) (using dictionaries to aid statutory interpretation).

[71] Subject, at least, to the requirements of the FHA, a QAP *can* award additional points to revitalization projects, but § 42(m)(1)(B)(ii)(III) *does not require* that the QAP do so.

community revitalization plan." *Id.* at § 42(m)(1)(C)(iii).[72] The inclusion of this criterion as one of several criteria confirms that Congress only intended revitalization projects that include the use of existing housing as part of a community revitalization plan to be one factor in the selection process, not a dispositive or preferred one. Congress could have, but did not, require that a QAP effectively prefer revitalization projects in QCTs by including that requirement in § 42(m)(1)(C). Accordingly, under a correct interpretation of the statute, the preference mandated by § 42(m)(1)(B)(ii)(III) comes into play *after* projects are selected and when LIHTC dollar amounts are being allocated *among selected projects.*[73]

The court recognizes that, due to the LIHTC selection system adopted in the state of Texas and implemented in the Texas QAP, only in rare circumstances will proposed developments in QCTs benefit from the preference set forth in § 42(m)(1)(B)(ii). This is because TDHCA only selects projects for which it

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[72] This is the only mandatory criterion related to revitalization, and TDHCA's 2012-13 QAP complies with this requirement.

[73] FRI also relies on § 42(d)(5)(B)(i) and (ii) as evidence of Congressional intent to give preference during the selection process to developments in QCTs. The court disagrees. These provisions make eligible for additional tax deductions (by increasing the property's basis) developments in QCTs that have been selected to receive LIHTC. *See id.*

has sufficient LIHTC to allocate.[74] When a developer applies for LIHTC, TDHCA staff ("Staff") first ensures that the application satisfies the threshold criteria set forth in the QAP. *See* Tex. Gov't Code Ann. § 2306.6710(a) (West 2008). The Staff then scores and ranks the applications that meet the threshold criteria according to the detailed scoring system that the QAP prescribes. *See id.* § 2306.6710(b). Beginning with the highest scoring applications, the Staff underwrites enough projects to ensure that all LIHTC will be allocated, including by underwriting projects that the Board places on the waiting list. *See id.* § 2306.6710(d). After the Staff makes its recommendations, the Board selects the projects that will receive a LIHTC commitment notice. If all of the available LIHTC are committed, the Board creates a waiting list that identifies which applicants will receive any additional LIHTC that become available. If an applicant who receives a commitment notice complies with the remaining obligations in the QAP, it will receive its LIHTC allocation. Therefore, under the QAP, *every* project that the Board selects is typically allocated LIHTC, meaning there is no opportunity for TDHCA to grant projects located in QCTs a "preference in allocating housing credit dollar amounts *among selected*

[74] The court notes that TDHCA's scoring and ranking system only applies to 9% LIHTC. Applicants seeking 4% LIHTC are not subject to the scoring and ranking process that the court describes in this section.

projects," since every project selected by the Board is allocated the full amount of available LIHTC.

The court's interpretation of § 42(m)(1)(B)(ii)(III) does not necessarily nullify in Texas the preference that the I.R.C. mandates. Although Texas' method for distributing LIHTC rarely,[75] if ever, would require that the preference mandated by § 42(m)(1)(B)(ii)(III) affect the distribution of LIHTC among the selected projects, § 42 governs every state's housing agency. A state could adopt a system in which it selected more proposed developments to receive LIHTC than it had available credits. If that were the case, the state agency *would be required* to give preference to projects covered by § 42(m)(1)(B)(ii)(III). Such projects would be funded preferentially. Texas, however, has adopted a system in which projects are not selected if they are unlikely to receive LIHTC.[76]

Because the TDHCA Plan only changes how projects are selected and does not alter how LIHTC dollar

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[75] The court notes that if TDHCA selected more projects than it could allocate LIHTC to, it would be required to allocate the LIHTC dollar amounts in accordance with § 42(m)(1)(B)(ii)(III).

[76] The court has no occasion in this case to determine whether, because Texas law and the QAP effectively foreclose TDHCA from having to consider the preference mandated by § 42(m)(1)(B)(ii)(III), Texas law is in tension with the I.R.C., but, to the extent that they are in tension, federal law is paramount.

amounts are allocated "among selected projects," TDHCA's proposed remedy does not violate § 42(m)(1)(B)(ii)(III). Accordingly, the court holds that FRI's objections lack force.[77]

V

The court now turns to the TDHCA Plan and the parties' objections.

A

TDHCA begins its proposal with a statement regarding its discretion, as it pertains to forward commitments and waivers:

> In approving the 2012 QAP, Governor Perry determined that the continuation of the ability to make awards of forward commitments was not desirable and that in exercising its discretion to waive any aspect of the QAP the Board should only grant waivers when doing so was necessary to further a purpose or policy

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[77] Because FRI's objections are based on an incorrect interpretation of § 42(m)(1)(B)(ii)(III), the court need not reach FRI's argument that the Plan is so vague that FRI and its experts have not had a meaningful opportunity to evaluate the proposed remedy. Even if FRI's experts were given additional time, FRI could not demonstrate that the remedy violates § 42(m)(1)(B)(ii)(III) because FRI only challenges how LIHTC developments are selected rather than how LIHTC dollar amounts are allocated among selected projects.

> enunciated in Tex. Gov't. Code, Chapter 2306.

Ds. Plan 5. In other words, TDHCA does not propose a remedy; instead, it describes the nature of the QAP as it now stands. ICP contends that "TDHCA can and should use its discretion to remedy the violation." P. Obj. 13. In particular, it proposes that TDHCA use "its discretion in making allocation decisions that accomplish the remedial purpose of the plan." *Id.*

It is within the court's authority to "order[] such affirmative action as may be appropriate" in order to remedy a FHA violation. 42 U.S.C. § 3613(c)(1). The court declines at this time, however, to require that the QAP be amended to authorize TDHCA to award forward commitments and waivers. Such a mandate would interfere with Texas' regulation of its own affairs. *See, e.g., Spallone*, 493 U.S. at 276 ("[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.") (alteration in original) (quoting *Milliken*, 433 U.S. at 280-81). And although the court is authorized to impose such a requirement—even one that interferes with Texas' regulation of its own affairs—if necessary to remedy the FHA violation, it is presently unclear whether such a remedy would have this effect. *See Rizzo*, 564 F.2d at 145 (prohibiting remedies that are "broader than that necessary to remove the violation and its effects"). As stated above, the court retains the authority to approve amendments to the remedial plan after receiving TDHCA's report and the parties' proposals. The court can determine later

whether it is necessary to empower TDHCA to award forward commitments and waivers to remedy the disparate impact.

B

TDHCA proposes to further strengthen the definition of an HOA. It posits that, in the 2012 QAP, HOA was defined to require "a development [to] be in a census tract that has BOTH a low incidence of poverty AND an above median income as well as . . . located in an area served by either recognized elementary schools or having a significant and accessible element of public transportation." Ds. Plan 5-6. It now proposes "to strengthen the criteria for locating developments within HOAs" by adopting the following "Opportunity Index":

Points	Population Served	Poverty Factor	Income Factor	School Quality Factor
7	General	<15% for all individuals	Top quartile of median household income for county or top quartile for MSA	Exemplary or recognized
5	General	<15% for all individuals	Top 2 quartiles of median household income for county or top	Exemplary or recognized

			2 quartiles for MSA	
5	Any	<15% for all individuals	Top quartile of median household income for county or top quartile for MSA	Exemplary or recognized
3	Any	<15% for all individuals	Top quartile of median household income for county or top quartile for MSA	n/a
1	Any	<15% for all individuals	Top 2 quartiles of median household income for county or top 2 quartiles for MSA	n/a

Id. at 6. In the first line, a proposed project located in such a census tract will receive the highest number of points a below-the-line criterion may receive—here, 7 points. An application located in an area that does not meet the stringent requirements of the first line may still receive points, to a lesser degree, if it satisfies the requirements of another line.

ICP does not object to the definition of HOAs or to the "Opportunity Index" to the extent that it provides "the highest value possible for below the line points for family units located in [HOAs]." P. Obj. 3. It posits that, to the extent the "Opportunity Index" offers 1 to 3 points, it is insubstantial and is "unlikely to have any remedial effect" because "[t]hese are minor points and have not worked to boost 9% program point totals in the past." *Id.* at 16. In support, ICP cites the Talton Report for the proposition that "the use of preference points for higher income areas has a 'tendency to create more local opposition' and have only a 'limited effect on a development's completed score.'" *Id.* at 17. It also "object[s] to the inclusion of applications for elderly units" in the "Opportunity Index" because "additional points for the elderly restricted units will not have any remedial effects and should not be part of the remedial plan."[78] P. Obj. 16; P. App. 3.

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[78] ICP also objects to including points in the "Opportunity Index" for proposed development sites in QCTs for which there is a concerted revitalization plan. It appears, however, that these points are not offered in the "Opportunity Index" but in the "Revitalization Index," which the court discusses *infra* at § V(E).

ICP also contends that this proposal is insufficient because a "proposed plan that only adds below the line criteria and points to the current system will not bring the allocation process into compliance." P. Obj. 21. ICP asserts that the points should be revalued so that the HOA criterion will have

The court adopts the TDHCA Plan's proposed "Opportunity Index," and overrules ICP's objections. As stated *supra* at § V(A), the court is authorized to adopt amendments to the remedial plan after receiving TDHCA's report and the parties' proposals. The court can determine later whether it is necessary to increase certain points offered in the "Opportunity Index"[79] or to limit the index only to elderly units in order to reduce the disparate impact.

C

TDHCA proposes the addition of the following below-the-line criteria, which it asserts are "indicative of educational quality and opportunity or lack of affordable housing":

> a. Location within the attendance zone of a public school with an academic rating of "Recognized" or "Exemplary" (or comparable rating) by the Texas Education Agency (up to 3 points):
>
> > A. 1 points if it is both an elementary school, and either a middle school or high school; or

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a higher value in comparison to the other criteria. The court addresses this *infra* at § VI.

[79] Moreover, while ICP maintains that the proposed 1 to 3 points are insubstantial, its argument and evidence do not demonstrate that 1 or 3 points will not reduce the disparate impact, albeit perhaps by a lesser extent.

> B. 3 points if it is an elementary school, a middle school, and a high school.
>
> b. A municipality or, if outside of the boundaries of any municipality, a county that has never received a competitive tax credit allocation. The application must also comply with all other anti-concentration provisions (2 points for general use/family or supportive housing; 1 point for elderly).

Ds. Plan 7-8. TDHCA also offers to remove all other "Development Location" options in the below-the-line criterion, unless required by statute, in order to preserve high incentives to target HOAs. ICP does not object to these proposals. Accordingly, the court adopts them as part of the remedy.

D

TDHCA next states that, because the 2012 QAP offers a 130% basis boost for proposed development sites located in HOAs, it will continue to do so. ICP supports this proposal but asserts that the basis boost should be limited to non-elderly units because "[t]he provision of the 130% basis boost for elderly and supportive housing will not remedy the violation of disproportionately allocating non-elderly units to locations in predominantly minority areas." P. Obj. 14.

For the reasons stated *supra* at § V(B), the court overrules ICP's objection.

E

TDHCA next proposes the adoption of the following "Revitalization Index":

Points	Population Served	Criteria
7	Any	The proposed development site is located in a QCT in which there is in effect a concerted revitalization plan consistent with the elements described in § 5 and the non-housing costs, as reflected in the local government certified plan budget, exceed $25,000 per unit in the proposed development.
3	Any	The proposed development site is located in a QCT in which there is in effect a concerted revitalization plan consistent with the elements described in § 5 and the non-housing costs, as reflected in the local government certified plan budget, exceed $10,000 per unit but are less than $25,000 per unit.

2	Any	The proposed development site is not located in a QCT but there is in effect a concerted revitalization plan consistent with the elements described in § 5 and the non-housing costs, as reflected in the local government certified plan budget, exceed $10,000 per unit.

Ds. Plan 10-11. According to TDHCA, the failure to grant the same preference provided to HOAs by the "Opportunity Index" to revitalization projects in QCTs is inconsistent with the preference for revitalization projects set forth in I.R.C. § 42(m).

ICP objects to the inclusion of the "Revitalization Index" for several reasons. First, it argues that, even according to TDHCA, the purpose of the "Revitalization Index" is not to remedy the FHA violation but to comply with § 42(m). ICP therefore maintains that the inclusion of the "Revitalization Index" in the remedy is improper because it makes the remedy broader than necessary to address the violation. The court has already held that § 42(m)(1)(B)(ii)(III) does not require TDHCA to give preference to revitalization projects in QCTs when selecting which projects will receive LIHTC; thus TDHCA need not include the "Revitalization Index" in the scoring system to comply with § 42(m). If the "Revitalization Index" need not be included to comply

with the I.R.C., there is no reason for the court to make it part of the FHA remedy. TDHCA, in fact, does not argue that the "Revitalization Index" is a necessary component of a plan to ameliorate the FHA violation, and ICP contends that the "Revitalization Index" may actually undercut the remedy that the court imposes. Because the "Revitalization Index" is not required by the I.R.C. and there has been no showing that it is a necessary component of a plan to remedy the FHA violation, its inclusion is impermissible because it will make the court's remedy broader than necessary. *See Rizzo*, 564 F.2d at 145 (holding that scope of remedy must be tailored to fit "the nature of the violation" and cannot be "broader than that necessary to remove the violation and its effects").[80] Accordingly, the court declines to include the "Revitalization Index" in the remedy.[81]

F

TDHCA proposes to strengthen the criteria for disqualifying proposed development sites that have undesirable features. It states that the 2012 QAP "included criteria for disqualifying proposed sites that have undesirable features," such as "developments

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[80] Because the court is not including the "Revitalization Index" in the remedy, it need not address ICP's other arguments related to the "Revitalization Index."

[81] As discussed *supra* at note 2, this does not preclude TDHCA from following its usual processes to include the "Revitalization Index" in the QAP.

located adjacent to or within 300 feet of junkyards." Ds. Plan 11-12. And it represents that it "will continue to include the same or similar criteria in its QAPs." *Id.* at 13. ICP does not object to this component of the Plan, stating that "[r]estricting the availability of such sites may have a remedial effect." P Obj. 23. The court adopts this proposal as part of the remedy.

TDHCA also proposes to "incorporate a more robust process to identify and address other potentially undesirable site features" by requiring "an applicant proposing development of multifamily housing with tax credits [to] disclose to [TDHCA] and obtain [TDHCA's] written notification of pre-clearance if the site involves any negative site features," such as "significant or recurring flooding," "at . or within 1000 feet of the proposed site." Ds. Plan 13. TDHCA will then determine whether to issue or withhold preclearance by reviewing the matters disclosed and conducting a site inspection, if necessary. ICP argues that "the use of a 1,000 feet distance as the primary measure for the ineligibility of a site under the criteria" is an inadequate measure of risk. P. App. 3. ICP maintains, instead, that "[t]he analysis should be on whether the condition poses such risk." P. Obj. 23-24. For the reasons stated *supra* at § V(B), the court overrules ICP's objection.

G

TDHCA next proposes strengthening the requirements for establishing a concerted revitalization plan in order to ensure that "true community revitalization is occurring." Ds. Plan 15. Under the

proposal, TDHCA can determine at a public meeting that a plan substantively and meaningfully demonstrates a revitalization effort, even if one or more factors have not been met.

