13-1371

No.

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

PETITION FOR A WRIT OF CERTIORARI

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
jonathan.mitchell@texasattorneygeneral.gov
(512) 936-1700

JONATHAN F. MITCHELL
Solicitor General
Counsel of Record

ANDREW S. OLDHAM
Deputy Solicitor General

BETH KLUSMANN
Assistant Solicitor General

QUESTIONS PRESENTED

1. Are disparate-impact claims cognizable under the Fair Housing Act?

2. If disparate-impact claims are cognizable under the Fair Housing Act, what are the standards and burdens of proof that should apply?

PARTIES TO THE PROCEEDING

Petitioners Texas Department of Housing and Community Affairs, Michael Gerber, Leslie Bingham-Escareno, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, Juan Sanchez Munoz, and Gloria L. Ray were Defendants-Appellants in the court of appeals.[1]

Respondent The Inclusive Communities Project, Inc., was a Plaintiff-Appellee in the court of appeals.

Respondent Frazier Revitalization, Inc., was an Intervenor-Appellant in the court of appeals.

---

[1] Pursuant to Supreme Court Rule 35, Petitioners note that Michael Gerber, Tomas Cardenas, C. Kent Conine, Dionicio Vidal Flores, and Gloria L. Ray were sued in their capacities as public officials and no longer hold office. They have been replaced by Timothy Irvine, J. Paul Oxer, Tom H. Gann, J. Mark McWatters, and Robert D. Thomas.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Miscellaneous

In the Supreme Court of the United States

No.

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

v.

THE INCLUSIVE COMMUNITIES PROJECT, INC.

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

PETITION FOR A WRIT OF CERTIORARI

The Fair Housing Act forbids landlords, homeowners, state housing authorities, and others to discriminate against any person "because of" race. 42 U.S.C. §§ 3604(a), 3605(a). Many courts interpret this statute to forbid practices that have a disparate impact, even when there is no evidence that a challenged decision was made *because of* a person's race. This Court has twice granted certiorari to resolve whether the Fair Housing Act provides for disparate-impact liability, but each case was dismissed before the Court could resolve the question. *See Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 134 S. Ct. 636 (2013) (mem.); *Magner v. Gallagher*, 132 S. Ct. 1306 (2012) (mem.). This case presents an opportunity for this Court finally to resolve

whether disparate-impact claims are cognizable under the Fair Housing Act.

OPINIONS BELOW

The opinion of the court of appeals is available at 2014 WL 1257127. *See* Pet. App. 1a–21a. The district court's findings of fact and conclusions of law, which found that the respondent had "proved its disparate impact claim" under the FHA, are reported at 860 F. Supp. 2d 312. *See* Pet. App. 146a–189a. The district court's remedial order is available at 2012 WL 3201401, Pet. App. 104a–145a, and the district court's order granting in part the petitioners' motion to amend the judgment is available at 2012 WL 5458208, Pet. App. 63a–67a.

JURISDICTION

The court of appeals entered its judgment on March 24, 2014. *See* Pet. App. 22a–25a. The petitioners timely filed this petition for a writ of certiorari on May 13, 2014. *See* 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Housing Act provides, in relevant part:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person be-

> cause of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a).

> It shall be 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, color, religion, sex, handicap, familial status, or national origin.

42 U.S.C. § 3605(a).

STATEMENT

Federal law offers tax credits to developers who build "qualified" low-income housing projects. *See* 26 U.S.C. § 42(g)(1).[2] This tax subsidy is known as the Low-Income Housing Tax Credit Program (LIHTC). The States administer this program by selecting the developers and projects that will receive these federal tax credits. *See* Pet. App. 4a, 6a–7a. And federal law requires States to allocate these credits according to a "qualified allocation

---

[2] A "qualified low-income housing project" is any residential rental property in which either (a) 20 percent or more of the units are both rent-restricted and occupied by individuals whose income is 50 percent or less of the area's median gross income (the "20–50 test"), or (b) 40 percent or more of the units are both rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income (the "40–60 test"). *See* 26 U.S.C. § 42(g)(1).

plan" (QAP) that "sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions." 26 U.S.C. § 42(m)(1)(B).

The Texas Department of Housing and Community Affairs, its board members, and executive director (collectively, "the Department") are responsible for distributing these tax credits throughout Texas. *See* Tex. Gov't Code § 2306.6701; Pet. App. 4a. But federal and state law impose many constraints on the Department's decision-making. Federal law, for example, requires a State's qualified-allocation plan to give preference to projects in low-income areas. *See* 26 U.S.C. § 42(m)(1)(B)(ii)(III).[3] And state law requires the Department to "score and rank the application using a point system." Tex. Gov't Code § 2306.6710(b). This point system requires the Department to "prioritize in descending order" the following eleven criteria:

> (A) financial feasibility of the development ... ;
>
> (B) quantifiable community participation with respect to the development ... ;
>
> (C) the income levels of tenants of the development;

---

[3] Specifically, federal law requires preferences for projects located in "qualified census tracts"—tracts for which 50 percent or more of the households have an income of less than 60 percent of the area median gross income, or that have poverty rates of at least 25 percent. *See* 26 U.S.C. § 42(d)(5)(B)(ii)(I).

