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

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

OBJECTIONS OF INTERVENOR FRAZIER REVITALIZATION INC.
TO DEFENDANTS' PROPOSED REMEDIAL PLAN

Intervenor Frazier Revitalization Inc. ("FRI") files its objections to the Defendants' Proposed Remedial Plan filed on May 18, 2012, as follows:

INTRODUCTION

On March 20, 2012, the Court issued a memorandum opinion and order in which it found in favor of Plaintiff The Inclusive Communities Project, Inc. ("ICP") on its disparate impact claim against the Texas Department of Housing and Community Affairs and its individual board members (collectively "TDHCA"). It ordered TDHCA to submit a proposed remedial plan within 60 days of the date of its order, and ordered ICP to file its objections to the plan, if any, within 30 thirty days of the date

of the filing of TDHCA's plan. TDHCA filed its proposed plan on May 18, 2012, making ICP's objections due June 18, 2012. FED. R. CIV. P. 6(a)(1)(C). On June 13, 2012, the Court granted FRI's motion to intervene, but did not state within the order the time within which FRI may file its objections to the TDHCA's proposed remedial plan. In an abundance of caution, FRI files its objections within the time granted to ICP to file its objections. FRI intends to supplement, further explain, and further provide support for these objections should the Court permit it to do so.

OBJECTIONS

1. TDHCA's Proposed Remedial Plan Is So Vague and Disconnected from the Required QAP That Meaningful Analysis by FRI or Its Experts Is Impossible.

No award of tax credits can be made without a qualified allocation plan (QAP). 26 U.S.C. § 42(m)(1). Yet TDHCA's Proposed Remedial Plan ("the Plan") fails to identify specific provisions of the current QAP that it intends to amend. In addition, the Plan includes numerous terms, discussed *infra*, that are completely undefined in the Plan or in the current QAP. It is unclear whether the Plan pertains just to Urban Region 3 or to the entire state. It is uncertain how, if at all, the Plan would affect current applications submitted under the 2012 QAP. The timelines within the Plan are nebulous, such as, for example, an unspecified "pre-clearance" period in which "undesirable features" might be removed from an area of revitalization. Until such ambiguities are resolved, it is impossible to comment fully on many details of the Plan. When these items are clarified, FRI would seek leave to present expert testimony concerning them and to present better informed objections to the Proposed Remedial Plan.

2. TDHCA's Proposed Remedial Plan Violates 26 U.S.C. § 42(m)(1)(B)(ii) by Failing To Give Preference to Developments That Contribute to a Concerted Community Revitalization Plan.

LIHTCs are not manna from heaven. Rather, they are a man-made creation of Congress, governed by section 42 of the Internal Revenue Code. Congress had very specific objectives in mind when it created the LIHTC program. One of those objectives was to promote developments that are part of a community revitalization plan existing within a qualified census tract ("QCT"). A QCT is defined in the Code as follows:

> The term "qualified census tract" means any census tract which is designated by the Secretary of Housing and Urban Development and, for the most recent year for which census data are available on household income in such tract, either in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent.

26 U.S.C. § 42(d)(5)(C). In short, a QCT is a low income area in which a large percentage of poor people reside.

The goal of revitalizing neighborhoods inhabited by low income residents is referenced twice in section 42. First, section 42(m)(1) provides that no tax credits shall be awarded to any building unless made pursuant to a qualified allocation plan (QAP) that gives "preference" to developments meeting the following criteria:

> (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*** . . ..

26 U.S.C. § 42 (m)(1)(B)(ii)(emphasis added).

In addition, Congress left no doubt about its preference for developments that help to revitalize blighted areas by making additional funds available for such projects. Section 42 (d)(5)(B)(i) and (ii) expressly permit a development in a QCT "to receive 130% of the tax credits a LIHTC development not in such an area would receive." *Inclusive Communities Project, Inc. v. Texas Dept. of Housing and Community Affairs*, 749 F. Supp.2d 486, 506 n.22 (N.D. Tex. 2010).