TDHCA includes this in the remedial plan in an attempt to be consistent with its view of the requirements of I.R.C. § 42(m). ICP objects to including these enhancements as part of the remedial plan. For the reasons stated *supra* at § IV, TDHCA has no legal obligation under § 42(m) to give a preference to revitalization developments when selecting which projects will receive LIHTC. Because TDHCA does not contend that this proposal is necessary to remedy the FHA violation, the court concludes that the proposed revitalization enhancement is "broader than that necessary to remove the violation and its effects." *Rizzo*, 564 F.2d at 145. Accordingly, the court declines to include in the remedy the point enhancements for developments that are part of a concerted community revitalization effort in the remedy.[82]

H

TDHCA proposes to "promulgate by rule a fair housing disclosure ., advising prospective tenants in writing of a website or other method of contact where they can obtain information about alternative housing

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[82] As discussed *supra* at notes 2 and 16, this does not preclude TDHCA from following its usual processes to include such enhancements in the QAP.

and their rights under fair housing laws." Ds. Plan 18. Under the Plan, this disclosure must be provided to prospective tenants before they can enter into a lease. TDHCA also proposes to "maintain a website providing relevant information and identifying tax credit assisted properties." *Id.*

ICP posits that the disclosure and website "will not affect TDHCA's allocation decisions and will not contribute to bringing those decisions into compliance with the [FHA]." P. Obj. 24. But it acknowledges that "some form of notice that would be tailored for use in the Dallas remedial area would be appropriate once there are more tax credit units in Caucasian areas." *Id.* ICP suggests that the parties together determine the content of the notice.

The court disagrees with ICP's position that the disclosure and website will not reduce the disparate impact. Such initiatives could increase demand by tenants for developments located in HOAs, which could, in turn, encourage developers to propose such developments, and which then could result in increased approval rates for non-elderly developments located in predominantly Caucasian neighborhoods. The court adopts TDHCA's proposal. The content of the disclosure will be subject to periodic review as are the other provisions of the Plan.

I

TDHCA proposes to "annually conduct an analysis of the effects of its prior QAP to determine if that QAP contribut[es] to disparate impact." Ds. Plan 18. ICP does

not object to an annual disparate impact analysis, and the court adopts the proposal as an efficacious method of monitoring whether the court-ordered remedy is ensuring that no future violations of the FHA occur and removing any lingering effects of past discrimination. *See Jamestown*, 557 F.2d at 1080 (collecting cases).[83]

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[83] ICP contests the use of "over-concentration" in TDHCA's heading, which states: "Annual analysis of effectiveness of plan and continued development and enhancement of a policy of avoidance of over-concentration of [LIHTC]." Ds. Plan 18. ICP asserts that "[a]ny analysis using concentration and over-concentration will not assist in bringing TDHCA's allocation decisions into compliance with the [FHA]." P. Obj. 22. Instead, ICP maintains that the analysis should focus, not on concentration, but on disparate racial impact.

Although the heading refers to the "over-concentration" of LIHTC, the content of TDHCA's proposal demonstrates that its focus is on disparate impact, given that TDHCA intends to examine the extent that its changes reduce the disparate impact and whether it is necessary to adopt additional changes. Moreover, after the court receives the annual report and any requested modifications to the remedial plan, it will review under court-approved procedures all relevant evidence to determine whether the remedial plan should be amended. If information as to over-concentration is relevant, TDHCA can present it for court consideration.

ICP also requests that the annual report be used to request *the court* for modifications to the remedial plan. The court has established these procedures *supra* at § III.

J

TDHCA proposes adding a mechanism to challenge the grounds for public comments that could lead to the negative scoring of 9% applications or constitute opposition to proposed 4% developments. Under the proposal, a party challenging a comment must state the basis for the challenge. The commenting party must then provide support for the accuracy of its comment. A fact finder from TDHCA will make a final determination on the validity of the challenge. ICP does not object to this proposal. Because this proposal could offer an applicant proposing a development located in an HOA a manner to challenge negative comments, the court adopts the proposal.

TDHCA also proposes that applications in HOAs receiving statements of support or neutrality from a neighborhood organization that previously opposed a development (thus causing it to lose points) receive two additional points. ICP objects to including these points in the remedy but does not justify its opposition. Because this proposal could assist an applicant proposing a development in an HOA, the court adopts it as part of the remedy.

Finally, TDHCA proposes to amend its debarment rules so that if an applicant attempts to create opposition to an application, it will be subject to debarment. ICP objects to including new debarment rules in the remedy, arguing that debarment and the actions that could lead to it are not related, and therefore not tailored, to the FHA violation. The court disagrees, concluding that the

proposed debarment rule could decrease impediments to applications for developments in HOAs.

K

TDHCA proposes that "[i]n the event of a tie in scoring, the tie breaker will be a preference for the developments that are located the greatest distance from the nearest development that is assisted by either 4% or 9% credits." Ds. Plan 20. ICP objects to this proposal. Similar to its argument above, ICP asserts that "[t]he use of distance alone is a TDHCA concentration policy," which does not address the disparate impact violation. P. Obj. 31. Instead, it posits that the tie breaker should be in favor of "[a]n application for a family unit development in [an HOA] which would be consistent with the [FHA]." *Id.* at 31-32. The court adopts ICP's proposal, concluding that it appears better tailored to reducing the disparate impact.

L

TDHCA proposes to "continue to make available on its website proposed and final QAPs with comments and responses, applications, underwriting reports, application and award logs, scoring logs by subject, inventories, and appeal materials." Ds. Plan 20. It also proposes to "post market studies, Phase I Environmental Site Assessments and property condition assessments on its website." *Id.* ICP does not object to this proposal, and it posits that the website could also offer "other documents necessary to monitor compliance with the Court ordered plan." P. Obj. 25.

The parties do not address, and the court cannot determine, how this proposal is intended to ensure that no future violations of the FHA occur or to remove any lingering effects of past discrimination. *See Jamestown*, 557 F.2d at 1080 (collecting cases). Accordingly, the court declines to include this proposal, concluding that it is outside the scope of the court's remedial power. *See Rizzo*, 564 F.2d at 145.[84]

M

Finally, TDHCA states that it is subject to statutory constraints, including "adherence to the Texas Administrative Procedures Act; the Texas General Appropriations Act; Chapter 2306 of the Texas Government Code; and adherence to various federal requirements regarding the administration of other sources of funding impacting [TDHCA's] ability to address such matters." Ds. Plan 20. ICP interprets this to be a proposal "that [the] court order[] compliance with state and federal law," asserts that this proposal has no "connection to the [FHA] violation or the appropriate remedy," and posits that "there is no basis for a Court order to require compliance with state and federal laws governing the general administration of the program." P. Obj. 32.

TDHCA does not appear to be offering a proposal. Instead, TDHCA's statement appears to reflect its

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[84] TDHCA is not precluded from implementing this proposal after following its usual processes. See supra at notes 2, 16, and 17.

position that it is subject to statutory restrictions derived from state and federal law. But 42 U.S.C. § 3615 states that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." *Id.* And TDHCA does not specify the federal laws on which it relies. The court therefore declines to include this proposal in the remedial plan.

VI

The court now turns to ICP's proposals. ICP asserts that "TDHCA has proposed no changes in the 4% program allocation and decision process." P. Obj. 33. The court recognizes that the Plan does not address 4% LIHTC specifically, but ICP's objection does not identify a specific deficiency in the remedial plan that results from this omission. There are distinctions between 4% and 9% LIHTC in that 4% LIHTC are available to all who qualify. Additionally, parts of the remedial plan would have the effect of promoting 4% LIHTC in predominantly Caucasian areas (e.g., criteria for disqualifying proposed sites with undesirable features). Accordingly, the court will consider the adequacy of the remedial plan in relation to 4% LIHTC as part of its annual review process.

ICP next contends that, although TDHCA suggests one change to its threshold criteria—the exclusion of proposed development sites that have undesirable features—TDHCA should propose additional amendments to the threshold criteria in order to

mitigate the disparate impact. ICP also proposes revaluing points to increase the weight of below-the-line criteria, especially criteria that would reduce the disparate impact. The court agrees that these changes *could* reduce the disparate impact, but it is unclear whether their adoption is *necessary* to reduce the disparate impact. The court will instead consider these proposals as part of its annual review process.

ICP also asserts that the use of TDHCA's discretion should be included in the remedial plan. The court has already declined to accept this argument.

VII

In the judgment filed today, the court implements the remedial plan adopted in this memorandum opinion and order and retains jurisdiction over this case for a period of five years after the first annual report is filed. Although no party moves for a temporal limit on the court-ordered remedy, the court concludes that one is necessary. *See, e.g., Ueno v. Napolitano*, 2007 WL 1395517, at *6 (E.D.N.Y. May 11, 2007), *rec. adopted*, (E.D.N.Y. May 11, 2007) (although plaintiffs did not state a time-limit for injunctive relief, adopting a three-year limitation period because otherwise, "the court would be overseeing the defendants' rental activities for the rest of their lives"). The court, in its discretion, adopts a five-year limitation period. *Cf. United States v. Real Estate One, Inc.*, 433 F. Supp. 1140, 1156 (E.D. Mich. 1977) (ordering that defendants provide annual reports detailing manner in which they had complied with judgment and directing that "[t]he reporting aspects of

the injunction may terminate after five (5) full years of substantial compliance with the terms hereof"). The court finds that such a period will be sufficient to "insur[e] that no future violations of the [FHA] occur and remov[e] any lingering effects of past discrimination." *See Jamestown*, 557 F.2d at 1080 (collecting cases); *see also Ueno*, 2007 WL 1395517, at *6 (adopting three-year limitation period because, *inter alia*, it "should be enough time to monitor the defendants' rental practices to ensure that they are not discriminatory, while limiting the burden imposed upon the court as well as the defendants by the imposition of injunctive relief"); *Rogers v. 66-36 Yellowstone Blvd. Coop. Owners, Inc.*, 599 F. Supp. 79, 85-86 (E.D.N.Y. 1984) (recognizing that two years was best suited for advancement towards these two goals); *Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth.*, 493 F. Supp. 1225, 1251 (S.D.N.Y. 1980) (holding that court had "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future") (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

The court finds that a five-year period is necessary because progress toward ensuring that no future violations of the FHA occur and of removing any lingering effects of past discrimination will be measured according to reports of LIHTC awards that (as to 9% tax credits) are made on an annual cycle. And because various factors can influence where applicants choose to develop projects in a particular annual cycle, the court must have a sufficiently broad empirical basis to enable

it to assess whether the FHA violation in this case has in fact been remedied. By retaining jurisdiction for five years, the court will be able to evaluate the impact of several QAPs on the allocation of LIHTC. *Cf. Rogers*, 599 F. Supp. at 85-86 (recognizing that one-year duration for injunctive order would not be sufficient to permit a "newly implanted open housing program to take root"). During this period, the parties will have opportunities to request modifications to the remedial plan. This will enable the court to reduce TDHCA's remedial obligations in fewer than five years if they are no longer warranted, or to increase the remedial requirements in the plan now adopted that do have the intended effect of ensuring that no future violations of the FHA occur and removing any lingering effects of past discrimination.

* * *

For the reasons explained, the court adopts in part TDHCA's Plan, and it enters judgment today in accordance with its memorandum opinions and orders in this case and the remedial plan adopted today.

SO ORDERED.

August 7, 2012.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER

CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES PROJECT, INC.,	§	
Plaintiff,	§	
	§	Civil Action No.
	§	3:08-CV-0546-D
VS.	§	
THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, et al.,	§	
Defendants.	§	

JUDGMENT

I

In a memorandum opinion and order filed September 28, 2010, the court granted plaintiff The Inclusive Communities Project, Inc.'s ("ICP's") motion for partial summary judgment and denied defendants' motions for judgment on the pleadings and for summary judgment. The parties thereafter tried the balance of the case in a bench trial. In a memorandum opinion and order filed March 20, 2012, the court found in favor of ICP on its

disparate impact claim under §§ 3604(a) and 3605(a) of the Fair Housing Act ("FHA"), and in favor of defendants on all other claims. In a memorandum opinion and order filed today, the court adopts a remedial plan for addressing the FHA violation.

For the reasons set out in the memorandum opinions and orders filed September 28, 2010, March 20, 2012, and today, it is ordered and adjudged as follows:

II

As used in this judgment, the terms "TDHCA" and "defendants" mean, collectively, defendants Texas Department of Housing and Community Affairs and its Executive Director and board members in their official capacities. The term "Plan" means TDHCA's proposed remedial plan, attached to this judgment as Exhibit A. The term "QAP" means the Qualified Allocation Plan adopted by TDHCA under I.R.C. § 42(m)(1)(B), and Tex. Gov't Code Ann. § 2306.6702(a)(10) (West 2011). The term "LIHTC" means Low Income Housing Tax Credits awarded under a QAP

III

TDHCA, its officers, agents, servants, employees, and attorneys, and all those in active concert or participation with it who receive actual notice of this judgment by personal service or otherwise, are enjoined from administering the LIHTC program in the Dallas metropolitan area in a manner inconsistent with the FHA.

IV

TDHCA shall, within a reasonable time after the entry of this judgment, implement the following affirmative actions concerning the awarding of 4% and 9% LIHTC in the Dallas metropolitan area:

A. include in the QAP as an additional below- the-line criteria the "Opportunity Index," as set forth in the Plan at 6-7;

B. include in the QAP the additional below-the-line criteria regarding the quality of public education and anti-concentration, and remove all other "Development Location" criteria, as set forth in the Plan at 7-8;

C. continue to include in the QAP a 130% basis boost for proposed developments in high opportunity areas ("HOAs");

D. continue to include in the QAP criteria for disqualifying proposed development sites that have undesirable features, as set forth in the Plan at 11-13, and incorporate the more robust process of identifying and addressing other potentially undesirable site features, as set forth in the Plan at 13-14;

E. promulgate by rule a fair housing choice disclosure that must be given to prospective tenants and maintain a website providing information as to tax-credit assisted properties, as set forth in the Plan at 18;

F. conduct an annual disparate impact analysis, as set forth in the Plan at 18-19;

G. provide a mechanism to challenge public comments that cause proposed developments to receive negative points, as set forth in the Plan at 19, and include in the QAP the additional two-point below-the-line criterion regarding support or neutrality from a neighborhood organization that previously opposed a development and an associated debarment rule, as set forth in the Plan at 19-20;

H. adopt a tie breaker, in the event of a tie in scoring a 9% application, that favors an application proposing development in an HOA; and

I. each calendar year, no later than 120 days after the TDHCA Board of Directors issues final commitments for allocations of LIHTC, file the annual report with the clerk of court, in accordance with the memorandum opinion and order filed today.

V

The remedial plan adopted by this judgment shall be effective for a period of five years after the first annual report is filed. During this period, the court shall retain jurisdiction. At such earlier time, if any, that TDHCA or another party can demonstrate that, as to the Dallas metropolitan area, the remedial plan adopted by this judgment has ensured that no future violations of the FHA will occur and has removed any lingering effects of past discrimination, it may move the court to terminate all or specific provisions of this judgment and/or the remedial plan.

VI

The objections and supplement to objections of intervenor Frazier Revitalization Inc. to the Plan, as adopted by this judgment as components of the remedial plan, are denied.

VII

Except for ICP's disparate impact claim under the FHA, ICP's claims against defendants are dismissed with prejudice. Except for the remedial relief included in this judgment, ICP's requests for remedial relief are denied. ICP may apply for an award of attorney's fees and non-taxable costs under Fed. R. Civ. P. 54(d).

VIII

Defendants shall bear their own taxable costs of court. ICP shall recover 50% of its taxable costs of court, as calculated by the clerk of court, from defendants. Defendants shall bear the remaining 50% of ICP's taxable costs of court, as calculated by the clerk of court.

Done at Dallas, Texas August 7, 2012.