> (D) the size and quality of the units;
>
> (E) the commitment of development funding by local political subdivisions;
>
> (F) the rent levels of the units;
>
> (G) the cost of the development by square foot;
>
> (H) the services to be provided to tenants of the development;
>
> (I) whether ... the proposed development site is located in an area declared to be a disaster under Section 418.014;
>
> (J) 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; and
>
> (K) the level of community support for the application, evaluated on the basis of a written statement from the state representative who represents the district containing the proposed development site;

Tex. Gov't Code § 2306.6710(b)(1). The Department has also developed "below-the-line" criteria to supplement these statutorily mandated factors, but no Department-created consideration may outweigh any "above-the-line" factor codified in section 2306.6710. *See* Tex. Att'y Gen. Op. No. GA-0208 (2004).

Respondent The Inclusive Communities Project, Inc., (ICP) is a non-profit that works to place Section 8 tenants in Dallas's affluent and predominantly white suburban neighborhoods. ICP's goals are explicitly race-conscious. It describes its mission as "assist[ing] Black or African American Dallas Housing Authority Section 8 families in finding housing opportunities in the suburban communities in the Dallas area." *See* Complaint ¶ 3, *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 3:08-CV-0546-D (N.D. Tex., filed Mar. 28, 2008); *see also id.* ¶ 6 ("ICP assists DHA Section 8 program families who choose to lease dwelling units in non-minority areas"). ICP helps its clients by locating apartments, subsidizing their expenses, and paying a "landlord incentive bonus," if necessary, to persuade an owner to accept a Section 8 voucher. *See Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 749 F. Supp. 2d 486, 492 (N.D. Tex. 2010). Because federal law forbids properties receiving low-income housing tax credits to discriminate against Section 8 tenants, ICP finds it easier and less expensive to place clients in those properties. *See* 26 U.S.C. § 42(h)(6)(B)(iv).

ICP sued the Department in 2008, accusing it of "disproportionately allocat[ing]" tax credits to properties in minority-populated areas. *See* Complaint ¶ 13, *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 3:08-CV-0546-D (N.D. Tex., filed Mar. 28, 2008). ICP brought disparate-treatment claims under the equal-protection clause and 42 U.S.C. § 1982, and a dis-

parate-impact claim under the FHA. *See* Pet. App. 146a.[4] It demanded an injunction requiring the Department "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."[5] Complaint at 16, *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 3:08-CV-0546-D (N.D. Tex., filed Mar. 28, 2008). ICP also asked the court to "enjoin[] the defendants from ... 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

---

[4] ICP established Article III standing by relying on the monetary harm caused by the Department's failure to approve more low-income housing tax credits in white-populated locations. ICP's mission is to place Section 8 tenants in predominantly white neighborhoods, and ICP must spend more resources to achieve that goal when applications for tax credits in those neighborhoods are denied. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Inclusive Cmtys. Project*, 749 F. Supp. 2d at 495–97.

[5] The Department would be able to escape this obligation only if its "approval rates for Low Income Housing Tax Credits 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* "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." Complaint at 16, *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 3:08-CV-0546-D (N.D. Tex., filed Mar. 28, 2008).

residents of the project into account." *Id.* ICP did not explain how the Department could comply with the first of these proposed injunctions without violating the second—or without violating the Fair Housing Act, which prohibits the Department from making decisions regarding the location and allotment of low-income housing "because of race." 42 U.S.C. § 3604(a).

After a four-day bench trial, the district court found that ICP had failed to prove intentional discrimination and dismissed its equal-protection and section 1982 claims. *See* Pet. App. 164a.

As for the disparate-impact claim, the district court first concluded that ICP established a "prima facie case" by showing that the Department had "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." Pet. App. 8a; *see also* Pet. App. 165a, 186a. Specifically, the district court found that the Department "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." Pet. App. 165a (footnote omitted). The mere existence of this statistical disparity—without regard to whether it was affected by the strength of the applications or other race-neutral factors—was sufficient (in the district court's view) to establish a "prima facie case" and flip the burden of proof to the Department.

The district court next held that the Department must "prove" that its actions furthered a "legitimate"

government interest *and* that "no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." Pet. App. 166a–167a (citations and internal quotation marks omitted).[6] The Department argued that this statistical disparity arose from federal and state laws requiring the Department to award low-income housing tax credits according to fixed criteria, some of which are correlated with race. *See* Pet. App. 168a–172a; *see also* 26 U.S.C. § 42(m)(1)(B)(ii)(III) (requiring a State's qualified-allocation plan to give preference to projects built in low-income areas). The district court assumed that compliance with these laws qualified as a "legitimate" interest but held that the Department failed to prove the absence of any alternative that would reduce the disparity in approval rates. Specifically, the court noted that the Department had not proven that it "cannot add other below-the-line criteria" or otherwise re-jigger its scoring criteria to achieve parity in its rates of approval for LIHTC applications. *See* Pet. App. 176a. Then the district court entered judgment for ICP on its disparate-impact claim and imposed a lengthy structural injunction on the Department. Pet. App. 68a–145a.