FRI is cognizant of the court's earlier ruling that TDHCA had failed to establish that it could not comply with both section 42 and the FHA, and of TDHCA's belief that no conflict exists between section 42 and the FHA. *Inclusive Communities Project*, 749 F.Supp.2d at 504. But the Court did not decide that section 42 no longer governs the allocation of tax credits created by that very provision. Indeed, in balancing the very real conflict between the interests of ICP and FRI, it cannot be ignored that FRI's very purpose is to ensure affordable housing for low income tenants residing in an area of concerted community revitalization. Section 42 thus requires that FRI's current and future proposed developments be given preference by TDHCA in its awards of tax credits.

In the only reported decision addressing similar claims on the merits, an intermediate appellate court in New Jersey rejected claims that the state housing agency's distribution of LIHTCs disproportionally to projects in minority neighborhoods violated the FHA, federal and state civil rights statutes, and the Fourteenth Amendment. *In re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan*, 848 A.2d 1 (N.J. Super. Ct.), *certif. denied*, 861 A.2d 846 (N.J. 2004) ("*In re Adoption*"). There the court found that the "overriding mission" of New

Jersey's analog to the TDHCA, the New Jersey Housing Mortgage Finance Agency (HMFA), "is to foster, through its financing and other powers, the construction and rehabilitation of housing, particularly affordable housing." *Id.* at 24-25. The court observed that to comply with the mandate in section 42, "the agency's QAP must focus primarily on the economic status of the tenants, housing needs, and sponsor qualifications, not racial composition of the area or proposed project." *Id.* at 25. The court further recognized that achievement of the goal of maximizing affordable housing "by focusing primarily on the racial composition of a relevant housing locale . . . may compromise HMFA's fundamental mission." Moreover, consideration of race-based criteria "may be constitutionally vulnerable, and may run counter to [the agency's] statutory duty to '[a]ssist in the revitalization of the State's urban areas.'" *Id.* at 29 (quoting N.J.S.A. 55:14K-2(e)(4)). Ultimately, the court concluded:

> The promotion of racial integration may be a desirable by-product of HMFA's exercise of [its] duties. Indeed, we have no doubt that, in order to advance the goals of Title VIII, the agency should foster racial integration in the manner by which it administers its programs. However, HMFA's central mission and statutory purposes should not be ignored or compromised in achieving that goal.

848 A.2d at 25.

This Court may disagree with the ultimate balance to be struck between section 42 and the Fair Housing Act. But the revitalization goals of section 42 should not be hindered, even if they are not given preference as required by the Code. Revitalization efforts are critical not just to residents represented by FRI in the single neighborhood of Frazier Courts in South Dallas. Revitalization is a fundamental interest of low income neighborhoods that have long been neglected throughout Texas. As a practical matter, most nonprofit organizations working to

support residents of low income neighborhoods simply cannot afford the luxury of intervention in a federal suit to protect their interests. But their interests in revitalization are every bit as strong and as urgent as FRI's. Here, TDHCA's Plan pays lip service to the revitalization goals of section 42, but in fact erects barriers intended to ensure that the objectives of the LIHTC program can never be fulfilled by developments like FRI's, situated in a QCT. This is a violation of section 42.

3. TDHCA's Current QAP Has Already Given ICP Preference Over Developments Seeking To Contribute to a Revitalization Effort.

At the outset, TDHCA's Proposed Remedial Plan makes clear that the changes the Department has already made to the QAP have in fact resulted in a loss of any preference for developments in revitalization areas in favor of developments in more affluent white areas. The vast majority of applicants for tax credits in Urban Region 3 are now seeking to build HOA projects. This is because the existing 2012 QAP requirements for building in a QCT are so restrictive that many developments were rejected during the pre-application phase and other QCT developers simply withdrew their applications. In fact, 16 of the 22 remaining Region 3 applications in 2012 are for HOA developments. Plan at 2-3. Since 2000, the number of applicants for tax credits to be used in QCTs has continued to decline. Plan at 10 (graph). In fact, TDHCA points out that its existing 2012 QAP has "clearly resulted in a virtual curtailment of QCT activity." Plan at 9.

Just as applications for QCT developments have declined, so have QCT awards. Indeed, TDHCA all but promises that HOA developments will receive four of the six tax credit awards that TDHCA will make in Urban Region 3 this year. Plan at

6. The current QAP thus ensures that the vast majority of tax credit awards will go to HOA projects. TDHCA claims that "[a]s each QAP is developed, the Department will analyze the distribution achieved under the previous QAP." Plan at 19. If that analysis is performed now, it is evident just from the data presented in TDHCA's Plan that the Department has already achieved the Plan's stated objectives. TDHCA should not be permitted to further curtail revitalization efforts in QCT areas. It has already gone too far.