/s/ Sidney A . Fitzwater
SIDNEY A. FITZWATER
CHIEF JUDGE

JUDGMENT EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES PROJECT, INC.,	*	
PLAINTIFF,	*	
v.	*	CIVIL ACTION NO. 3:08-CV-0546-D
THE TEXAS EPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, AND MICHAEL GERBER, LESLIE BINGHAM-ESCARENO, TOMAS CARDENAS, C. KENT CONINE, DIONICIO VIDAL (SONNY) FLORES, JUAN SANCHEZ MUNOZ, AND GLORIA L. RAY, IN THEIR OFFICIAL CAPACITIES,	*	
DEFENDANTS.	*	

DEFENDANTS' PROPOSED REMEDIAL PLAN

This proposed Remedial Plan ("Plan") is submitted to the Court in accordance with the Memorandum Opinion and Order dated March 20, 2012. Certain clarifying remarks are provided to explain to the Court and to the

Plaintiff why certain propounded ways to provide remedial measures are not being offered in this Plan. To the extent that some of these clarifying remarks relate to matters of public record which occurred after the closing of the record in these proceedings, Defendant Texas Department of Housing and Community Affairs (the "Department") is prepared to offer such support by way of affidavits of fact or sworn testimony as the Court may deem necessary.

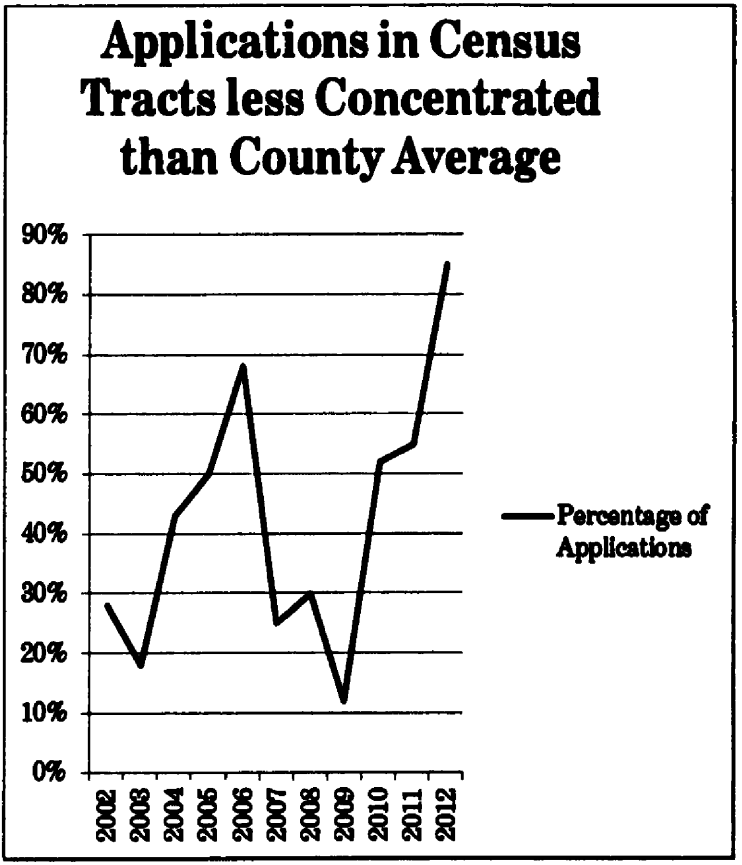
Introduction and Background

When the Qualified Allocation Plan (QAP) for 2012 (the "2012 QAP") was submitted to Governor Perry to approve, reject, or modify and approve in accordance with Tex. Gov't. Code, §2306.6724(b), Governor Perry approved the 2012 QAP with modifications. Those modifications clearly limited the use of discretion by the Department's Governing Board by curtailing the ability of the Department to make awards of forward commitments of low income housing tax credits (LIHTCs) and by narrowing the conditions under which that Governing Board could approve waivers under the 2012 QAP. That signal was consistent with the limited discretion provided by statute, as confirmed by opinions issued by the Office of the Attorney General. Thus, with regard to the proposal of this Plan, Department staff has endeavored to structure a proposal that strives to create a legally-supportable framework in which future QAPs can achieve the objectives of race neutral dispersion of LIHTC assisted developments within the remedial plan area by fashioning clear requirements, which are reasonably calculated to yield the intended result.

Because this is a process with numerous variables, not least of which is the complex decision-making process that developers undergo in selecting their proposed sites, this Plan will require annual analysis and, as needed, recalibration.

In addition to the limitations on discretion in the 2012 QAP, that rule took a new and significant policy direction towards the development and intended successful implementation of measures to generate a greater level of tax credit-assisted development activity in high opportunity areas. The results to date of these strong actions, actions already taken that set the stage for significant high opportunity activity in the area covered by these proceedings, are publicly available. On the Department's website the current status report of the 2012 competitive 9% tax credit round shows that a significant number of competitive applications in high opportunity areas have been submitted in Urban Region 3 with 16 of the applications located in such areas, many of which indicate they are top scoring applications.

The graphic below shows compellingly that actions already taken by the Department have materially changed the overall character of the competitive LIHTC round in 2012, promoting overwhelming interest in high opportunity areas.



In applicant-initiated appeals and requests for waivers the Board has taken seriously the limitations placed on its discretion and deliberated extensively in publicly conducted, transcribed meetings, leading to results that have closely followed the 2012 QAP The Board has considered waivers only in truly exceptional and compelling circumstances where failure to grant the

waiver would result in a clear failure to make the opportunity to compete available throughout the state.

It is the Department's belief that this proposed Remedial Plan offers meaningful improvements on the path already forged in the 2012 QAP and creates concepts which, if successful, can nurture and reinforce future QAPs. The Plan embraces the notion of providing maximum permissible incentives for areas that truly reflect the greatest opportunity, namely those areas with the highest income, lowest poverty, and best public education opportunities.

As set forth more fully in §12, captioned "Plan subject to statutory constraints," the Department operates under several layers of complex legal requirements, including the congressional statement in Internal Revenue Code §42(m) that the Department must give preference to "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...". Furthermore, the statutory schema for scoring of LIHTC competitive applications under QAPs is driven largely by TEX. GOV'T. CODE, §2306.6710, which has not been questioned in these proceedings and, presumably, must be adhered to in developing and administering future QAPs. Two of the key remedial tools proffered by the Plaintiff are the use of discretion, as discussed above, and the creation of set-asides. With respect to set-asides, it is open to question whether there is statutory authority for the Department to create set-asides in addition to those set forth in TEX. GOV'T. CODE, Chapter

2306. Even if, *arguendo*, creating set-asides were authorized, the suggestion to create a set-aside in the remedial area is problematic because that area is but a portion of a larger region pursuant to statute and to which the Department must regionally allocate LIHTCs.

As a result of these limitations and premises, the Department is proposing a Plan which focuses on: (1) according proposed developments located in defined high opportunity areas the greatest incentives allowed by state law; and, (2) according developments in Qualified Census Tracts (QCTs) that are part of true concerted revitalization plans co-equal incentives in order to provide the preference created by Internal Revenue Code §42(m). It is envisioned that the revitalization incentive will set a very high threshold, making it unlikely to yield a number of successful applicants in QCTs such that would perpetuate any discriminatory patterns found to have occurred unintentionally.

Plaintiff has requested that 4% non-competitive LIHTCs be addressed in this plan. Because of restrictions of federal law, states do not have the ability to designate the 130% basis boost for 4% LIHTC's, and therefore the only 4% LIHTC's eligible for the 130% basis boost are developments in federally designated QCTs and difficult to develop areas (DDAs).

The development and implementation of this Plan and the development of future QAPs in accordance with this Plan will be a matter to which the Department, in collaboration with Plaintiff, the Department's oversight bodies, and the public, will continue to work to develop

more nuanced and effective ideas to achieve an optimal dispersion of LIHTC developments. In developing this remedial plan for the subject Dallas metro area, the Department intends to apply some of these concepts, or similar concepts to the remainder of the state; however, certain other regions will need specifically tailored plans due to differing demographics and other factors.

1. Use of discretion - waivers.

In approving the 2012 QAP, Governor Perry determined that the continuation of the ability to make awards of forward commitments was not desirable and that in exercising its discretion to waive any aspect of the QAP the Board should only grant waivers when doing so was necessary to further a purpose or policy enunciated in Tex. Gov't. Code, Chapter 2306.

2. Strengthened definition of a High Opportunity Area (HOA).

In the development of its 2012 QAP, the Department adopted a strengthened definition of a high opportunity area; and, under the scoring criterion of development location, provided 4 competitive points for a development proposing a location in a HOA. In order to qualify as being in an HOA, a development must be in a census tract that has BOTH a low incidence of poverty AND an above median income as well as being located in an area served by either recognized elementary schools or having a significant and accessible element of public transportation. The Department currently anticipates that the highest four scoring 2012 applications in Urban Region 3 are located within the 5 county remedial area,

are located in HOAs, and are within the attendance zones of recognized or exemplary rated elementary schools. The Department further anticipates awards in Urban Region 3 will be limited to no more than 6 applications due to the amount of 9% credits available for allocation.

In future QAPs, the Department is committed to continuing to strengthen the criteria for locating developments within HOAs. The Department will create a new "Opportunity Index" in order to incentivize applications to locate developments in the highest income and lowest poverty areas of the remedial area. At the same time, applicants that propose projects in areas of high opportunity that do not meet the most stringent criteria will still be incentivized, albeit to a lesser degree. The proposed Opportunity Index is reflected in the following chart. The highest "below the line" (scoring items ranking lower than statutorily required scoring items) point value will be assigned to the highest category within the Opportunity Index (actual point values may change commensurate with changes in the above the line statutory scoring criteria).

Points	Population Served	Poverty Factor	Income Factor	School Quality Factor
7 Points	General use	<15% rate for all individuals	Tract in top quartile of median household income for county or, for site in an Metropolitan Statistical Area (MSA), top quartile for MSA	"Exemplary" or "Recognized" elementary school
5 Points	General Use	<15% rate for all individuals	Tract in top 2 quartiles of median household income for county or, for site in an MSA, top 2 quartiles for MSA	"Exemplary" or "Recognized" elementary school
5 Points	Any	<15% rate for all individuals	Tract in top quartile of median household income for county or, for site in an	"Exemplary" or "Recognized" elementary school

			MSA, top quartile for MSA	
3 Points	Any	<15% rate for all individuals	Tract in top quartile of median household income for county or, for site in an MSA, top quartile for MSA	N/A
1 Point	Any	<15% rate for all individuals	Tract in top 2 quartiles of median household income for county or, for site in an MSA, top 2 quartiles for MSA	N/A
Up to 7 Points	Any	The proposed development site is located in a QCT for which there is in effect a concerted revitalization plan (consistent with the elements described in §5. See Revitalization Index, §4, below.		

The Department will utilize data from the 5-year American Community Survey to determine a

development site's qualification under the poverty and income criteria. For categories requiring an "Exemplary" or "Recognized" elementary school, the development site must be located within the school attendance zone that has the applicable academic rating, as of the beginning of the Application Acceptance Period, or comparable rating if the rating system changes by the same date as determined by the Texas Education Agency. An elementary attendance zone does not include elementary schools with district-wide possibility of enrollment or no defined attendance zones, sometimes known as magnet schools. However, districts with district-wide enrollment and only one elementary school are acceptable.

The following additional factors, indicative of educational quality and opportunity or lack of affordable housing, will be incorporated as new below-the-line criteria:

a. Location within the attendance zone of a public school with an academic rating of "Recognized" or "Exemplary" (or comparable rating) by the Texas Education Agency (up to 3 points):

A. 1 points if it is both an elementary school, and either a middle school or high school; or

B. 3 points if it is an elementary school, a middle school, and a high school.

b. A municipality or, if outside of the boundaries of any municipality, a county that has never received a competitive tax credit allocation. The application must also comply with all other anti-concentration provisions

(2 points for general use/family or supportive housing; 1 point for elderly).

All other Development Location incentive criteria in the current QAP, such as incentives for developments in central business districts, will be removed in future QAPs, unless required by statute, in order to maintain high incentives to target HOAs.

3. 130% basis boost for transactions in HOAs.

Under the authority granted by the Housing and Economic Recovery Act of 2008, P L. 110-289, the 2012 QAP offers a 130% basis boost for transactions assisted by 9% LIHTCs that are located in HOAs as defined in paragraph 2, above.

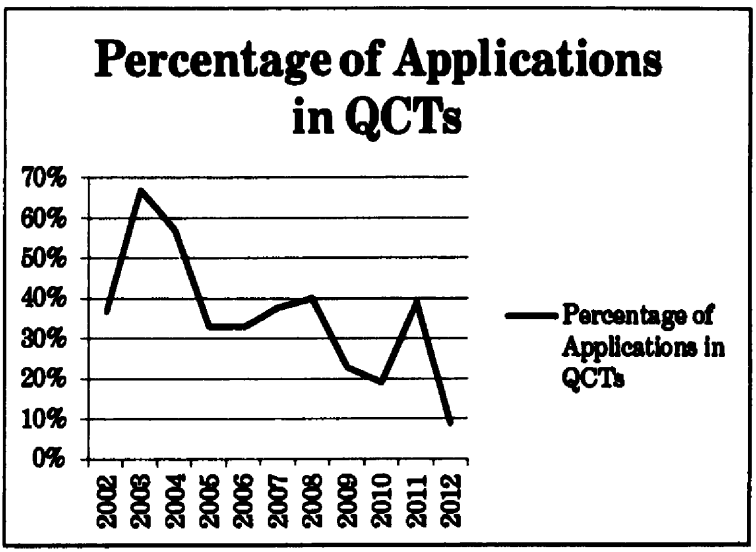
The Department will continue to include in its QAPs a 130% basis boost for applications that are intended to be located in HOAs. This requirement will not preclude or limit the Department's ability to offer a lawful basis boost in other appropriate instances. The authority for states to define criteria for a 130% boost for non-competitive 4% housing tax credit or tax-exempt bond developments is not available under §42 of the Internal Revenue Code.

4. The remedial balance and the Revitalization Index.

The Opportunity Index clearly provides the greatest point incentives for HOA transactions that serve the general public, including families, that are also in areas of significantly greater income, the top quartile. While a proposed transaction in a second quartile tract, a

proposed transaction in the top quartile serving a targeted, albeit legally targeted, population rather than the general population, or even a proposed transaction in a second quartile tract serving an elderly population would be characterized as HOA, it is clear that in order to achieve the spirit and intent of the Plan, it is only that top quartile/general population plan should receive that greatest level of recognition for competitive enhancement. This Plan does propose a mechanism allowing for a similar prioritization for a proposed transaction in a qualified census tract (QCT) that is the subject of a concerted plan of community revitalization, as federally mandated by Internal Revenue Code (IRC) §42(m). The Department contends that failure to grant same preference for such transactions could be seen as inconsistent with federal law. However, the Department is well aware of the fact that a significant level of continuing activity in development in QCTs would be inconsistent with the remedial objectives of this Plan. Therefore, it is critical to note that in developing this language, Department strongly believes that the high thresholds established for revitalization plans will demand significant investments of time, analysis, and local commitments of funding for non-housing activity from an applicant. Accordingly, these points are unlikely to achieve in the natal cycle after approval of a Remedial Plan, a significant number of applications that can demonstrably earn the maximum points for being in a QCT AND having in place a revitalization plan meeting the substantive criteria proposed.

As the graphic below conveys, changes implemented in the 2012 QAP have clearly resulted in a virtual curtailment of QCT activity. While such a curtailment might be viewed as accelerating a catch-up to restore a more balanced distribution of assisted developments in areas of all income levels, it would not be consistent with a prospective race neutral distribution or the congressionally expressed preferences set forth in the IRC.



Therefore, the Department believes that it is appropriate for an application in the area of greatest opportunity to be given coequal incentives with an application achieving the greatest revitalization purpose. Without this balance the Plan would in effect be forsaking that sector of the community in greatest need of this federal assistance. However, it is a generally

acknowledged contention that tax credit developers have been able to marshal community support to validate the conclusions that they were meeting the objectives of IRC §42(m) possibly where meaningful non-housing revitalization activity was not occurring. In order to assure that such efforts involve meaningful substance and do not create an unregulated opportunity to characterize an effort as revitalization that may not be meaningful and substantive, the Department has developed a concept similar to the Opportunity Index to address revitalization.