---

[6] The district court recognized that the Fifth Circuit had not yet adopted a "standard and proof regime for FHA-based disparate impact claims" and noted that the federal courts of appeals have adopted "at least three different standards and proof regimes." Pet. App. 166a (citing cases). Nevertheless, the district court chose to follow an approach similar to the opinion in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988).

The Department appealed to the Fifth Circuit. During that appeal, the United States Department of Housing and Urban Development (HUD) issued a regulation that purports to establish standards for proving disparate-impact claims under the FHA. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100). According to HUD, the Fair Housing Act should impose liability on practices with a "discriminatory effect," which includes (in HUD's view) any practice that "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." 24 C.F.R. § 100.500(a).

HUD's regulation provides that the plaintiff should bear the burden of proving that the challenged practice has a "discriminatory effect." 24 C.F.R. § 100.500(c)(1). If the plaintiff meets this initial burden, then the defendant must 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 that burden of proof, then the plaintiff would bear the burden of proving that those substantial, legitimate, and nondiscriminatory interests "could be served by another practice that has a less discriminatory effect." *Id.* § 100.500(c)(3).

The Fifth Circuit panel was bound by prior decisions of that court holding that the FHA provides for disparate-impact liability. *See* Pet. App. 12a (citing *Artisan/Am. Corp. v. City of Alvin*, 588 F.3d 291, 295 (5th

Cir. 2009); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996)). But the Fifth Circuit had never before resolved the standards for proving a disparate-impact claim. Rather than endorsing the burden-shifting approach of the district court, the Fifth Circuit adopted the HUD regulations as the law of the circuit and remanded for the district court to apply that standard. Judge Jones specially concurred, questioning whether ICP had proven even a "prima facie case" of disparate-impact discrimination. *See* Pet. App. 18a–21a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS TWICE GRANTED CERTIORARI TO DECIDE WHETHER DISPARATE-IMPACT CLAIMS ARE COGNIZABLE UNDER THE FHA

In two previous cases, this Court granted certiorari to resolve whether disparate-impact claims may be brought under the FHA. *See Magner v. Gallagher*, 132 S. Ct. 548 (2011) (mem.); *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013) (mem.). In both cases, however, the parties settled before oral argument and the writs of certiorari were dismissed. *See Gallagher*, 132 S. Ct. 1306; *Mount Holly*, 134 S. Ct. 636. The reasons supporting the grants of certiorari in those cases are equally applicable here.

A. The Questions Presented In This Petition Are Indistinguishable From The Questions On Which This Court Granted Certiorari In *Gallagher* and *Mount Holly*

The plaintiffs in *Gallagher* sued to block a city's increased code-enforcement efforts, alleging that it would reduce affordable housing for low-income individuals. Because low-income individuals are disproportionately minorities, the plaintiffs asserted disparate-impact claims (along with disparate-treatment claims) under the FHA. The district court dismissed all the claims at summary judgment. *See* 619 F.3d 823, 830 (8th Cir. 2010). But the Eighth Circuit reversed the grant of summary judgment on the disparate-impact claim, holding that there was a fact issue surrounding whether any alternative practices could reduce the alleged disparate impact. *See id.* at 833–38, 845. The Eighth Circuit denied rehearing en banc, but five judges dissented, questioning whether the FHA can be construed to impose any type of disparate-impact liability. *See Gallagher v. Magner*, 636 F.3d 380, 381–83 (8th Cir. 2010) (Colloton, J., dissenting).

This Court granted certiorari on two questions. The first question was: "Are disparate impact claims cognizable under the Fair Housing Act?" Pet. for Cert., *Magner v. Gallagher*, 2011 WL 549171 (Feb. 14, 2011). The second question involved the standards and burdens of proof that should apply were this Court to conclude that the FHA imposes disparate-impact liability. *See id.* But the parties settled after merits briefing and before oral argument, and the Court dismissed the writ of certiorari. *See Gallagher*, 132 S. Ct. 1306; Sup. Ct. R. 46.1.

Sixteen months later, this Court again granted certiorari to resolve whether the FHA imposes disparate-impact liability. *See Mount Holly*, 133 S. Ct. 2824; Pet. for Cert., *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 2012 WL 2151511 (June 11, 2012). The plaintiffs in *Mount Holly* alleged that a township's efforts to renew a blighted area would reduce affordable housing, adversely affecting low-income residents who are disproportionately minorities. *See Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 377–81 (3d Cir. 2011). The district court dismissed the plaintiffs' disparate-treatment and disparate-impact claims on summary judgment. *Id.* at 380–81. On appeal, the Third Circuit affirmed the dismissal of the disparate-treatment claims, but reversed and remanded on the disparate-impact claims, holding that fact issues existed on whether any alternative practice might reduce the alleged disparate impact. *Id.* at 387.