4. The Apparent Intent of TDHCA's Proposed Remedial Plan Is To Resolve This Lawsuit by Ensuring That HOA Developments Receive Preference, Not Parity.

In principle, FRI favors the location of affordable housing developments in every neighborhood throughout Urban Region 3, including QCTs, HOAs and Central Business Districts (CBD). Given the scarcity of available tax credit funding, however, preference should be given to developments contributing to revitalization in QCTs, as anticipated in section 42. TDHCA's most recent application log for Region 3 reveals that applications seeking $31,139,097 in tax credits have been filed, with only $7,867,826 available for funding.

Developments slated for HOAs and CBDs have one distinct difference from those planned in QCTs. HOA and CBD developments have alternate sources of funding. Because of their high tax base, more affluent suburbs have bonding capacity, they can create redevelopment authorities or rely on inclusive zoning to secure funding for affordable housing developments. Alternative funding is also frequently available for affordable housing development in CBDs as part of larger redevelopment campaigns. Not so for affordable housing in a QCT sited for

revitalization. Without federal tax credit assistance, such developments simply are not built.

The purpose of TDHCA's Plan is not to level the playing field among these competing interests in an attempt to resolve tension between the Fair Housing Act and IRC section 42. Instead, TDHCA freely acknowledges again and again that the Plan was crafted to ensure a preference for developments in white neighborhoods, while still making ostensible allowance for incentives to QCT developments "as federally mandated by Internal Revenue Code (IRC) §42(m)." Plan at 9.

> 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. Plan at 3.
>
> 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. Plan at 6.
>
> 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. Plan at 8.
>
> 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. Plan at 4.

In an effort to put an end to this litigation, the Department appears to have capitulated entirely to the demands of ICP. But TDHCA cannot disregard the mandate in section 42 to give preference to developments contributing to revitalization. TDHCA should not be permitted to shirk its duties to the citizens of the City's blighted areas just to escape the ire of better-funded interests. "TDHCA is a governmental agency that must represent the general public interest, not the

private interests of [a party]." Memorandum Opinion and Order Granting FRI's Motion To Intervene, Document 185, at 6.

5. TDHCA's Plan Is Filled with Arbitrary Requirements Inequitably Applied That Would Thwart the Stated Goal of Section 42 of Contributing to Community Revitalization Efforts.

Under the Proposed Remedial Plan, TDHCA makes clear that FRI will not receive even equal treatment, much less the preference to which it is entitled under the plain language of section 42. It is true that HOA and QCT applicants may in theory both be entitled to seven point awards. Plan at 6-7. But in practice, to receive that 7 point allocation, HOA applicants would have to show just two things: that the developments are planned for neighborhoods with money and with good schools. Plan at 6. By contrast, QCT applicants with revitalization developments are subject to a litany of requirements, many vague and undefined, before showing themselves entitled to the same award of points. Plan at 10-14, 16-18.

TDHCA concedes that it includes the seven point "revitalization index" only because the "failure to grant [the] same preference for such transactions could be seen as inconsistent with federal law." Plan at 9. According to TDHCA, "a significant level of continuing activity in development in QCTs would be inconsistent with the remedial objectives of this Plan." *Id*. Thus, TDHCA contrived such "high thresholds … for revitalization plans" that only an insignificant number would ever "earn the maximum points for being in a QCT AND hav[e] in place a revitalization plan meeting the substantive criteria proposed." *Id*. (Emphasis in original).

Given this frank admission, it is not surprising that the Plan is filled with pages of requirements that far from showing the required section 42 preference for

developments in areas of revitalization, instead would completely inhibit any use of tax credits for such revitalization efforts in the very low income areas that the tax credits were created to remedy in the first place. What's worse is that TDHCA pledges in the future to "continu[e] to strengthen the criteria for locating developments within HOAs," Plan at 6, which will only ensure that opportunities for revitalization are even further reduced.