Revitalization index:

Points	Population served	Criteria
7 points	Any	The proposed development site is located in a QCT in which there is in effect a concerted revitalization plan (consistent with the elements described in §5 and the non-housing costs, as reflected in the local government certified plan budget, exceed $25,000 per unit in the proposed development.
3 points	Any	The proposed development site is

		located in a QCT in which there is in effect a concerted revitalization plan (consistent with the elements described in §5 and the non-housing costs, as reflected in the local government certified plan budget, exceed $10,000 per unit but are less than $25,000 per unit.
2 points	Any	The proposed development site is not located in a QCT but there is in effect a concerted revitalization plan (consistent with the elements described in §5 and the non-housing costs, as reflected in the local government certified plan budget, exceed $10,000 per unit.

An application seeking to receive points under the Revitalization Plan must provide the plan and plan budget for review at pre-application and provide substantiation of the budget through submittal of a local

government certified copy of the plan and budget supporting the claimed points at full application.

5. Strengthened criteria for disqualifying proposed sites that have undesirable features.

In the 2012 QAP, the Department included criteria for disqualifying proposed sites that have undesirable features, as follows:

> (13) Development Sites with negative characteristics in subparagraphs (A) - (G) of this paragraph will be considered ineligible. If Staff identifies what it believes would constitute an unacceptable negative site feature not covered by the those identified in subparagraphs (A) - (G) of this paragraph Staff may seek Board clarification and, after holding a hearing before the Board, the Board may make a final determination as to whether that feature is unacceptable. Rehabilitation (excluding Reconstruction) Developments with ongoing and existing federal assistance from HUD or TRDO-USDA are exempt. For purposes of this exhibit, the term 'adjacent' is interpreted as sharing a boundary with the Development Site. The distances are to be measured from the nearest boundary of the Development Site to the boundary of the negative characteristic. If none of these negative characteristics exist, the Applicant must

sign a certification to that effect. The negative characteristics include:

(A) developments located adjacent to or within 300 feet of junkyards;

(B) developments located adjacent to or within 300 feet of active railroad tracks, unless the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone or the railroad in question is commuter or light rail (Developments located in a Central Business District are exempt);

(C) developments located adjacent to or within 300 feet of heavy industrial uses such as manufacturing plants, refinery blast zones, etc.;

(D) developments located adjacent to or within 300 feet of a solid waste or sanitary landfills;

(E) developments where the buildings are located within the easement of any overhead high voltage transmission line or inside the engineered fall distance of any support structure for high voltage transmission lines, radio antennae, satellite towers, etc. This does not apply to local service electric lines and poles;

(F) developments where the buildings are located within the accident zones or clear

zones for commercial or military airports; or

(G) development is located adjacent to or within 300 feet of a sexually-oriented business. For purposes of this paragraph, a sexually-oriented business shall be defined as stated in §243.002 of the Texas Government Code.

As a part of the Plan, the Department will continue to include the same or similar criteria in its QAPs for disqualifying proposed sites that have undesirable features. Additionally, the Department will incorporate a more robust process to identify and address other potentially undesirable site features in future QAPs. Under this criterion, an applicant proposing development of multifamily housing with tax credits must disclose to the Department and may obtain the Department's written notification of pre-clearance if the site involves any negative site features at the proposed site or within 1000 feet of the proposed site such as the following:

a. A history of significant or recurring flooding;

b. A hazardous waste site or a source of localized hazardous emissions, whether remediated or not;

c. Heavy industrial use;

d. Active railways (other than commuter trains);

e. Landing strips or heliports;

f. Significant presence of blighted structures;

g. Fire hazards which will increase the fire insurance premiums for the proposed site;

h. Locally known presence of gang activity, prostitution, drug trafficking, or other significant criminal activity that rises to the level of frequent police reports.

The Department will develop a process for the efficient, timely resolution of the preclearance process. The Department may require that disclosure occur on an expedited basis, including but not limited to during the pre-application process. The Department will review these matters as disclosed to them and will either issue or withhold a pre-clearance. The standard to be employed will be that the pre-clearance will be withheld if one or more of the factors enumerated above are present at or within 1000 feet of the proposed site and are of a nature that would not be typical in a neighborhood that would qualify for HOA points under the Opportunity Index. An applicant providing disclosure will be encouraged to provide any plans for mitigation of the present undesirable feature(s), which may include a concerted community revitalization plan as described in §5.

In assessing disclosures the Department staff may, at its discretion, conduct a site inspection. Non-disclosure of any of the enumerated conditions if known or in the exercise of reasonable diligence could have been ascertained is a basis for withholding pre-clearance. Withholding or denial of pre-clearance may be appealed

pursuant to the appeals process set forth in the applicable QAP.

With respect to the presence or absence of hazardous waste sites or emissions, an applicant may rely on the required Phase I Environmental Site Assessment.

6. Strengthening of incentives for applications in qualified census tracts where the housing is part of a concerted community revitalization plan.

Consistent with §42(m) of the Internal Revenue Code, the 2012 QAP offers incentives for applications in qualified census tracts and for applications in areas where the housing is a necessary component of a community revitalization plan. In future QAPs, the Department will strengthen the correlation between revitalization and development located in qualified census tracts and the requirements for establishing that true community revitalization is occurring and that affordable housing is a necessary part of the revitalization and will continue to provide appropriate incentives for affordable rental housing developments meeting such strengthened criteria.

Beginning with its 2013 QAP, the Department will establish a scoring criteria in which any application for low income housing tax credits located in a qualified census tract, as defined in §42(d)(5)(C) of the Internal Revenue Code, will be eligible for enhanced points, based on its location, if there is, as described below, a concerted revitalization plan that is in effect and to which the development will contribute.

A concerted community revitalization plan adopted by a municipality or county will be deemed to exist based on the following:

a. A community revitalization plan must have been adopted by the municipality or county in which the proposed development is intended to be located.

b. The adopting municipality or county must have performed, in a process providing for public input, an assessment of the factors in need of being addressed as a part of such community revitalization plan. Factors to be considered include the following:

A. adverse environmental conditions, natural or manmade, that are material in nature and are inconsistent with the general quality of life in typical average income neighborhoods. By way of example, such conditions might include significant and recurring flooding, presence of hazardous waste sites or ongoing localized emissions not under appropriate remediation, nearby heavy industrial, uses or uses presenting significant safety or noise concerns such as major thoroughfares, nearby active railways (other than commuter trains), or landing strips; significant and widespread (*i.e.*, not localized to a small number of businesses or other buildings) rodent or vermin infestation acknowledged to present health risks requiring a concerted effort; or fire hazards;

B. presence of blighted structures;

C. presence of inadequate transportation;

D. lack of accessibility to and/or presence of inadequate health care facilities, law enforcement and fire fighting facilities, social and recreational facilities, and other public facilities comparable to those typically found in neighborhoods containing comparable but unassisted housing;

E. the presence of significant crime.

F. the presence, condition, and performance of public education; or

G. the presence of local business providing employment opportunities.

H. A municipality is not required to identify and address all such factors, but it must set forth in its plan those factors that it has identified and determined it will address.

c. The adopting municipality or county must have based its plan on the findings of the foregoing assessment and must have afforded the public opportunity to provide input and comment on the proposed plan and the factors that it would address. To the extent that issues identified require coordination with other authorities, jurisdictions, or the like, such as school boards or hospitals, the adopting municipality should include coordination with such bodies in its plan and, to the extent feasible, secure their cooperation.

d. The adopted plan, taken as a whole, must be a plan that can reasonably be expected to revitalize the community and address in a substantive and meaningful way the material factors identified. The adopted plan

must specifically address how the providing of affordable rental housing fits into the overall plan and is a necessary component thereof.

e. The adopted plan must describe the planned sources and uses of funds to accomplish its purposes.

f. For any application located in a qualified census tract at the time of application to be eligible for enhanced points for this item based on its location, the revitalization plan must already be in place as evidenced by as certification that:

A. the plan was duly adopted with the required public comment processes followed;

B. that funding and activity under the plan have already commenced; and

C. the adopting municipality or county has no reason to believe that the overall funding for the full and timely implementation of the plan will be unavailable.

At the time of any award of Low Income Housing Tax Credits the site and neighborhood of any unit covered by the award and must conform to the Department's rules regarding unacceptable sites.

It is recognized that municipalities and counties will need to devote time and effort to adopt a concerted revitalization plan that complies with the requirements of this remedial plan. Therefore, for purposes of the first cycle of Low Income Housing Tax Credit awards following the issuance of an Order adopting a remedial

plan, the The Board of the Department may, in a public meeting, determine that a revitalization plan substantively and meaningfully satisfies a revitalization effort, notwithstanding one or more of the above factors not having been satisfied.

7. Promulgation of fair housing choice disclosure.

The Department will promulgate by rule a fair housing choice disclosure in a form substantially equivalent to that set out in Attachment A, advising prospective tenants in writing of a website or other method of contact where they can obtain information about alternative housing and their rights under fair housing laws. The Department will maintain a website providing relevant information and identifying tax credit assisted properties searchable by ZIP code, city, and/or county. The Department will require that no initial lease be entered into for a

unit assisted with low income housing tax credits unless that disclosure has first been provided to the prospective tenant.

8. Annual analysis of effectiveness of plan and continued development and enhancement of a policy of avoidance of over-concentration of low income housing units.

The Department will annually conduct an analysis of the effects of its prior QAP to determine if that QAP was contributing to disparate impact; and will take appropriate and lawfully permitted measures to amend the next and subsequent QAPs (beginning with its 2013

QAP), to avoid present or potentially developing disparate impact in the allocation of low income housing tax credits.

As each QAP is developed, the Department will analyze the distribution achieved under the previous QAP. It will take that analysis into account and use it to develop (within the measures available to the Department under applicable law) changes in the incentives, threshold requirements, and other factors to address any potential disparate impact and to achieve, prospectively, a broad and race neutral dispersion of low income housing tax credit assisted

properties.

The QAP disparate impact analysis the Department performs will be made public. The public will be given opportunity to comment on the analysis, and the development of QAPs will also be carried out in a public meeting or hearing with opportunity for review and comment by the public, including the Plaintiff. In order to achieve consistency on a statewide basis, the Department will endeavor to apply the principles and objectives in this Plan on a statewide basis.

9. Review of challenged public input.

Any public comment that will be considered for negative scoring of applications, or as opposition to 4% non-competitive allocations, may be challenged if it is contrary to findings or determinations, including zoning determinations, of a municipality, county, school district, or other local governmental entity. If any such comment

is challenged, the party that made the challenge will have to declare the basis for the challenge. The party that made the comment will be given seven (7) days to provide any support for the accuracy of its assertions. All such materials and the analysis of the Department's staff will be provided to a fact finder for a review and determination. The Department's determination will be final.

Additionally, applications in HOAs that receive statements of neutrality or support from a Neighborhood Organization that had provided a statement of opposition against a tax credit development in the last three years and for which the prior application was assigned the point value associated with opposition, will receive an additional two (2) points. The Department will amend its debarment rules to provide that if an applicant is found to have worked to create opposition to their own or another's application in any application round, they shall be subject to debarment. An applicant against whom debarment proceedings have been initiated in good faith by the Department shall not be eligible for these points.

10. Tie breakers.

In the event of a tie in scoring, the tie breaker will be a preference for the developments that are located the greatest distance from the nearest development that is assisted by either 4% or 9% credits.

11. Transparency and openness of process.

The Department will continue to make available on its website proposed and final QAPs with comments

and responses, applications, underwriting reports, application and award logs, scoring logs by subject, inventories, and appeal materials. Additionally, the Department will beginning with the 2013 competitive tax credit cycle, post market studies, Phase I Environmental Site Assessments and property condition assessments on its website. Nothing will require the disclosure of any item which has been found to be confidential as a matter of law.

12. Plan subject to statutory constraints.

This Plan acknowledges that as the Department considers and takes actions within its lawful powers, the implementation of such matters is an inherently deliberate and public process that takes time. Factors which must be addressed include adherence to the Texas Administrative Procedures Act; the Texas General Appropriations Act; Chapter 2306 of the Texas Government Code; and adherence to various federal requirements regarding the administration of other sources of funding impacting the Department's ability to address such matters. Subject to adherence to all such requirements, as they may apply, the Department shall take appropriate actions within its power and control as provided for herein.

Nothing in this Plan shall in any way limit or affect the right of the State of Texas to enact laws; or obligate the Department to take any action not allowed by law; or require the Department to become obligated for funds that have not been appropriated to it for the purposes intended.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF FILING AND SERVICE

I certify that on May 18, 2012, I electronically submitted the foregoing document with the clerk of the court for the United States District Court for the Northern District of Texas using the electronic case file system of the court, such that all counsel of record will be provided a "Notice of Electronic filing", and access to this document.

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/s/ G. Tomas Rhodus
G. Tomas Rhodus

Attachment A
to
Remedial Plan

FAIR HOUSING CHOICE DISCLOSURE

You are about to enter into a lease agreement, which is a binding contract. Before you enter into your lease you should know that under fair housing laws you have certain basic rights, including the right to make certain choices as to where you will live. There are programs administered by a number of state and local institutions to provide assistance with respect to housing, including, but not limited to, affordable rental housing supported by low income housing tax credits, housing assisted with loans or grants from HUD programs and USDA programs, different types of vouchers, and public housing. The requirements under the programs may be different and not all types of housing options may be available where you would like to live.

Where you live has the potential to impact you and others in your household. For example, where you live may provide greater access to some (but not necessarily all) of the things listed below:

- Better schools
- Less crime
- Better public transportation
- Better access to health care

- Better access to grocery stores offering more healthy food choices

- Better proximity to family, friends, and organizations to which you might belong

There are other things that may be important to you. If you want to explore other housing options you can identify other affordable rental properties in your community at:

[hyperlink]

This link will also summarize your rights under fair housing laws and direct you to fair housing resources

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES PROJECT, INC.,	§	
Plaintiff,	§	Civil Action No. 3:08-CV-0546-D
VS.	§	
THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION
AND ORDER

Defendants' September 4, 2012 motion to alter or amend judgment or, alternatively, for new trial is granted in part and denied in part.

I

In the court's August 7, 2012 memorandum opinion and order, *Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, 2012

WL 3201401 (N.D. Tex. Aug. 7, 2012) (Fitzwater, C.J.) ("Remedy Opinion"), it noted that its decision to decline to include the "Revitalization Index" in the remedy "does not preclude TDHCA from following its usual processes to include the 'Revitalization Index' in the QAP." *Id.* at *10 n. 16. Defendants maintain that, despite this notation, the judgment "order[s] Defendants to eliminate any other development location criteria." Ds. Mot. Alter or Amend Judg. 8. They state that, "[a]s a result, Defendants are unsure whether they are permitted to use the Revitalization Index, a development location criteri[on], in the Dallas metropolitan area if it was enacted as part of the QAP." *Id.*

Because, as noted in the Remedy Opinion, the court did not intend to "preclude TDHCA from following its usual processes to include the 'Revitalization Index' in the QAP," the court amends the judgment to add the following provision at the end of § IV: "Nothing in this judgment precludes TDHCA from following its usual processes to include the Revitalization Index, as set forth in the Plan at 10-11, in the QAP."