The township sought certiorari on the same two questions that this Court had agreed to resolve in *Gallagher*. *See* Pet. for Cert., *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 2012 WL 2151511 (June 11, 2012). This time, however, the Court called for the views of the Solicitor General before ruling on the certiorari petition. *See Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 569 (Oct. 29, 2012) (mem.). And while the certiorari petition was pending, HUD issued new regulations declaring that the FHA (in HUD's view) imposes disparate-impact liability and purporting to announce the standards and

burdens of proof that courts should apply to those disparate-impact claims. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).

When the Solicitor General filed his petition-stage amicus brief in May of 2013, he urged this Court to deny certiorari, noting that the recently issued HUD regulation "directly addresses those questions" and arguing that the courts of appeals should have the first opportunity to weigh in on the legality of HUD's rule. *See* Brief of the United States as Amicus Curiae at 5–6, *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507 (U.S., filed May 17, 2013). The Solicitor General also argued that this Court should deny certiorari because the case was "in an interlocutory posture" and because "neither of the questions presented was addressed below." *Id.* at 6. This Court nevertheless granted the petition, though only on the first question presented: whether disparate-impact liability can exist under the FHA. *See Mount Holly*, 133 S. Ct. 2824.

As with *Gallagher*, though, this Court was unable to resolve the question presented because the parties settled before oral argument and the Court dismissed the writ of certiorari. *See Mount Holly*, 134 S. Ct. 636; Sup. Ct. R. 46.1.

This case presents the opportunity for this Court to finally resolve the question on which it has twice granted certiorari. Neither the interlocutory posture nor the recently issued HUD regulation dissuaded this Court from granting certiorari in *Mount Holly*, and they should not do so here. The Department has already spent more

than a year operating its low-income housing tax credit program under a structural injunction designed to achieve race-specific outcomes. The Department is now faced with the prospect of litigating anew a disparate-impact claim that may not even exist. If this Court wants to resolve whether the FHA imposes disparate-impact liability, it should not wait and see if the Department will be found liable a second time.

B. The Far-Reaching Scope Of Disparate-Impact Liability Makes This A Question Of Exceptional Importance

The need for the Court's guidance on this issue is acute, given the wide variety of actions that can trigger disparate-impact liability. The Department, for example, administers almost two dozen housing programs throughout the State of Texas. *See* Tex. Gov't Code ch. 2306. Until Texas achieves racial symmetry in all aspects of government decisionmaking, operating any one of those programs exposes the State to a potential disparate-impact lawsuit. *See, e.g.*, Tex. Gov't Code §§ 2306.581 to .591 (establishing program to help colonias, which are low-income communities near the Mexican border); 2306.801 to .805 (funding rehabilitation of certain at-risk multifamily housing developments); 2306.921 to .933 (governing migrant labor housing facilities). And given the wide scope of actionable conduct under the FHA, there is almost no housing decision for which a litigant would be unable to establish a "prima facie case." *See* 42 U.S.C. §§ 3604, 3605 (applying to selling, renting, negotiating, advertising, making representations, financing, and otherwise making unavailable or

denying a dwelling to someone); *see also Washington v. Davis*, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.").

This concern exists not only in Texas but nationwide. In the past sixteen months, there have been nine courts of appeals decisions involving disparate-impact claims brought under the FHA.[8] Zoning decisions frequently become the subject of disparate-impact lawsuits. *See Town of Huntington, N.Y. v. Huntington Branch NAACP*, 488 U.S. 15 (1989); *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225 (10th Cir. 2007); *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565 (2d Cir. 2003); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977). Other lawsuits have challenged occupancy limits, *see Mountain Side Mobile Estates P'ship v.*

---

[8] *McCulloch v. Town of Milan*, No. 12-4574-CV, 2014 WL 1189868 (2d Cir. Mar. 25, 2014); Pet. App. 1a–21a; *City of Fort Lauderdale v. Scott*, No. 12-15014, 2014 WL 28612 (11th Cir. Jan. 3, 2014); *Pac. Shore Props., LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013); *Whitaker v. N.Y. Univ.*, 531 F. App'x 89 (2d Cir. 2013); *Rodriguez v. Nat'l City Bank*, 726 F.3d 372 (3d Cir. 2013); *L&F Homes & Dev., LLC v. City of Gulfport*, 538 F. App'x 395 (5th Cir. 2013); *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013); *Sheptock v. Fenty*, 707 F.3d 326 (D.C. Cir. 2013).

Sec'y of Hous. & Urban Dev., 56 F.3d 1243 (10th Cir. 1995); the closure of a homeless shelter, *see Boykin v. Gray*, No. 10-1790 (PLF), 2013 WL 5428780 (D.D.C. Sept. 30, 2013); and charging a fee to collect garbage, *see 30 Clinton Place Owners, Inc. v. City of New Rochelle*, No. 13 CV 3793(VB), 2014 WL 890482 (S.D.N.Y. Feb. 27, 2014). The aftermath of Hurricane Katrina produced at least three lawsuits alleging that recovery efforts produced a disparate impact on minorities. *See Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078 (D.C. Cir. 2011); *Anderson v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 525 (5th Cir. 2008); *Bonvillian v. Lawler-Wood Hous., LLC*, 242 F. App'x 159 (5th Cir. 2007). And ICP recently sued HUD for disparate-impact discrimination over its actions in setting small-area fair-market rents for housing vouchers in the Dallas area. *See Inclusive Cmtys. Project, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 3:14-cv-1465-K (N.D. Tex.).