To receive the same seven points that an HOA applicant receives from the "Opportunity Index" simply for showing its project would be sited in an affluent area with good schools, the QCT applicant is charged with a Sisyphean task list. TDHCA begins with the requirement that 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." Plan at 10-11. Nowhere does TDHCA define the meaning of "non-housing costs," making it impossible to comment other than to object at the obvious inequity in requiring QCT applicants to fulfill a requirement not imposed upon HOA applicants.

The same is true for many of TDHCA's other requirements for developments in the very revitalization areas at which section 42 was directed. Developments cannot be too near train tracks, or power lines or manufacturing facilities, or a primary thoroughfare or a fire hazard or a blighted structure, or a noisy place or significant crime or rodent infestation, though it's unstated whether that includes

squirrels. Plan at 12-16. The litany of prohibitions ignores the obvious fact that areas in need of revitalization can seldom be described as bucolic.

And if a QCT applicant is able to navigate that maze successfully, other unspecified requirements may be interposed. Despite TDHCA's claim that Governor Perry has restricted its discretion, Plan at 2, the Department maintains that if a proposed revitalization site has "an unacceptable negative site feature" not already prohibited in the Proposed Remedial Plan, TDHCA can decide later whether that formerly unidentified aspect is sufficient to refuse an allocation of points. Plan at 11. TDHCA also retains discretion to conduct site inspections should that be necessary to disqualify a revitalization development. Plan at 14.

TDHCA's Plan also provides that "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." Again, the provision applies only to give a possible benefit for HOA applicants, when it should be the same for all applicants, not just those now given preference by TDHCA.

Finally, TDHCA's Plan also contains two pages of requirements to be imposed on a municipality that might benefit from a developer's use of federal tax credits to contribute to revitalization efforts in the way Congress envisioned when it drafted section 42. The requirements are remarkably ill-considered, however, including, for example, a proposal not to allow tax credits to be awarded to revitalization projects where urban blight is present. Plan at 16. Most would agree, however, that a

neighborhood without blight is one not requiring revitalization. But under the Plan, no neighborhood in need of revitalization would be eligible to receive tax credits to assist in achieving it.

TDHCA not only specifies what a municipality's revitalization effort should look like; it dictates what sort of community input the municipality must receive in order to adopt such a plan. Plan at 15-17. And yet, TDHCA would require no proof from a municipality concerning the community input garnered before siting an affordable housing project in an HOA.

FRI agrees that municipalities should be an integral part of the process of ensuring that limited resources are well invested in LIHTC developments that will help revitalize lives and communities. But the municipalities should not be dictated to by a pre-ordained QAP whose agenda is influenced largely by real estate developers. As Mr. Kent Conine has testified, TDHCA offers no guidance on where LIHTC developments should be located; the developers decide that. Trial Transcript, Vol. III (August 31, 2011), at 157; Trial Transcript, Vol. IV (September 1, 2011), at 41. And now, in response to litigation with just one organization espousing a single viewpoint, TDHCA has imposed an ill-considered checklist for revitalization on municipalities that are charged with balancing many competing interests. TDHCA and all the residents it serves would be better served by calling upon municipalities to participate in developing the QAP in the first place.

6. TDHCA Should Not Require Revitalization Areas To Look Like White Suburbs as a Prerequisite for an Award of Tax Credits.

The many requirements of TDHCA's proposed "revitalization index" – both specific and vague – are objectionable, then, because they are unfairly applied only

to QCT applicants for the confessed purpose of preventing future tax credit awards in those neighborhoods, despite the stated objectives of Congress. But many features of the revitalization index are bad policy, even were they fairly applied to all applicants. For example, TDHCA's Plan would render ineligible any QCT development too near active railroad tracks, though that prohibition inexplicably would not extend to developments in a Central Business District (CBD). Plan at 12. Also prohibitive would be a nearby manufacturing plant. *Id*. Yet the nation is literally crisscrossed with railroad tracks bordered on one or both sides by residential housing. And a manufacturing plant would bring much-needed jobs to an area of revitalization.