II

Defendants maintain that the court should amend the judgment to make clear the portions that apply to 4% LIHTCs. *See* Ds. Mot. Alter or Amend Judg. 9. In the Remedy Opinion, the court noted "that the Plan [did] not address 4% LIHTC specifically," but it concluded that "ICP's objection [did] not identify a specific deficiency in the remedial plan that result[ed] from this omission." Inclusive Cmtys., 2012 WL 3201401, at *14. The court

also pointed out that "[t]here are distinctions between 4% and 9% LIHTC in that 4% LIHTC are available to all who qualify. Additionally, parts of the remedial plan would have the effect of promoting 4% LIHTC in predominantly Caucasian areas (e.g., criteria for disqualifying proposed sites with undesirable features)." *Id.* The court concluded that it would "consider the adequacy of the remedial plan in relation to 4% LIHTC as part of its annual review process." *Id.*

To clarify that some components of the remedial plan may not apply to 4% LIHTC, the court amends § IV of the judgment so that the part reads "TDHCA shall, within a reasonable time after the entry of this judgment, implement the following affirmative actions concerning the awarding of 4% and 9% LIHTC in the Dallas metropolitan area" is amended to read "TDHCA shall, within a reasonable time after the entry of this judgment, implement the following affirmative actions concerning the award of 9% LIHTC (and, to the extent applicable, 4% LIHTC) in the Dallas metropolitan area." As indicated in the Remedy Opinion, the court "will consider the adequacy of the remedial plan in relation to 4% LIHTC as part of its annual review process." *Id.* If, for example, the revised language in § IV of the amended judgment has the effect of permitting TDHCA to administer LIHTC in the Dallas metropolitan area in a manner inconsistent with the FHA—which is expressly prohibited under § III of the amended judgment—the court can revisit this provision and other issues pertaining to 4% LIHTC as part the annual review process.

III

Defendants maintain that the court should not have taxed costs as it did. The court concludes that § VIII of the judgment is incorrectly worded and should be revised in the amended judgment.

The court intended that defendants bear their own taxable costs of court and 50% of ICP's taxable costs of court, and that ICP bear the remaining 50% of its own taxable costs of court. Accordingly, the judgment is amended so that § VIII provides: "Defendants shall bear their own taxable costs of court. ICP shall recover 50% of its taxable costs of court, as calculated by the clerk of the court, from defendants and shall bear the remaining 50% of its own taxable costs of court, as calculated by the clerk of the court."

IV

Except as granted in this memorandum opinion and order, defendants' motion to alter or amend judgment or, alternatively, for new trial is denied.

* * *

Defendants' September 4, 2012 motion to alter or amend judgment or, alternatively, for new trial is granted in part and denied in part.

SO ORDERED.

November 8, 2012.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES PROJECT, INC., Plaintiff,	§	
	§	Civil Action No.
	§	3:08-CV-0546-D
VS.	§	
THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, et al., Defendants.	§	

AMENDED JUDGMENT

I

In a memorandum opinion and order filed September 28, 2010, the court granted plaintiff The Inclusive Communities Project, Inc.'s ("ICP's") motion for partial summary judgment and denied defendants' motions for judgment on the pleadings and for summary judgment. The parties thereafter tried the balance of the case in a bench trial. In a memorandum opinion and order filed March 20, 2012, the court found in favor of ICP on its disparate impact claim under §§ 3604(a) and 3605(a) of the Fair Housing Act ("FHA"), and in favor of defendants on all other claims. In a memorandum

opinion and order filed August 7, 2012, the court adopted a remedial plan for addressing the FHA violation. The court also filed a judgment on August 7, 2012. In a memorandum opinion and order filed today, the court grants in part and denies in part defendants' motion to alter or amend judgment or, alternatively, for new trial.

For the reasons set out in the memorandum opinions and orders filed September 28, 2010, March 20, 2012, August 7, 2012, and today, it is ordered and adjudged as follows:

II

As used in this amended judgment (hereafter "judgment"), the terms "TDHCA" and "defendants" mean, collectively, defendants Texas Department of Housing and Community Affairs and its Executive Director and board members in their official capacities. The term "Plan" means TDHCA's proposed remedial plan, attached to this judgment as Exhibit A. The term "QAP" means the Qualified Allocation Plan adopted by TDHCA under I.R.C. § 42(m)(1)(B), and Tex. Gov't Code Ann. § 306.6702(a)(10) (West 2011). The term "LIHTC" means Low Income Housing Tax Credits awarded under a QAP.

III

TDHCA, its officers, agents, servants, employees, and attorneys, and all those in active concert or participation with it who receive actual notice of this judgment by personal service or otherwise, are enjoined from administering the LIHTC program in the Dallas

metropolitan area in a manner inconsistent with the FHA.

IV

TDHCA shall, within a reasonable time after the entry of this judgment, implement the following affirmative actions concerning the awarding of 9% LIHTC (and, to the extent applicable, 4% LIHTC) in the Dallas metropolitan area:

A. Include in the QAP as an additional below-the-line criteria the "Opportunity Index," as set forth in the Plan at 6-7;

B. include in the QAP the additional below-the-line criteria regarding the quality of public education and anti-concentration, and remove all other "Development Location" criteria, as set forth in the Plan at 7-8;

C. continue to include in the QAP a 130% basis boost for proposed developments in high opportunity areas ("HOAs");

D. continue to include in the QAP criteria for disqualifying proposed development sites that have undesirable features, as set forth in the Plan at 11-13, and incorporate the more robust process of identifying and addressing other potentially undesirable site features, as set forth in the Plan at 13-14;

E. promulgate by rule a fair housing choice disclosure that must be given to prospective tenants and maintain a website providing information as to

tax-credit assisted properties, as set forth in the Plan at 18;

F conduct an annual disparate impact analysis, as set forth in the Plan at 18-19;

G. provide a mechanism to challenge public comments that cause proposed developments to receive negative points, as set forth in the Plan at 19, and include in the QAP the additional two-point below-the-line criterion regarding support or neutrality from a neighborhood organization that previously opposed a development and an associated debarment rule, as set forth in the Plan at 19-20;

H. adopt a tie breaker, in the event of a tie in scoring a 9% application, that favors an application proposing development in an HOA; and

I. each calendar year, no later than 120 days after the TDHCA Board of Directors issues final commitments for allocations of LIHTC, file the annual report with the clerk of

court, in accordance with the memorandum opinion and order filed today.

Nothing in this judgment precludes TDHCA from following its usual processes to include the Revitalization Index, as set forth in the Plan at 10-11, in the QAP.

V

The remedial plan adopted by this judgment shall be effective for a period of five years after the first annual report is filed. During this period, the court shall retain

jurisdiction. At such earlier time, if any, that TDHCA or another party can demonstrate that, as to the Dallas metropolitan area, the remedial plan adopted by this judgment has ensured that no future violations of the FHA will occur and has removed any lingering effects of past discrimination, it may move the court to terminate all or specific provisions of this judgment and/or the remedial plan.

VI

The objections of intervenor Frazier Revitalization Inc. to the Plan, as adopted by this judgment as components of the remedial plan, are denied.

VII

Except for ICP's disparate impact claim under the FHA, ICP's claims against defendants are dismissed with prejudice. Except for the remedial relief included in this judgment, ICP's requests for remedial relief are denied. ICP may apply for an award of attorney's fees and non-taxable costs under Fed. R. Civ. P. 54(d).

VIII

Defendants shall bear their own taxable costs of court. ICP shall recover 50% of its taxable costs of court, as calculated by the clerk of the court, from defendants and shall bear the remaining 50% of its own taxable costs of court, as calculated by the clerk of the court.

Done at Dallas, Texas November 8, 2012.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
CHIEF JUDGE

JUDGMENT EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES PROJECT, INC., PLAINTIFF,	*	
v.	*	CIVIL ACTION NO. 3:08-CV-0546-D
THE TEXAS EPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, AND MICHAEL GERBER, LESLIE BINGHAM-ESCARENO, TOMAS CARDENAS, C. KENT CONINE, DIONICIO VIDAL (SONNY) FLORES, JUAN SANCHEZ MUNOZ, AND GLORIA L. RAY, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS.	*	

DEFENDANTS' PROPOSED REMEDIAL PLAN

This proposed Remedial Plan ("Plan") is submitted to the Court in accordance with the Memorandum Opinion and Order dated March 20, 2012. Certain clarifying remarks are provided to explain to the Court and to the Plaintiff why certain propounded ways to provide remedial measures are not being offered in this Plan. To the extent that some of these clarifying remarks relate to

matters of public record which occurred after the closing of the record in these proceedings, Defendant Texas Department of Housing and Community Affairs (the "Department") is prepared to offer such support by way of affidavits of fact or sworn testimony as the Court may deem necessary.

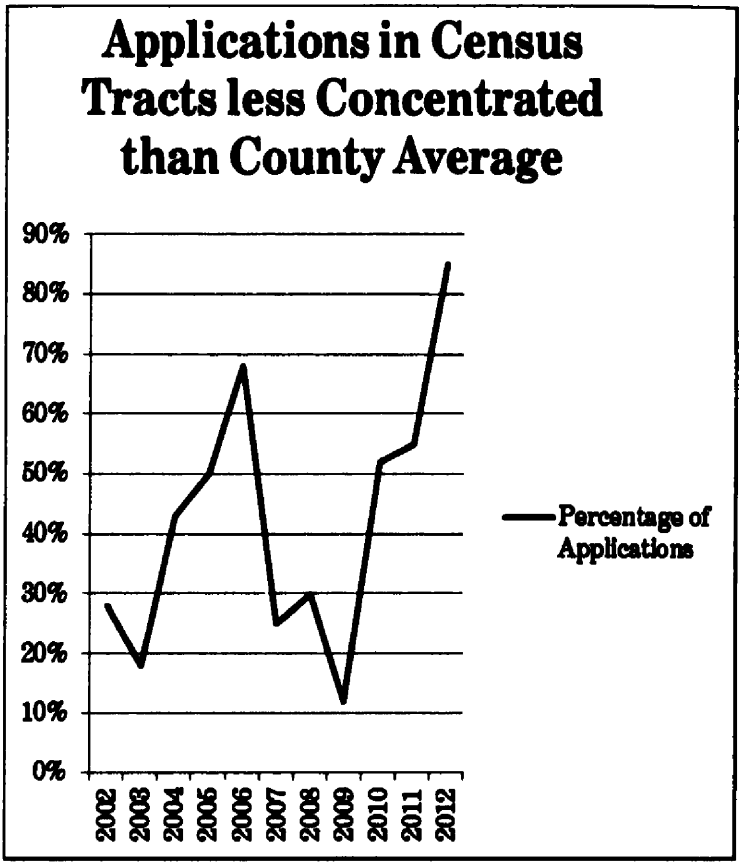
Introduction and Background

When the Qualified Allocation Plan (QAP) for 2012 (the "2012 QAP") was submitted to Governor Perry to approve, reject, or modify and approve in accordance with Tex. Gov't. Code, §2306.6724(b), Governor Perry approved the 2012 QAP with modifications. Those modifications clearly limited the use of discretion by the Department's Governing Board by curtailing the ability of the Department to make awards of forward commitments of low income housing tax credits (LIHTCs) and by narrowing the conditions under which that Governing Board could approve waivers under the 2012 QAP. That signal was consistent with the limited discretion provided by statute, as confirmed by opinions issued by the Office of the Attorney General. Thus, with regard to the proposal of this Plan, Department staff has endeavored to structure a proposal that strives to create a legally-supportable framework in which future QAPs can achieve the objectives of race neutral dispersion of LIHTC assisted developments within the remedial plan area by fashioning clear requirements, which are reasonably calculated to yield the intended result. Because this is a process with numerous variables, not least of which is the complex decision-making process that developers undergo in selecting their proposed

sites, this Plan will require annual analysis and, as needed, recalibration.

In addition to the limitations on discretion in the 2012 QAP, that rule took a new and significant policy direction towards the development and intended successful implementation of measures to generate a greater level of tax credit-assisted development activity in high opportunity areas. The results to date of these strong actions, actions already taken that set the stage for significant high opportunity activity in the area covered by these proceedings, are publicly available. On the Department's website the current status report of the 2012 competitive 9% tax credit round shows that a significant number of competitive applications in high opportunity areas have been submitted in Urban Region 3 with 16 of the applications located in such areas, many of which indicate they are top scoring applications.

The graphic below shows compellingly that actions already taken by the Department have materially changed the overall character of the competitive LIHTC round in 2012, promoting overwhelming interest in high opportunity areas.



In applicant-initiated appeals and requests for waivers the Board has taken seriously the limitations placed on its discretion and deliberated extensively in publicly conducted, transcribed meetings, leading to results that have closely followed the 2012 QAP. The Board has considered waivers only in truly exceptional and compelling circumstances where failure to grant the waiver would result in a clear failure to make the opportunity to compete available throughout the state.

It is the Department's belief that this proposed Remedial Plan offers meaningful improvements on the path already forged in the 2012 QAP and creates concepts which, if successful, can nurture and reinforce future QAPs. The Plan embraces the notion of providing maximum permissible incentives for areas that truly reflect the greatest opportunity, namely those areas with the highest income, lowest poverty, and best public education opportunities.

As set forth more fully in §12, captioned "Plan subject to statutory constraints," the Department operates under several layers of complex legal requirements, including the congressional statement in Internal Revenue Code §42(m) that the Department must give preference to "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...". Furthermore, the statutory schema for scoring of LIHTC competitive applications under QAPs is driven largely by TEX. GOV'T. CODE, §2306.6710, which has not been questioned in these proceedings and, presumably, must be adhered to in developing and administering future QAPs. Two of the key remedial tools proffered by the Plaintiff are the use of discretion, as discussed above, and the creation of set-asides. With respect to set-asides, it is open to question whether there is statutory authority for the Department to create set-asides in addition to those set forth in TEX. GOV'T. CODE, Chapter 2306. Even if, *arguendo*, creating set-asides were authorized, the suggestion to create a set-aside in the

remedial area is problematic because that area is but a portion of a larger region pursuant to statute and to which the Department must regionally allocate LIHTCs.

As a result of these limitations and premises, the Department is proposing a Plan which focuses on: (1) according proposed developments located in defined high opportunity areas the greatest incentives allowed by state law; and, (2) according developments in Qualified Census Tracts (QCTs) that are part of true concerted revitalization plans co-equal incentives in order to provide the preference created by Internal Revenue Code §42(m). It is envisioned that the revitalization incentive will set a very high threshold, making it unlikely to yield a number of successful applicants in QCTs such that would perpetuate any discriminatory patterns found to have occurred unintentionally.

Plaintiff has requested that 4% non-competitive LIHTCs be addressed in this plan. Because of restrictions of federal law, states do not have the ability to designate the 130% basis boost for 4% LIHTC's, and therefore the only 4% LIHTC's eligible for the 130% basis boost are developments in federally designated QCTs and difficult to develop areas (DDAs).

The development and implementation of this Plan and the development of future QAPs in accordance with this Plan will be a matter to which the Department, in collaboration with Plaintiff, the Department's oversight bodies, and the public, will continue to work to develop more nuanced and effective ideas to achieve an optimal dispersion of LIHTC developments. In developing this

remedial plan for the subject Dallas metro area, the Department intends to apply some of these concepts, or similar concepts to the remainder of the state; however, certain other regions will need specifically tailored plans due to differing demographics and other factors.

1. Use of discretion - waivers.

In approving the 2012 QAP, Governor Perry determined that the continuation of the ability to make awards of forward commitments was not desirable and that in exercising its discretion to waive any aspect of the QAP the Board should only grant waivers when doing so was necessary to further a purpose or policy enunciated in Tex. Gov't. Code, Chapter 2306.

2. Strengthened definition of a High Opportunity Area (HOA).

In the development of its 2012 QAP, the Department adopted a strengthened definition of a high opportunity area; and, under the scoring criterion of development location, provided 4 competitive points for a development proposing a location in a HOA. In order to qualify as being in an HOA, a development must be in a census tract that has BOTH a low incidence of poverty AND an above median income as well as being located in an area served by either recognized elementary schools or having a significant and accessible element of public transportation. The Department currently anticipates that the highest four scoring 2012 applications in Urban Region 3 are located within the 5 county remedial area, are located in HOAs, and are within the attendance zones of recognized or exemplary rated elementary

schools. The Department further anticipates awards in Urban Region 3 will be limited to no more than 6 applications due to the amount of 9% credits available for allocation.