This proliferation of lawsuits alone calls for the Court's attention. But there is yet a further danger that disparate-impact liability will push defendants (or potential defendants) to resort to illegal race-based discrimination. *See Ricci v. DeStefano*, 557 U.S. 557, 580–84 (2009); *id.* at 594 (Scalia, J. concurring) ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes"). The structural injunction imposed by the district court forces the Department to walk that tightrope—attempting to achieve

racial balancing in the low-income housing tax credit program without actually taking race into account. No statute should be construed to force defendants (or potential defendants) into that balancing act absent clear and unambiguous language.

C. The Statutory Language That Provides For Disparate-Impact Claims Under Title VII And The ADEA Is Missing From The FHA

Courts that recognize disparate-impact claims under the FHA have relied on Title VII case law. *See* 42 U.S.C. § 2000e-2; *Graoch Assocs. #33, LP v. Louisville/Jefferson Cty. Metro Human Relations Comm'n*, 508 F.3d 366, 371–73 (6th Cir. 2007); *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000). But these statutes are not identical, and the statutory language that provides for disparate-impact liability in Title VII is nowhere to be found in the FHA.

This Court first recognized disparate-impact liability under Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), stating that the "thrust of the Act" was directed at "the consequences of employment practices, not simply the motivation." *Id.* at 432. Three years later, the Eighth Circuit became the first court of appeals to apply that reasoning to the FHA, concluding that "[e]ffect, and not motivation, is the touchstone" of claims brought under the FHA. *See United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974). Then the Seventh Circuit followed suit, again relying on *Griggs*. *See Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288–90 (7th Cir. 1977). The remaining circuits (other than the D.C. Circuit, which has

yet to reach the issue) have all concluded that disparate-impact liability exists under the FHA.[9]

But in 1988, this Court identified, for the first time, the language in Title VII that allows for disparate-impact liability. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (relying on § 2000e-2(a)(2), which prohibits actions that "*adversely affect* [an individual's] status as an employee.") (emphasis added). And in *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court more fully explained the language needed to create a disparate-impact cause of action. 544 U.S. 228, 235–36 (2005) (plurality op.).

The question in *Smith* was whether the Age Discrimination in Employment Act established a disparate-impact cause of action. *See* 544 U.S. at 230 (plurality op.). Seven Justices agreed that the first subsection of 29 U.S.C. § 623(a) could not support disparate-impact liability. *See id.* at 236 n.6 (plurality op. of Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.) (citing 29 U.S.C. § 623(a)(1)); *id.* at 249 (O'Connor, J., dissenting, joined by Kennedy and Thomas, JJ.). That subsection of the ADEA provided:

---

[9] *See Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995); *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Hanson v. Veterans' Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574–75 (6th Cir. 1986); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036–37 (2d Cir. 1979); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146–48 (3d Cir. 1977).

> It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C. § 623(a)(1). The seven justices agreed that the operative language in that subsection requires discriminatory intent—"to fail or refuse to hire," "to discharge," or "to discriminate" "because of" such individual's age.

Subsection (a)(2), however, prohibits an employer from "limit[ing], segregat[ing], or classify[ing] his employees in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect his status as an employee*, because of such individual's age." 29 U.S.C. § 623(a)(2) (emphasis added). The plurality opinion, citing *Watson*, noted that *this* subsection (like Title VII) prohibits actions that "adversely affect" an individual. *See Smith*, 544 U.S. at 235–56 (plurality op.). The plurality concluded that this text focuses on the *effects* of the act on the employee, rather than the employer's motivation. *See id.* Second, the plurality highlighted the language "limit[ing] . . . *his employees*," arguing that this language emphasizes the employer's actions toward his employees as a group, even if the harm befalls only an individual. *Id.* at 236 n.6 (emphasis added). The plurality therefore concluded that the language of the ADEA supported disparate-impact liability. *Id.* at 240.

The FHA, by contrast, does not contain any of the statutory language on which *Watson* and the *Smith* plu-

rality relied. All of the prohibitions in sections 3604(a) and 3605(a) are phrased to require intentional conduct: "refus[ing] to sell or rent," "refus[ing] to negotiate," "mak[ing] unavailable," "deny[ing]" a dwelling, and "discriminat[ing]" against any person "because of race, color, religion, sex, familial status, or national origin." There is no mention, as in Title VII or the ADEA, of anything "adversely affect[ing]" a person. And there is no reference to limiting, segregating, or classifying a large number of people. The FHA refers only to specific acts of intentional conduct against individuals. That is not language that can establish disparate-impact liability.

Unfortunately, by the time this Court decided *Smith*, all of the circuits (aside from the D.C. Circuit) had already concluded that the FHA provides for disparate-impact liability. The dissent from the denial of rehearing en banc in *Gallagher* was the first and (as far as we are aware) the only time that a federal appellate judge has considered how *Smith* should affect this question. 636 F.3d at 382–83 (Colloton, J., dissenting). Given that the courts of appeals have uniformly reached decisions at odds with the jurisprudence of this Court, and appear to have no intention of revisiting this issue, the Court should grant certiorari to resolve this question—just as it did in *Gallagher* and *Mount Holly*.