TDHCA's stated intent is to prohibit the use of tax credits in areas possessing characteristics not "typical in a neighborhood that would qualify for HOA points under the Opportunity Index." Plan at 14. *See also* Plan at 16 (concerning vague factors "inconsistent with the general quality of life in typical average income neighborhoods.") The Department begins from the flawed assumption that what's best for low income residents is what's customary in more affluent neighborhoods. The entire notion embraces a failing experiment in which people live in unsustainably large houses and drive unsustainably large vehicles fueled by foreign oil to jobs located so far from home that the nation's children are deprived of supervision for hours each day while their parents sit in traffic that pollutes the environment. Revitalization in an urban area need not, and should not necessarily, look like traditional suburbia.

TDHCA's Plan also ignores the history of the Frazier Courts neighborhood, of South Dallas and of "blighted" communities across Texas. Indeed, it was failed public policy and funding decisions that created the blight in the once solid community of Frazier Courts – that split the neighborhood into pieces with the I-45 and the S.M. Wright freeways, that made zoning decisions to allow polluting industry in the region, and that permitted areas schools to decline without adequate funding. It is only fair that the community now receive the preference mandated by Congress in section 42 to revitalize the neighborhoods that paid most dearly for those failed policy decisions.

If cities are not to receive the assistance with revitalization efforts that Congress intended in enacting section 42, then the vast majority of low income residents in "blighted" neighborhoods will be left with no remedy, even with the relocation efforts of well-intentioned groups like ICP. This is so because the residents served by FRI's efforts do not want to leave their community. Many Frazier Courts residents were born and raised there. Their families are there; their friends are there; their churches are there. Many residents have the opportunity to move to areas now so distant they are referred to exurbs, but they choose not to. These residents are the backbone of the revitalization effort.

The vision for revitalization shared by Congress and by Frazier Courts residents is one shared with fair housing advocates who believe the suburban model should be supplemented with new solutions that address racial inequality in the inter-related contexts of environmental, economic and social sustainability. James A. Kushner, *Urban Neighborhood Regeneration and the Phases of Community Evolution*

After World War II in the United States, 41 IND. L. REV. 575, 595-96 (2008). Professor Kushner proposes that the nation turn its efforts to "Smart Growth" that creates urban design for pedestrians rather than cars and connects communities through public transport. *Id*. at 597-98. In Kushner's view, "higher density, mixed tenure of home occupancy, and income [are] the more attractive strategy to generate increased class and ethnic integration." *Id.* at 599. "Walkable and diverse urban neighborhoods are popular with a wide array of income, age, and ethnic groups suggesting that New Urbanism as a choice for community design will be popular." *Id.* at 601. In urging the nation to embark on a "fifth post-World War II phase of community evolution," Kushner concluded: "Communities segregated by income result in unsustainable and unstable districts housing the poor and prevent stability, economic growth, and regeneration. The antidote may be mixed-income neighborhoods." *Id*.

7. The 130% Basis Boost Should Be Reserved for QCT Developments in an Area of Concerted Community Revitalization.

Finally, FRI objects to the Plan's offer of the 130 percent basis boost for HOA developments receiving tax credits. Plan at 8. It is true that the Housing and Economic Recovery Act of 2008 amended section 42 to allow states to award an increase in basis up to 30 percent to developments located outside a QCT when the increase is necessary to make the building "financially feasible." 26 U.S.C. § 42 (d)(5)(B)(v). But to deplete the available pool of funding for tax credits by awarding a 130 percent boost for projects in white neighborhoods where traditional sources of funding are already easier to obtain would run counter to the preference for

revitalization developments contained in section 42. The 130 percent boost should be limited to projects in revitalization areas. This would in no way affect the ability of HOA developments to receive their now lion's share of tax credits, and it would preserve available funds to allow greater opportunity for the developments in revitalization areas that were contemplated by Congress in the first place.

CONCLUSION

FRI objects to the Defendants' Proposed Remedial Plan generally and in the particulars described above. FRI urges the Court to order TDHCA to submit a new remedial plan that complies with section 42 of the Internal Revenue Code; that specifies precisely how LIHTCs will be awarded and how the criteria differ from those in the current QAP; that specifies the time period that it will apply; and that resolves the definitional ambiguities present in the Plan currently before the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 18, 2012, I electronically submitted the foregoing document for filing with the United States District Court for the Northern District of Texas using the electronic case filing system of the Court, and that all counsel of record will be provided a "Notice of Electronic Filing" and access to this document.

/s/ Brent M. Rosenthal
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