In future QAPs, the Department is committed to continuing to strengthen the criteria for locating developments within HOAs. The Department will create a new "Opportunity Index" in order to incentivize applications to locate developments in the highest income and lowest poverty areas of the remedial area. At the same time, applicants that propose projects in areas of high opportunity that do not meet the most stringent criteria will still be incentivized, albeit to a lesser degree. The proposed Opportunity Index is reflected in the following chart. The highest "below the line" (scoring items ranking lower than statutorily required scoring items) point value will be assigned to the highest category within the Opportunity Index (actual point values may change commensurate with changes in the above the line statutory scoring criteria).

Points	Population Served	Poverty Factor	Income Factor	School Quality Factor
7 Points	General use	<15% rate for all individuals	Tract in top quartile of median household income for county or, for site in an Metropolitan Statistical Area (MSA), top quartile for MSA	"Exemplary" or "Recognized" elementary school
5 Points	General Use	<15% rate for all individuals	Tract in top 2 quartiles of median household income for county or, for site in an MSA, top 2 quartiles for MSA	"Exemplary" or "Recognized" elementary school
5 Points	Any	<15% rate for all individuals	Tract in top quartile of median household income for county or, for site in an	"Exemplary" or "Recognized" elementary school

			MSA, top quartile for MSA	
3 Points	Any	<15% rate for all individuals	Tract in top quartile of median household income for county or, for site in an MSA, top quartile for MSA	N/A
1 Point	Any	<15% rate for all individuals	Tract in top 2 quartiles of median household income for county or, for site in an MSA, top 2 quartiles for MSA	N/A
Up to 7 Points	Any	The proposed development site is located in a QCT for which there is in effect a concerted revitalization plan (consistent with the elements described in §5. See Revitalization Index, §4, below.		

The Department will utilize data from the 5-year American Community Survey to determine a development site's qualification under the poverty and income criteria. For categories requiring an "Exemplary" or "Recognized" elementary school, the development site must be located within the school attendance zone that has the applicable academic rating, as of the beginning of the Application Acceptance Period, or comparable rating if the rating system changes by the same date as determined by the Texas Education Agency. An elementary attendance zone does not include elementary schools with district-wide possibility of enrollment or no defined attendance zones, sometimes known as magnet schools. However, districts with district-wide enrollment and only one elementary school are acceptable.

The following additional factors, indicative of educational quality and opportunity or lack of affordable housing, will be incorporated as new below-the-line criteria:

a. Location within the attendance zone of a public school with an academic rating of "Recognized" or "Exemplary" (or comparable rating) by the Texas Education Agency (up to 3 points):

A. 1 points if it is both an elementary school, and either a middle school or high school; or

B. 3 points if it is an elementary school, a middle school, and a high school.

b. A municipality or, if outside of the boundaries of any municipality, a county that has never received a

competitive tax credit allocation. The application must also comply with all other anti-concentration provisions (2 points for general use/family or supportive housing; 1 point for elderly).

All other Development Location incentive criteria in the current QAP, such as incentives for developments in central business districts, will be removed in future QAPs, unless required by statute, in order to maintain high incentives to target HOAs.

3. 130% basis boost for transactions in HOAs.

Under the authority granted by the Housing and Economic Recovery Act of 2008, P. L. 110-289, the 2012 QAP offers a 130% basis boost for transactions assisted by 9% LIHTCs that are located in HOAs as defined in paragraph 2, above.

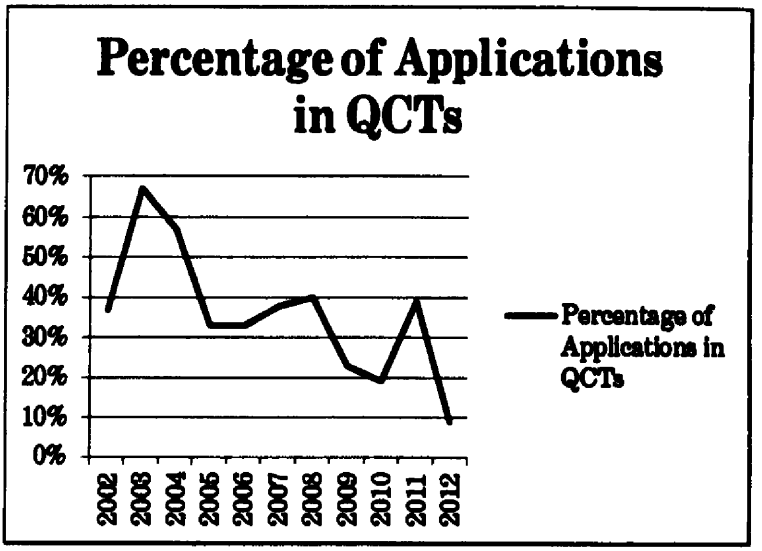
The Department will continue to include in its QAPs a 130% basis boost for applications that are intended to be located in HOAs. This requirement will not preclude or limit the Department's ability to offer a lawful basis boost in other appropriate instances. The authority for states to define criteria for a 130% boost for non-competitive 4% housing tax credit or tax-exempt bond developments is not available under §42 of the Internal Revenue Code.

4. The remedial balance and the Revitalization Index.

The Opportunity Index clearly provides the greatest point incentives for HOA transactions that serve the general public, including families, that are also in areas

of significantly greater income, the top quartile. While a proposed transaction in a second quartile tract, a proposed transaction in the top quartile serving a targeted, albeit legally targeted, population rather than the general population, or even a proposed transaction in a second quartile tract serving an elderly population would be characterized as HOA, it is clear that in order to achieve the spirit and intent of the Plan, it is only that top quartile/general population plan should receive that greatest level of recognition for competitive enhancement. This Plan does propose a mechanism allowing for a similar prioritization for a proposed transaction in a qualified census tract (QCT) that is the subject of a concerted plan of community revitalization, as federally mandated by Internal Revenue Code (IRC) §42(m). The Department contends that failure to grant same preference for such transactions could be seen as inconsistent with federal law. However, the Department is well aware of the fact that a significant level of continuing activity in development in QCTs would be inconsistent with the remedial objectives of this Plan. Therefore, it is critical to note that in developing this language, Department strongly believes that the high thresholds established for revitalization plans will demand significant investments of time, analysis, and local commitments of funding for non-housing activity from an applicant. Accordingly, these points are unlikely to achieve in the natal cycle after approval of a Remedial Plan, a significant number of applications that can demonstrably earn the maximum points for being in a QCT AND having in place a revitalization plan meeting the substantive criteria proposed.

As the graphic below conveys, changes implemented in the 2012 QAP have clearly resulted in a virtual curtailment of QCT activity. While such a curtailment might be viewed as accelerating a catch-up to restore a more balanced distribution of assisted developments in areas of all income levels, it would not be consistent with a prospective race neutral distribution or the congressionally expressed preferences set forth in the IRC.



Therefore, the Department believes that it is appropriate for an application in the area of greatest opportunity to be given coequal incentives with an application achieving the greatest revitalization purpose. Without this balance the Plan would in effect be forsaking that sector of the community in greatest need of this federal assistance. However, it is a generally

acknowledged contention that tax credit developers have been able to marshal community support to validate the conclusions that they were meeting the objectives of IRC §42(m) possibly where meaningful non-housing revitalization activity was not occurring. In order to assure that such efforts involve meaningful substance and do not create an unregulated opportunity to characterize an effort as revitalization that may not be meaningful and substantive, the Department has developed a concept similar to the Opportunity Index to address revitalization.

Revitalization index:

Points	Population served	Criteria
7 points	Any	The proposed development site is located in a QCT in which there is in effect a concerted revitalization plan (consistent with the elements described in §5 and the non-housing costs, as reflected in the local government certified plan budget, exceed $25,000 per unit in the proposed development.

3 points	Any	The proposed development site is located in a QCT in which there is in effect a concerted revitalization plan (consistent with the elements described in §5 and the non-housing costs, as reflected in the local government certified plan budget, exceed $10,000 per unit but are less than $25,000 per unit.
2 points	Any	The proposed development site is not located in a QCT but there is in effect a concerted revitalization plan (consistent with the elements described in §5 and the non-housing costs, as reflected in the local government certified plan budget, exceed $10,000 per unit.

An application seeking to receive points under the Revitalization Plan must provide the plan and plan

budget for review at pre-application and provide substantiation of the budget through submittal of a local government certified copy of the plan and budget supporting the claimed points at full application.

5. Strengthened criteria for disqualifying proposed sites that have undesirable features.

In the 2012 QAP, the Department included criteria for disqualifying proposed sites that have undesirable features, as follows:

> (13) Development Sites with negative characteristics in subparagraphs (A) (G) of this paragraph will be considered ineligible. If Staff identifies what it believes would constitute an unacceptable negative site feature not covered by the those identified in subparagraphs (A) - (G) of this paragraph Staff may seek Board clarification and, after holding a hearing before the Board, the Board may make a final determination as to whether that feature is unacceptable. Rehabilitation (excluding Reconstruction) Developments with ongoing and existing federal assistance from HUD or TRDO-USDA are exempt. For purposes of this exhibit, the term 'adjacent' is interpreted as sharing a boundary with the Development Site. The distances are to be measured from the nearest boundary of the Development Site to the boundary of the negative

characteristic. If none of these negative characteristics exist, the Applicant must sign a certification to that effect. The negative characteristics include:

(A) developments located adjacent to or within 300 feet of junkyards;

(B) developments located adjacent to or within 300 feet of active railroad tracks, unless the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone or the railroad in question is commuter or light rail (Developments located in a Central Business District are exempt);

(C) developments located adjacent to or within 300 feet of heavy industrial uses such as manufacturing plants, refinery blast zones, etc.;

(D) developments located adjacent to or within 300 feet of a solid waste or sanitary landfills;

(E) developments where the buildings are located within the easement of any overhead high voltage transmission line or inside the engineered fall distance of any support structure for high voltage transmission lines, radio antennae, satellite towers, etc. This does not apply to local service electric lines and poles;

(F) developments where the buildings are located within the accident zones or clear zones for commercial or military airports; or

(G) development is located adjacent to or within 300 feet of a sexually-oriented business. For purposes of this paragraph, a sexually-oriented business shall be defined as stated in §243.002 of the Texas Government Code.

As a part of the Plan, the Department will continue to include the same or similar criteria in its QAPs for disqualifying proposed sites that have undesirable features. Additionally, the Department will incorporate a more robust process to identify and address other potentially undesirable site features in future QAPs. Under this criterion, an applicant proposing development of multifamily housing with tax credits must disclose to the Department and may obtain the Department's written notification of pre-clearance if the site involves any negative site features at the proposed site or within 1000 feet of the proposed site such as the following:

a. A history of significant or recurring flooding;

b. A hazardous waste site or a source of localized hazardous emissions, whether remediated or not;

c. Heavy industrial use;

d. Active railways (other than commuter trains);

e. Landing strips or heliports;

f. Significant presence of blighted structures;

g. Fire hazards which will increase the fire insurance premiums for the proposed site;

h. Locally known presence of gang activity, prostitution, drug trafficking, or other significant criminal activity that rises to the level of frequent police reports.

The Department will develop a process for the efficient, timely resolution of the preclearance process. The Department may require that disclosure occur on an expedited basis, including but not limited to during the pre-application process. The Department will review these matters as disclosed to them and will either issue or withhold a pre-clearance. The standard to be employed will be that the pre-clearance will be withheld if one or more of the factors enumerated above are present at or within 1000 feet of the proposed site and are of a nature that would not be typical in a neighborhood that would qualify for HOA points under the Opportunity Index. An applicant providing disclosure will be encouraged to provide any plans for mitigation of the present undesirable feature(s), which may include a concerted community revitalization plan as described in §5.

In assessing disclosures the Department staff may, at its discretion, conduct a site inspection. Non-disclosure

of any of the enumerated conditions if known or in the exercise of reasonable diligence could have been ascertained is a basis for withholding pre-clearance. Withholding or denial of pre-clearance may be appealed pursuant to the appeals process set forth in the applicable QAP.

With respect to the presence or absence of hazardous waste sites or emissions, an applicant may rely on the required Phase I Environmental Site Assessment.

6. Strengthening of incentives for applications in qualified census tracts where the housing is part of a concerted community revitalization plan.

Consistent with §42(m) of the Internal Revenue Code, the 2012 QAP offers incentives for applications in qualified census tracts and for applications in areas where the housing is a necessary component of a community revitalization plan. In future QAPs, the Department will strengthen the correlation between revitalization and development located in qualified census tracts and the requirements for establishing that true community revitalization is occurring and that affordable housing is a necessary part of the revitalization and will continue to provide appropriate incentives for affordable rental housing developments meeting such strengthened criteria.

Beginning with its 2013 QAP, the Department will establish a scoring criteria in which any application for low income housing tax credits located in a qualified census tract, as defined in §42(d)(5)(C) of the Internal Revenue Code, will be eligible for enhanced points,

based on its location, if there is, as described below, a concerted revitalization plan that is in effect and to which the development will contribute.

A concerted community revitalization plan adopted by a municipality or county will be deemed to exist based on the following:

a. A community revitalization plan must have been adopted by the municipality or county in which the proposed development is intended to be located.

b. The adopting municipality or county must have performed, in a process providing for public input, an assessment of the factors in need of being addressed as a part of such community revitalization plan. Factors to be considered include the following:

A. adverse environmental conditions, natural or manmade, that are material in nature and are inconsistent with the general quality of life in typical average income neighborhoods. By way of example, such conditions might include significant and recurring flooding, presence of hazardous waste sites or ongoing localized emissions not under appropriate remediation, nearby heavy industrial, uses or uses presenting significant safety or noise concerns such as major thoroughfares, nearby active railways (other than commuter trains), or landing strips; significant and widespread (*i.e.*, not localized to a small number of businesses or other buildings) rodent or vermin infestation acknowledged to present health risks requiring a concerted effort; or fire hazards;

B. presence of blighted structures;

C. presence of inadequate transportation;

D. lack of accessibility to and/or presence of inadequate health care facilities, law enforcement and fire fighting facilities, social and recreational facilities, and other public facilities comparable to those typically found in neighborhoods containing comparable but unassisted housing;

E. the presence of significant crime.

F the presence, condition, and performance of public education; or

G. the presence of local business providing employment opportunities.

H. A municipality is not required to identify and address all such factors, but it must set forth in its plan those factors that it has identified and determined it will address.

c. The adopting municipality or county must have based its plan on the findings of the foregoing assessment and must have afforded the public opportunity to provide input and comment on the proposed plan and the factors that it would address. To the extent that issues identified require coordination with other authorities, jurisdictions, or the like, such as school boards or hospitals, the adopting municipality should include coordination with such bodies in its plan and, to the extent feasible, secure their cooperation.

d. The adopted plan, taken as a whole, must be a plan that can reasonably be expected to revitalize the community and address in a substantive and meaningful

way the material factors identified. The adopted plan must specifically address how the providing of affordable rental housing fits into the overall plan and is a necessary component thereof.

e. The adopted plan must describe the planned sources and uses of funds to accomplish its purposes.

f. For any application located in a qualified census tract at the time of application to be eligible for enhanced points for this item based on its location, the revitalization plan must already be in place as evidenced by as certification that:

A. the plan was duly adopted with the required public comment processes followed;

B. that funding and activity under the plan have already commenced; and

C. the adopting municipality or county has no reason to believe that the overall funding for the full and timely implementation of the plan will be unavailable.