II. THE COURTS OF APPEALS ARE DIVIDED ON THE STANDARDS AND BURDENS OF PROOF THAT SHOULD APPLY TO DISPARATE-IMPACT CLAIMS BROUGHT UNDER THE FHA

The courts of appeals have long been divided over the standards and burdens of proof that should apply to dis-

parate-impact claims under the FHA. This circuit split has been identified and discussed in previous certiorari petitions, as well in the recently issued HUD rule. *See* Pet. for Cert., *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 2012 WL 2151511, at *22–33 (June 11, 2012); Pet. for Cert., *Magner v. Gallagher*, 2011 WL 549171, at *15–21 (Feb. 14, 2011); Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,462–63.

At least three courts of appeals use a three-step burden-shifting approach similar (though not identical) to the HUD regulation. *See, e.g.*, *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729 at 740–42 (8th Cir. 2005); *Langlois*, 207 F.3d at 49–50; *Huntington Branch*, 844 F.2d at 939. The Seventh Circuit uses a four-part balancing test. *See Metro. Hous. Dev. Corp.*, 558 F.2d at 1290. Two courts of appeals use a hybrid of these two approaches. *See, e.g.*, *Graoch*, 508 F.3d at 373 (balancing test incorporated as elements of proof after second step of burden-shifting framework); *Mountain Side Mobile Estates*, 56 F.3d at 1252, 1254. And the Fourth Circuit uses a different test for public and private defendants. *See Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 989 n.5 (4th Cir. 1984). Finally, the Fifth Circuit is (as far as we are aware) the only court of appeals to have adopted the approach of the HUD regulations. In short, the courts of appeals are all over the map on this question.

In *Gallagher*, this Court granted certiorari to resolve the standard (if any) that courts should apply to disparate-impact claims under the FHA. *See* 132 S. Ct. 548. But the Court denied certiorari on that same question in

Mount Holly. *See* 133 S. Ct. 2824. By the time of *Mount Holly*, of course, HUD had issued regulations purporting to establish standards and burdens of proof for disparate-impact claims, and this may have led the Court to conclude that the issue was no longer certworthy. The Department nevertheless offers this issue for the Court's consideration, and respectfully asks the Court to grant certiorari on both questions presented. The federal district courts remain bound by the case law from their court of appeals, so it is unrealistic to expect HUD's regulation to bring about uniformity in the judicial interpretation of the FHA. Uniformity can be attained only by a decision of this Court that either rejects disparate-impact liability under the FHA, or endorses disparate-impact liability while simultaneously announcing the standards and burdens of proof that courts must apply.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
jonathan.mitchell@
texasattorneygeneral.gov
(512) 936-1700

JONATHAN F. MITCHELL
Solicitor General
Counsel of Record

ANDREW S. OLDHAM
Deputy Solicitor General

BETH KLUSMANN
Assistant Solicitor General

May 2014

APPENDIX

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, 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

[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.

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 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

---

[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).

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

---

[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.

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,

---

[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 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

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 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

---

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").

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,

Defendants – Appellants

Appeal 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 plaintiff-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

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.

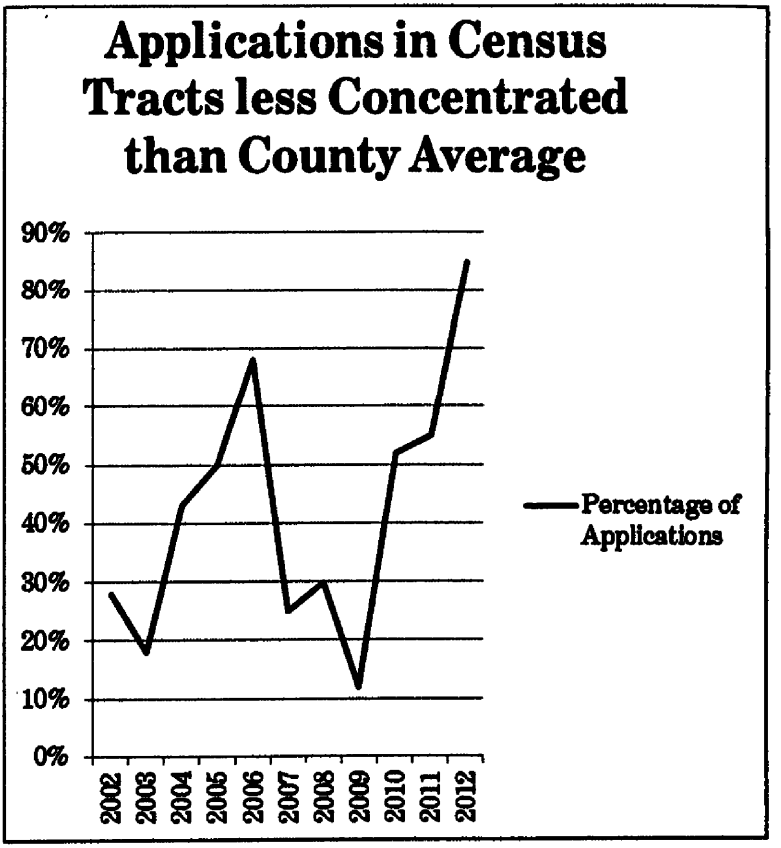
Introduction and Background

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.