At the time of any award of Low Income Housing Tax Credits the site and neighborhood of any unit covered by the award and must conform to the Department's rules regarding unacceptable sites.

It is recognized that municipalities and counties will need to devote time and effort to adopt a concerted revitalization plan that complies with the requirements of this remedial plan. Therefore, for purposes of the first cycle of Low Income Housing Tax Credit awards following the issuance of an Order adopting a remedial

plan, the The Board of the Department may, in a public meeting, determine that a revitalization plan substantively and meaningfully satisfies a revitalization effort, notwithstanding one or more of the above factors not having been satisfied.

7. Promulgation of fair housing choice disclosure.

The Department will promulgate by rule a fair housing choice disclosure in a form substantially equivalent to that set out in Attachment A, advising prospective tenants in writing of a website or other method of contact where they can obtain information about alternative housing and their rights under fair housing laws. The Department will maintain a website providing relevant information and identifying tax credit assisted properties searchable by ZIP code, city, and/or county. The Department will require that no initial lease be entered into for a unit assisted with low income housing tax credits unless that disclosure has first been provided to the prospective tenant.

8. Annual analysis of effectiveness of plan and continued development and enhancement of a policy of avoidance of over-concentration of low income housing units.

The Department will annually conduct an analysis of the effects of its prior QAP to determine if that QAP was contributing to disparate impact; and will take appropriate and lawfully permitted measures to amend the next and subsequent QAPs (beginning with its 2013 QAP), to avoid present or potentially developing

disparate impact in the allocation of low income housing tax credits.

As each QAP is developed, the Department will analyze the distribution achieved under the previous QAP. It will take that analysis into account and use it to develop (within the measures available to the Department under applicable law) changes in the incentives, threshold requirements, and other factors to address any potential disparate impact and to achieve, prospectively, a broad and race neutral dispersion of low income housing tax credit assisted properties.

The QAP disparate impact analysis the Department performs will be made public. The public will be given opportunity to comment on the analysis, and the development of QAPs will also be carried out in a public meeting or hearing with opportunity for review and comment by the public, including the Plaintiff. In order to achieve consistency on a statewide basis, the Department will endeavor to apply the principles and objectives in this Plan on a statewide basis.

9. Review of challenged public input.

Any public comment that will be considered for negative scoring of applications, or as opposition to 4% non-competitive allocations, may be challenged if it is contrary to findings or determinations, including zoning determinations, of a municipality, county, school district, or other local governmental entity. If any such comment is challenged, the party that made the challenge will have to declare the basis for the challenge. The party that made the comment will be given seven (7) days to

provide any support for the accuracy of its assertions. All such materials and the analysis of the Department's staff will be provided to a fact finder for a review and determination. The Department's determination will be final.

Additionally, applications in HOAs that receive statements of neutrality or support from a Neighborhood Organization that had provided a statement of opposition against a tax credit development in the last three years and for which the prior application was assigned the point value associated with opposition, will receive an additional two (2) points. The Department will amend its debarment rules to provide that if an applicant is found to have worked to create opposition to their own or another's application in any application round, they shall be subject to debarment. An applicant against whom debarment proceedings have been initiated in good faith by the Department shall not be eligible for these points.

10. Tie breakers.

In the event of a tie in scoring, the tie breaker will be a preference for the developments that are located the greatest distance from the nearest development that is assisted by either 4% or 9% credits.

11. Transparency and openness of process.

The Department will continue to make available on its website proposed and final QAPs with comments and responses, applications, underwriting reports, application and award logs, scoring logs by subject, inventories, and appeal materials. Additionally, the

Department will beginning with the 2013 competitive tax credit cycle, post market studies, Phase I Environmental Site Assessments and property condition assessments on its website. Nothing will require the disclosure of any item which has been found to be confidential as a matter of law.

12. Plan subject to statutory constraints.

This Plan acknowledges that as the Department considers and takes actions within its lawful powers, the implementation of such matters is an inherently deliberate and public process that takes time. Factors which must be addressed include adherence to the Texas Administrative Procedures Act; the Texas General Appropriations Act; Chapter 2306 of the Texas Government Code; and adherence to various federal requirements regarding the administration of other sources of funding impacting the Department's ability to address such matters. Subject to adherence to all such requirements, as they may apply, the Department shall take appropriate actions within its power and control as provided for herein.

Nothing in this Plan shall in any way limit or affect the right of the State of Texas to enact laws; or obligate the Department to take any action not allowed by law; or require the Department to become obligated for funds that have not been appropriated to it for the purposes intended.

Respectfully submitted,

By: */s/ G. Tomas Rhodus*
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CERTIFICATE OF FILING AND SERVICE

I certify that on May 18, 2012, I electronically submitted the foregoing document with the clerk of the court for the United States District Court for the Northern District of Texas using the electronic case file system of the court, such that all counsel of record will be provided a "Notice of Electronic filing", and access to this document.

/s/ G. Tomas Rhodus
G. Tomas Rhodus

Attachment A
to
Remedial Plan

FAIR HOUSING CHOICE DISCLOSURE

You are about to enter into a lease agreement, which is a binding contract. Before you enter into your lease you should know that under fair housing laws you have certain basic rights, including the right to make certain choices as to where you will live. There are programs administered by a number of state and local institutions to provide assistance with respect to housing, including, but not limited to, affordable rental housing supported by low income housing tax credits, housing assisted with loans or grants from HUD programs and USDA programs, different types of vouchers, and public housing. The requirements under the programs may be different and not all types of housing options may be available where you would like to live.

Where you live has the potential to impact you and others in your household. For example, where you live may provide greater access to some (but not necessarily all) of the things listed below:

- Better schools
- Less crime
- Better public transportation
- Better access to health care

- Better access to grocery stores offering more healthy food choices

- Better proximity to family, friends, and organizations to which you might belong

There are other things that may be important to you. If you want to explore other housing options you can identify other affordable rental properties in your community at:

[hyperlink]

This link will also summarize your rights under fair housing laws and direct you to fair housing resources.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 24, 2014
Lyle W. Cayce
Clerk

No. 12-11211
cons. w/13-10306

THE INCLUSIVE COMMUNITIES PROJECT, INCORPORATED,

Plaintiff – Appellee

v.

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS; MICHAEL GERBER; LESLIE BINGHAM-ESCARENO; TOMAS CARDENAS; C KENT CONINE; DIONICIO VIDAL FLORES, Sonny; JUAN SANCHEZ MUNOZ; GLORIA L. RAY, In Their Official Capacities,

Defendants – Appellants

FRAZIER REVITALIZATION, INCORPORATED

Intervenor-Appellant

Cons. w/13-10306

THE INCLUSIVE COMMUNITIES PROJECT, INCORPORATED,

Plaintiff – Appellee

v.

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS; MICHAEL GERBER; LESLIE BINGHAM-ESCARENO; TOMAS CARDENAS; C KENT CONINE; DIONICIO VIDAL FLORES, Sonny; JUAN SANCHEZ MUNOZ; GLORIA L. RAY, In Their Official Capacities,

Defendants – Appellants

No. 12-11211 cons. w/13-10306
Appeals from the United States District Court
for the Northern District of Texas
Appeals from the United States District Court for the
Northern District of Texas

Before JONES, WIENER, and GRAVES, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

In this housing discrimination case, the district court held that plaintiff The Inclusive Communities Project ("ICP") had proven that Defendants' allocation of Low Income Housing Tax Credits ("LIHTC") in Dallas resulted in a disparate impact on African-American residents under the Fair Housing Act ("FHA"). The

primary issue on appeal is the correct legal standard to be applied in disparate impact claims under the FHA. We adopt the standard announced in recently enacted Department of Housing and Urban Development ("HUD") regulations regarding the burdens of proof in disparate impact housing discrimination cases, *see* 24 C.F.R. § 100.500, and remand to the district court for application of this standard in the first instance.

I. Factual and Procedural Background

ICP filed this action against Defendants the Texas Department of Housing and Community Affairs ("TDHCA") and its Executive Director and board members in their official capacities under the FHA, the Fourteenth Amendment, and 42 U.S.C. §§ 1982 and 1983. "ICP is a non-profit organization that seeks racial and socioeconomic integration in the Dallas metropolitan area. In particular, ICP assists low-income, predominately African-American families who are eligible for the Dallas Housing Authority's Section 8 Housing Choice Voucher program ('Section 8') in finding affordable housing in predominately Caucasian, suburban neighborhoods." *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs (ICP II)*, 860 F. Supp. 2d 312, 314 (N.D. Tex. 2012) (order after bench trial) (footnote omitted). A development that receives tax credits under the LIHTC program cannot refuse tenants because of their use of Section 8 vouchers; thus "it is important to ICP where the developments are located in the Dallas metropolitan area." *Id.*

Under § 42 of the Internal Revenue Code, the federal government provides LIHTC that are distributed to developers of low-income housing through a designated state agency. *See generally* 26 U.S.C. § 42. TDHCA administers the federal LIHTC program in Texas. *See* Tex. Gov't Code § 2306.6701 *et seq.* Developers apply to TDHCA for tax credits for particular housing projects. Such credits may be sold to finance construction of the project. *ICP II*, 860 F. Supp. 2d at 314. The number of credits TDHCA may award for a low-income housing project is determined by calculating the project's "qualified basis," which is a fraction representing the percentage of the project occupied by low-income residents multiplied by eligible costs. *See* 26 U.S.C. § 42(c).

There are two types of credits: 9% credits and 4% credits. The 9% credits are distributed on an annual cycle and are oversubscribed, and developers must compete with each other to earn the available credits. As the district court explained:

> Certain federal and state laws dictate, at least in part, the manner in which TDHCA can select the applications that will receive 9% tax credits. First, I.R.C. § 42 requires that the designated state agency adopt a "Qualified Allocation Plan" ("QAP") that prescribes the "selection criteria." *See id.* at § 42(m)(1)(A)-(B). The QAP must include, *inter alia*, certain selection criteria, *see id.* at § 42(m)(1)(C), and preferences, *see id.* at § 42(m)(1)(B);

otherwise, "zero" housing credit dollars will be provided, *see id.* at § 42(m)(1)(A). Second, the Texas Government Code regulates how TDHCA administers the LIHTC program. The Code requires TDHCA to adopt annually a QAP and corresponding manual. *Id.* at § 2306.67022. It also sets out how TDHCA is to evaluate applications. TDHCA must first "determine whether the application satisfies the threshold criteria" in the QAP *Id.* at § 2306.6710(a). Applications that meet the threshold criteria are then "score[d] and rank[ed]" by "a point system" that "prioritizes in descending order" ten listed statutory criteria (also called "above-the-line criteria"), which directly affects TDHCA's discretion in creating the "selection criteria" in each QAP. *Id.* at § 2306.6710(b). The Texas Attorney General has interpreted this provision to obligate TDHCA to "use a point system that prioritizes the [statutory] criteria in that specific order." Tex. Att'y Gen. Op. No. GA-0208, 2004 WL 1434796, at *4 (2004). Although the Texas Government Code does not mandate the points to be accorded each statutory criterion, "the statute must be construed to require [TDHCA] to assign more points to the first criterion than to the second, and so on, in order to effectuate the mandate

> that the scoring system 'prioritiz[e the criteria] in descending order.'" *Id.* (quoting Tex. Gov't Code Ann. § 2306.6710(b)(1) (West 2004)). And while TDHCA can consider other criteria and preferences (also called "below-the-line" criteria), it "lacks discretionary authority to intersperse other factors into the ranking system that will have greater points than" the statutory criteria. *Id.* at *6 (citation and internal quotation omitted). Once TDHCA adopts a QAP, it submits the plan to the Governor, who can "approve, reject, or modify and approve" it. Tex. Gov't Code Ann. § 2306.6724(b)-(c) (West 2001). Once approved, TDHCA staff review the applications in accordance with the QAP, underwrite applications in order "to determine the financial feasibility of the development and an appropriate level of housing tax credits," *id.* at § 2306.6710(b)(1)(A) & (d), and submit their recommendations to TDHCA. *See id.* at § 2306.6724(e). TDHCA then reviews the staff recommendations and issues final commitments in accordance with the QAP. *See id.* at § 2306.6724(e)-(f).

ICP II, 860 F. Supp. 2d at 314-16 (footnotes omitted). The parties heavily dispute the amount of discretion TDHCA has to award 9% credits to projects other than those receiving the highest scores. By contrast, all agree

that the 4% credits are allocated on a non-competitive basis year-round to developments that use private activity bonds as a component of their project financing, some of which are issued by TDHCA. Applicants need to meet only certain threshold eligibility and underwriting requirements in order to receive 4% tax credits. Applications for the 4% tax credits are not subject to scoring under the QAP selection criteria. *See id.* at 316.

In March 2008, ICP filed suit against Defendants, claiming that the distribution of LIHTC in Dallas violated 42 U.S.C. §§ 1982 and 1983, the Fourteenth Amendment, and the FHA, 42 U.S.C. §§ 3604 and 3605. The FHA makes it unlawful, *inter alia*, to "make unavailable or deny, a dwelling to any person because of race. . " 42 U.S.C. § 3604(a). Section 3605(a) provides that it is unlawful, *inter alia*, "for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race...." *Id.* § 3605(a). A "residential real estate-related transaction" includes providing financial assistance for the construction of a dwelling. *Id.* § 3605(b). ICP alleged that Defendants were disproportionately approving tax credit units in minority-concentrated neighborhoods and disproportionately disapproving tax credit units in predominantly Caucasian neighborhoods, thereby creating a concentration of the units in minority areas, a lack of units in other areas, and maintaining and perpetuating segregated housing patterns.

ICP filed a motion for partial summary judgment to establish standing and a prima facie case of discrimination. Defendants filed motions for judgment on the pleadings and summary judgment. Defendants argued that, assuming that ICP had established a prima facie case, Defendants won as a matter of law, under both disparate treatment and disparate impact theories of discrimination.[1] The district court denied Defendants' motions and granted ICP partial summary judgment, concluding that ICP had made a prima facie showing of both intentional discrimination and disparate impact. *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs (ICP I)*, 749 F. Supp. 2d 486, 499-500, 501-02 (N.D. Tex. 2010) (order granting partial summary judgment). With regard to the disparate impact case, the court concluded that "ICP has established that its clients are African-Americans, members of a protected class, who rely on government assistance with housing, and that TDHCA has disproportionately approved tax credits for non-elderly developments in minority neighborhoods and,

[1] On appeal, Defendants now attempt to raise multiple challenges to the prima facie case of disparate impact, including various challenges to ICP's statistics and an argument that ICP failed to isolate a specific policy or practice that caused the disparate impact. Our own review of the record does not clearly resolve which of these challenges to the prima facie case of disparate impact were waived in the district court. Because we reverse and remand for other reasons, we do not address the issue of whether the district court erred by holding that ICP had established a prima facie case.

conversely, has disproportionately denied tax credits for non-elderly housing in predominately Caucasian neighborhoods." *Id.* at 499. In particular, the court relied on evidence that, "from 1999-2008, TDHCA approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed nonelderly units in 90% to 100% Caucasian areas." *Id.* The court also pointed to data showing "92.29% of LIHTC units in the city of Dallas were located in census tracts with less than 50% Caucasian residents." *Id.* The court found that the statistical evidence was supported by other evidence, including the "Talton Report," a report of the House Committee on Urban Affairs and prepared for the Texas House of Representatives, which concluded that TDHCA disproportionately allocates LIHTC funds to developments located in areas with above-average minority concentrations. *Id.* at 500. The court also relied on a HUD study reaching "a similar conclusion." *Id.* The district court held that "[t]his evidence establishes that TDHCA disproportionately approves applications for non-elderly LIHTC units in minority neighborhoods, leading to a concentration of such units in these areas. This concentration increases the burden on ICP as it seeks to place African-American Section 8 clients in LIHTC housing in predominately Caucasian neighborhoods." *Id.*

The case then proceeded to trial on the remaining elements of ICP's intentional discrimination and disparate impact claims. After a bench trial on the merits, the district court found that ICP did not meet its

burden of establishing intentional discrimination and therefore found for the Defendants on ICP's § 1982, § 1983, and Fourteenth Amendment claims. *ICP II*, 860 F Supp. 2d at 318-21. On the disparate impact claim under the FHA, 42 U.S.C. §§ 3604(a) and 3605(a), the district court applied the burdens of proof found in the Second Circuit's decision in *Huntington Branch*, which required Defendants to (1) justify their actions with a compelling governmental interest and (2) prove that there were no less discriminatory alternatives. *See id.* at 322-23 (citing *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curiam)).[2] The district court assumed that Defendants' interests were legitimate and bona fide, but concluded that Defendants had not produced any evidence supporting their contention that there were no less discriminatory alternatives to the challenged allocations. *Id.* at 326. The court concluded that Defendants had not shown "that TDHCA cannot allocate LIHTC in a manner that is objective, predictable, and transparent, follows federal and state law, and furthers the public interest, without disproportionately approving LIHTC in predominantly minority neighborhoods and disproportionately denying LIHTC in predominantly Caucasian neighborhoods." *Id.* For example, the court

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[2] The Supreme Court affirmed the Second Circuit in *Huntington Branch*, but expressly did not rule on the proper test for disparate impact housing discrimination claims in its opinion. *Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 18 (1988).

noted that Defendants did not prove that "TDHCA cannot add other below-the-line criteria [to the QAP] that will effectively reduce the discriminatory impact while still furthering its interests." *Id.* at 327. "Moreover," the court found, "although defendants maintain that TDHCA's discretion in creating the selection criteria is limited to adopting below-the-line criteria, it appears that this discretion is actually broader. It appears to extend to the authority to choose the number of points to be accorded each above- and below-the-line criterion, so long as the priority of statutory above-the-line criteria is maintained and the Governor approves." *Id.* at 328. Because it held that Defendants had not met their burden of proof, the district court found in favor of ICP on its discriminatory impact claim under the FHA. *Id.* at 331.