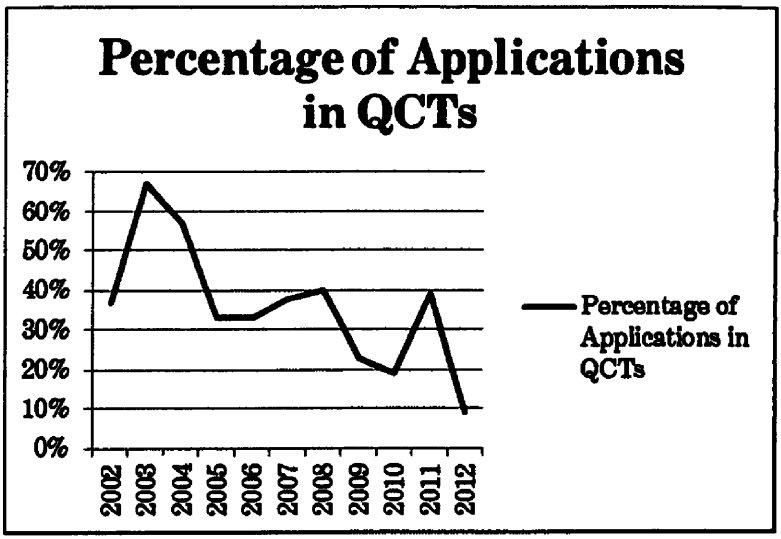
4. The remedial balance and the Revitalization Index.

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*
G. Tomas Rhodus
Texas State Bar No. 16824500
William B. Chaney
Texas State Bar No. 04108500

LOOPER REED & McGRAW, P.C.
1601 Elm Street, Suite 4600
Dallas, Texas 75201

214.954.4135 (Phone)
214.953.1331 (Fax)

Timothy E. Bray
Texas State Bar No. 24061240
Shelley N. Dahlberg
Assistant Attorneys General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
512.463.2120 (Phone)
512.320.0667 (Fax)

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.

/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.	§	

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.

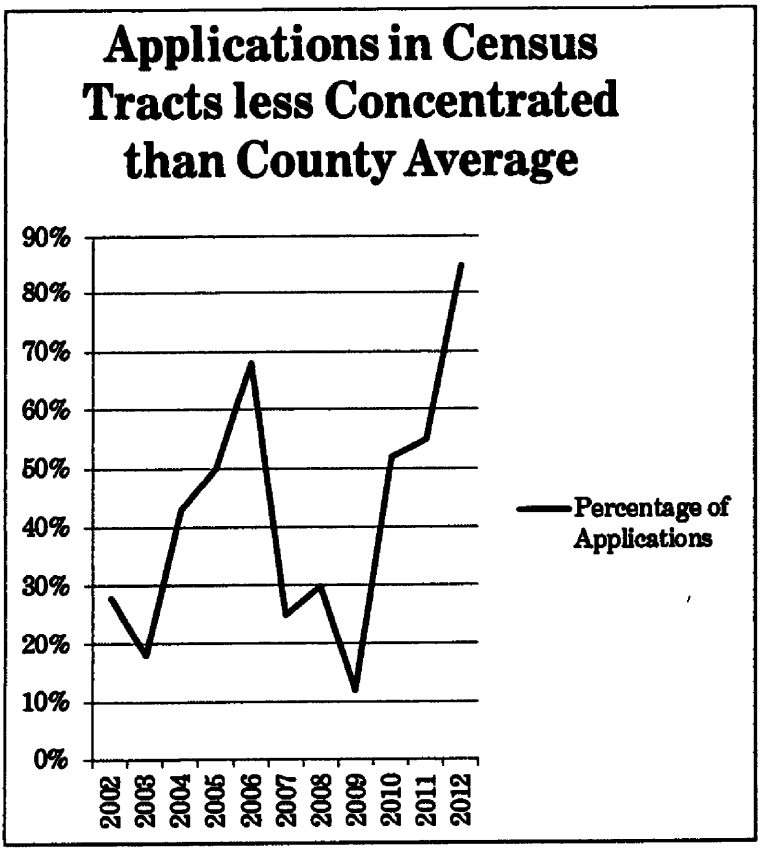
Introduction and Background

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.