After trial, while the district court was considering the injunctive remedy that should be implemented, Frazier Revitalization, Inc. ("FRI") was granted permission to intervene to represent the interests of developers or organizations who seek to revitalize low-income neighborhoods. After considering submissions from the parties, the district court adopted a remedial plan including alterations to the QAP, stated that it would review the plan annually for at least five years, and entered judgment. *See Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, No 3:08-CV-0546-D, 2012 WL 3201401 (N.D. Tex. Aug. 7, 2012), *amended in part*, 2012 WL 5458208 (N.D. Tex.

Nov. 8, 2012). The court also ordered Defendants to pay attorneys' fees to ICP.[3]

II. Discussion

Defendants, along with Intervenor FRI, appeal various issues. However, we find it necessary to reach only one issue: whether the district court correctly found that ICP proved a claim of violation of the Fair Housing Act based on disparate impact.

As the district court correctly noted, violation of the FHA can be shown either by proof of intentional discrimination or by proof of disparate impact. *See Artisan/Am. Corp. v. City of Alvin, Tex.*, 588 F.3d 291, 295 (5th Cir. 2009) ("We have recognized that a claim brought under the Act 'may be established not only by proof of discriminatory intent, but also by proof of a significant discriminatory effect.'"); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996) ("We agree that a violation of the FHA may be established not only by proof of discriminatory intent, but also by a showing of significant discriminatory effect.").[4] However,

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[3] The consolidated appeal, No. 13-10306, challenges the attorneys' fees the district court awarded to ICP. In light of our remand, we likewise vacate and remand the award of attorneys' fees in that appeal.

[4] Defendants and FRI point to two recent cases in which the Supreme Court granted certiorari to determine whether disparate impacts claims are cognizable under the FHA. *See Twp. of Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013); *Magner v. Gallagher*, 132 S. Ct. 548 (2011). Both cases were dismissed before the Court heard any argument. *Twp. of*

we have not previously determined the legal standards that should be applied in disparate impact housing discrimination cases.

As we stated above, on the disparate impact claim under the FHA, 42 U.S.C. §§ 3604(a) and 3605(a), the district court applied the burdens of proof found in *Huntington Branch. ICP II*, 860 F. Supp. 2d at 322 (citing *Huntington Branch*, 844 F.2d at 939). The district court noted the absence of controlling law, as this court

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Mount Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc., 134 S. Ct. 636 (2013); *Magner v. Gallagher*, 132 S. Ct. 1306 (2012). "Absent an intervening Supreme Court case overruling prior precedent, we remain bound to follow our precedent even when the Supreme Court grants certiorari on an issue." *United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n.1 (5th Cir. 2008). Our circuit precedent provides that disparate impact claims are cognizable under the FHA. *See Artisan/Am. Corp.*, 588 F.3d at 295; *Simms*, 83 F.3d at 1555. All other circuits that have considered the issue have agreed. *See Mt. Holly Gardens Citizens in Action, Inc v. Twp. of Mount Holly*, 658 F.3d 375, 381 (3d Cir. 2011); *Gallagher v. Magner*, 619 F.3d 823, 833-34 (8th Cir. 2010); *Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 371 (6th Cir. 2007); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 & n.3 (1st Cir. 2000); *Mountain Side Mobile Estates P'ship v. HUD*, 56 F.3d 1243, 1250 (10th Cir. 1995); *Huntington Branch*, 844 F.2d at 934; *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *see also* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (February 15, 2013) (codified at 24 C.F.R. § 100.500) ("HUD and every federal appellate court to have ruled on the issue have determined that liability under the Act may be established through proof of discriminatory effects").

has not previously addressed the question of what legal standards apply to a disparate impact housing discrimination claim. Our sister circuits have applied multiple different legal standards to similar claims under the FHA. *See* Robert G. Schwemm, Housing Discrimination Law and Litigation § 10:6 (2013) (discussing the various standards applied across the circuits). Most circuits agree that once a plaintiff establishes a prima facie case, the burden shifts to the defendants to show that the challenged practice serves a legitimate interest. *See Mt. Holly Gardens*, 658 F.3d at 382; *Gallagher*, 619 F.3d at 833-34; *Graoch Assocs.*, 508 F.3d at 374; *Mountain Side Mobile Estates*, 56 F.3d at 1254; *Huntington Branch*, 844 F.2d at 936. At that point, the circuits diverge in some respects. The Second and Third Circuits require a defendant to bear the burden of proving that there are no less discriminatory alternatives to a practice that results in a disparate impact. *See Huntington Branch*, 844 F.2d at 936; *Mt. Holly Gardens*, 658 F.3d at 382 (requiring defendant to prove there is no less discriminatory alternative and plaintiff to prove there is a less discriminatory alternative). The Eighth and Tenth Circuits place the burden on the plaintiff to prove that there are less discriminatory alternatives. *See Gallagher*, 619 F.3d at 834; *Mountain Side Mobile Estates*, 56 F.3d at 1254. The Seventh Circuit has applied a four-factor balancing test rather than burden-shifting. *See Metro. Hous. Dev. Corp.*, 558 F.2d at 1290. The Fourth and Sixth Circuits have applied a four-factor balancing test to public defendants and a burden-shifting approach to private defendants. *See Betsey v. Turtle Creek Assocs.*, 736 F.2d

983, 988 n.5 (4th Cir. 1984); *Graoch Assocs.*, 508 F.3d at 371, 372-74.

However, after the district court's decision in this case, HUD issued regulations regarding disparate impact claims under the FHA. *See* 24 C.F.R. § 100.500; Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013). Congress has given HUD authority to administer the FHA, including authority to issue regulations interpreting the Act. 42 U.S.C. §§ 3608(a), 3614a. Specifically, 42 U.S.C. § 3608(a) gives the Secretary of HUD the "authority and responsibility for administering this Act," and § 3614a provides expressly that "The Secretary may make rules. to carry out this subchapter." The new regulations issued by HUD took effect in March 2013. 24 C.F.R. § 100.500. The regulations recognize, as we have, that "Liability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in paragraph (a) of this section, even if the practice was not motivated by a discriminatory intent." 24 C.F.R. § 100.500. The regulations further provide that "A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." *Id.* § 100.500(a). Finally, with regard to the burdens of proof in disparate impact housing discrimination cases, the regulations provide:

(1) The charging party has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.

(2) Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

24 C.F.R. § 100.500(c).

We now adopt the burden-shifting approach found in 24 C.F.R. § 100.500 for claims of disparate impact under the FHA. *See* 24 C.F.R. § 100.500. First, a plaintiff must prove a prima facie case of discrimination by showing

that a challenged practice causes a discriminatory effect, as defined by 24 C.F.R. § 100.500(a). 24 C.F.R. § 100.500(c)(1). If the plaintiff makes a prima facie case, the defendant must then prove "that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests . ." *Id.* § 100.500(c)(2). If the defendant meets its burden, the plaintiff must then show that the defendant's interests "could be served by another practice that has a less discriminatory effect." *Id.* § 100.500(c)(3).

These standards are in accordance with disparate impact principles and precedent. While the approaches of our sister circuits have varied, the most recent decisions have applied a similar three-step burden-shifting approach. *Mt. Holly Gardens*, 658 F.3d at 382; *Gallagher*, 619 F.3d at 834; *Graoch Assocs.*, 508 F.3d at 374. Further, the three-step burden-shifting test contained in the HUD regulations is similar to settled precedent concerning Title VII disparate impact claims in employment discrimination cases. *See* 42 U.S.C. § 2000e-2(k); *Ricci v. DeStefano*, 557 U.S. 557, 624 (2009) (describing the disparate impact burdens of proof in Title VII employment discrimination cases). Many courts interpreting the FHA recognize the similar purpose and language of the statutes and borrow from Title VII precedent to interpret the FHA. *See, e.g.*, *Graoch Assocs.*, 508 F.3d at 371-73; *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000) ("Courts have recognized that Title VIII is the functional equivalent of Title VII and so the provisions of these two statutes are given like construction and

application.") (internal citations omitted)); *Huntington Branch*, 844 F.2d at 934-35.

Given the complex record and fact-intensive nature of this case, and the district court's demonstrated expertise with those facts, we remand for the district court to apply this legal standard to the facts in the first instance. To be clear, we do not hold that the district court must retry the case; we leave it to the sound discretion of that court to decide whether any additional proceedings are necessary or appropriate. Finally, given our decision to remand, we do not find it necessary to reach the additional arguments raised by Defendants in support of reversal.

III. Conclusion

For the reasons we have stated, we REVERSE and REMAND for further proceedings consistent with this opinion.

JONES, Circuit Judge, specially concurring.

As a second-best result, I concur in the court's judgment to reverse and remand this case for reconsideration under the recently promulgated HUD guidelines. This is second-best, however, because on remand, the district court should reconsider the State's forceful argument that the appellees did not prove a facially neutral practice that caused the observed disparity in TDHCA's allocation of LIHTC units to predominately "non-Caucasian" areas. Perhaps the standard for proving a prima facie case of disparate impact in the fair housing context was uncertain before the HUD guidelines resolved circuit splits. In any event,

because FHA cases will now be modeled closely upon the Title VII formula, it is clear that the appellees could not rely on statistical evidence of disparity alone for their prima facie case. *See Smith v. City of Jackson*, 544 U.S. 228, 241, 125 S. Ct. 1536, 1545 (2005) ("[I]t is not enough to simply allege that there is a disparate impact on workers."); *Pacheco v. Mineta*, 448 F.3d 783, 787 n.5 (5th Cir. 2003) (finding "Pacheco's disparate impact allegations wholly conclusional" because "[t]here is no suggestion of in what manner the process operated so as to disadvantage Hispanics"); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996) (Fair Housing Act issue is "whether a policy, procedure, or practice specifically identified by the plaintiff has a significantly greater discriminatory impact on members of a protected class.") A plaintiff must specifically identify the facially neutral policy that caused the disparity.

The appellees' entire argument for disparate impact here assumed the conclusion: there is a statistical "imbalance" in the location of LIHTC units approved by TDHCA, therefore there must be a disparate approval "practice" that causes the statistical imbalance. The district court accepted this oversimplified formulation. But under disparate impact law, the State's burden is *NOT* to justify the statistics, but only the facially neutral policy or policies that caused the statistics. The State's burden ensues only when a plaintiff isolates the policy that caused the disparity. Without proof of an offending policy, alleged racial imbalance in and of itself is both the cause and effect of a violation. This has not been the law

for many years. The Supreme Court held in *Wards Cove* that:

> "[e]ven if on remand respondents can show that nonwhites are underrepresented . . . in a [statistically correct] manner . ., this alone will not suffice to make out a prima facie case of disparate impact. Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. To hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition their work forces.' "

Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657, 109 S. Ct. 2115, 2125 (1989) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992, 108 S. Ct. 2777, 2787 (1988)). Put more bluntly, if the appellees' framing of disparate impact analysis is correct, then the NBA is prima facie liable for disparate impact in the hiring of basketball players.

As the district court's opinions demonstrate, TDHCA's policies and practices for awarding LIHTC grants are anything but simple. They are governed by federal and state statutes, which require satisfaction of

numerous criteria to ensure the integrity, financial viability, and effectiveness of the projects. One specific object of the federal tax credit provision is to advantage projects located in low income census tracts or subject to a community revitalization plan. 26 U.S.C. § 42(m)(1)(B). In essence, the appellees are seeking a larger share of a fixed pool of tax credits at the expense of other low-income people who might prefer community revitalization. To balance these conflicting goals while meeting the program's other specifications, a complex point system has been used and annually updated. On remand, the district court must "require, as part of [appellees'] prima facie case, a demonstration that specific elements of the [State's award practices] have a significantly disparate impact on nonwhites." *Wards Cove*, 490 U.S. at 658, 109 S. Ct. at 2125.

I concur in the judgment.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 24, 2014
Lyle W. Cayce
Clerk

No. 12-11211

D.C. Docket No. 3:08-CV-546

THE INCLUSIVE COMMUNITIES PROJECT, INCORPORATED,

Plaintiff – Appellee

v.

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS; MICHAEL GERBER; LESLIE BINGHAM-ESCARENO; TOMAS CARDENAS; C KENT CONINE; DIONICIO VIDAL FLORES, Sonny; JUAN SANCHEZ MUNOZ; GLORIA L. RAY, In Their Official Capacities,

Defendants – Appellants

FRAZIER REVITALIZATION, INCORPORATED

Intervenor-Appellant

Appeals from the United States District Court for the Northern District of Texas, Dallas

Before JONES, WIENER, and GRAVES, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that appellee pay to appellants the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: April 15, 2014

A True Copy
Attest
Clerk, U.S. Court of Appeals,
Fifth Circuit
By: /s/ Nancy F. Dolly
Deputy
April 15, 2014
New Orleans, Louisiana

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 24, 2014
Lyle W. Cayce
Clerk

No. 13-10306

D.C. Docket No. 3:08-CV-546

THE INCLUSIVE COMMUNITIES PROJECT, INCORPORATED,

Plaintiff – Appellee

v.

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS; MICHAEL GERBER; LESLIE BINGHAM-ESCARENO; TOMAS CARDENAS; C KENT CONINE; DIONICIO VIDAL FLORES, Sonny; JUAN SANCHEZ MUNOZ; GLORIA L. RAY, In Their Official Capacities,

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ISSUED AS MANDATE: April 15, 2014

A True Copy
Attest
Clerk, U.S. Court of Appeals,
Fifth Circuit

By: /s/ Nancy F. Dolly
Deputy
April 15, 2014
New Orleans, Louisiana

(ORDER LIST: 573 U.S.)

THURSDAY, OCTOBER 2, 2014

...

CERTIORARI GRANTED

...

13-1371 TX DEPT. HOUS. & COM. AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT

The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.