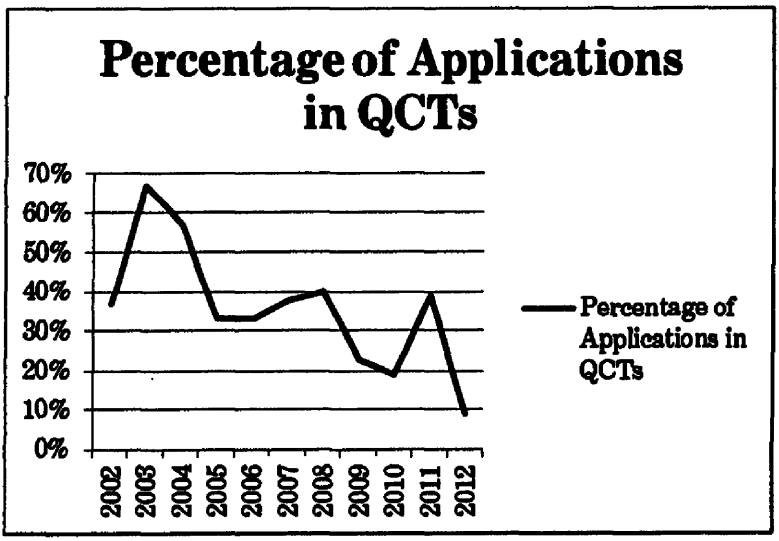
4. The remedial balance and the Revitalization Index.

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,

By: */s/ G. Tomas Rhodus*
G. Tomas Rhodus
Texas State Bar No. 16824500
William B. Chaney
Texas State Bar No. 04108500

LOOPER REED & McGRAW, P.C.
1601 Elm Street, Suite 4600
Dallas, Texas 75201

214.954.4135 (Phone)
214.953.1331 (Fax)

Timothy E. Bray
Texas State Bar No. 24061240
Shelley N. Dahlberg
Assistant Attorneys General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
512.463.2120 (Phone)
512.320.0667 (Fax)

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.

/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

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.[1]

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.*

[1] 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.

of Educ. v. Brinkman, 433 U.S. 406, 419-20 (1977); *Swann*, 402 U.S. at 16. The scope of the 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." *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:[2]

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;

---

[2] 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.[3] 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 discrimination." *Id.*; *see also Brown v. Plata*, ___ U.S.

---

[3] 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.

___, 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).[4] 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).

---

[4] 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).[5] 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.[6] 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 community revitalization plan." *Id.* at § 42(m)(1)(C)(iii).[7] The inclusion of this criterion as one of several criteria

---

[5] "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).

[6] 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.

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

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*.[8]

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 has sufficient LIHTC to allocate.[9] 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.

---

[8] 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.*

[9] 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.

§ 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 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,[10] if ever, would require that

---

[10] 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).

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.[11]

Because the TDHCA Plan only changes how projects are selected and does not alter how LIHTC dollar 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.[12]

---

[11] 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.

[12] 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

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 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

---

how LIHTC developments are selected rather than how LIHTC dollar amounts are allocated among selected projects.

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 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. 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."[13] P. Obj. 16; P. App. 3.

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

---

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

certain points offered in the "Opportunity Index"[14] 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
>
> 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).

---

[14] 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.

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").[15] Accordingly, the court declines to include the "Revitalization Index" in the remedy.[16]

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 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

---

[15] 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."

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

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.[17]

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 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

---

[17] 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.

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).[18]

---

[18] ICP contests the use of "over-concentration" in TDHCA's heading, which states: "Annual analysis of effectiveness of

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

---

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.

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.[19]

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

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 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.	§	

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 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

---

[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.*

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

---

[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 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.

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 § 42(m)(1)(B);[6] otherwise, "zero" housing credit dollars

---

[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,
> (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:

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.[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

---

> [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.

[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.").

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

---

[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;
> (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).

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).

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]

---

[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 admissibility of witnesses who were offered as experts, the court holds that the party offering the testimony has either satisfied 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 Equal Protection Clause, ICP must demonstrate discriminatory intent, not merely discriminatory effect." *Id.* (citing *City of Cuyahoga Falls v. Buckeye Cmty.*

---

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.

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 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,

---

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

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 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

---

[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.

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

[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

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 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

---

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.

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

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 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 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.

---

[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.

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

[16] The court relied on other evidence as well, including the "Talton Report," a report of the House Committee on Urban Affairs

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

---

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,

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

---

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 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.

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]

B

1

Defendants assert that they acted in furtherance of a compelling, or at least legitimate, governmental interest:

---

[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 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).

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 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.

---

[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 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).

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.

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.

---

[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.

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 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]

---

[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.

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

---

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.*

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

---

[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.

governmental interest. Regarding the selection criteria of each QAP, which applies only to the 9% tax credits, 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 years from the Texas Department of Agriculture's Rural Municipal Finance Program or Real Estate Development and Infrastructure Program; (3) "a census

---

[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.

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 four points. Thus even assuming that the third, fourth, and fifth options could reduce the asserted discriminatory impact, as suggested by defendants,[26] an

---

[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.

[26] This is based on defendants' underlying assumption that "there's a known association between race and income and poverty levels in

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]

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

---

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

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.* 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 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

---

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

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 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, 12.[30] This suggests that, despite an application's score

---

[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.

[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: . . .

under the selection critiera, TDHCA was authorized 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]

(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;
(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

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)

---

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

(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 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

---

[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.

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 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