

Proposed Remedial Plan at Issue in Texas Tax Credit Allocation Case*

The Texas Department of Housing and Community Affairs (TDHCA) has proposed a remedial plan¹ in response to a federal district court ruling² that its current method of allocating low-income housing tax credits violated the federal Fair Housing Act. The court had ruled that the agency's allocation method, which disproportionately allocated credits to developments located in very low-income, high-minority communities, had a disparate impact that was not legally justified. The TDHCA's recently filed remedial plan asserts that it would award proposed developments in "high opportunity areas" the "greatest incentives allowed by state law." The court will now evaluate the sufficiency of the plan to remedy the Fair Housing Act violation and enable low-income families to live in racially and economically diverse neighborhoods.

The plaintiff in the case, the Inclusive Communities Project (ICP), filed its objections on June 18, claiming the plan did not go far enough.³ ICP assists low-income families, primarily African-American, in finding housing in high-opportunity, racially integrated areas.⁴

Low-income housing tax credits (LIHTC) are the largest source of federal funding for affordable housing for low-income families. Texas has received about \$9.7 billion in federal housing tax credits since 1990.⁵ Administered by the Internal Revenue Service, the program allows flexibility for each state to distribute tax credits through the qualified allocation plan (QAP) process.

Through the Texas process, 78% of LIHTC units built statewide are in census tracts where more than half of residents are minorities. Only 3% are in areas with at least 70% white populations.⁶ The credits are based upon the cost of the proposed development, excluding land acquisition.⁷ Contemporary affordable housing development and preservation frequently relies on LIHTC to reduce debt burdens and thereby achieve financial viability.

Texas awards LIHTC according to a point system created pursuant to statute.⁸ Within each region, TDHCA allocates tax credits to the highest scoring development proposals as assessed through the rubric of the biennially produced QAP. State law prescribes the order of "above-the-line" criteria, such as financial feasibility and community support. They must each be assigned more points in the QAP than any of TDHCA's discretionary "below-the-line" criteria.⁹

The competition for credits is extremely tight. According to John Henneberger, co-director of the Texas Low Income Housing Information Service in Austin, "A lot of deals are decided on just one point."¹⁰

ICP sued TDHCA in 2008, alleging that TDHCA's discretionary QAP had violated the Fair Housing Act, the Equal Protection Clause of the 14th Amendment, and 42 U.S.C. § 1982.¹¹ Finding no discriminatory intent on the part of TDHCA, the court nevertheless ruled in September 2010 that ICP had established a prima facie case of racial discrimination under a disparate impact theory.¹² The court's most recent decision held that TDHCA failed to demonstrate a legally sufficient justification for the

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¹Defendants' Proposed Remedial Plan, Inclusive Communities Project v. Tex. Dep't of Hous. & Cmty. Affairs, No. 08cv546 (N.D. Tex. filed May 18, 2012), <http://www.tdhca.state.tx.us/multifamily/htc/docs/ProposedRemedialPlan.pdf> [hereinafter Remedial Plan].

²Inclusive Communities Project v. Tex. Dep't of Hous. & Cmty. Affairs, 2012 WL 953696 (N.D. Tex. March 20, 2012) [hereinafter ICP III]. For a review of the decision, see NHLP, *Federal Court Finds Texas Tax Credit Allocation System Violates Fair Housing Act*, 42 HOUS. L. BULL. 126 (June 2012).

³Response to Defendants' Proposed Remedial Plan, Inclusive Communities Project v. Tex. Dep't of Hous. & Cmty. Affairs, No. 08cv546 (N.D. Tex. filed June 18, 2012) [hereinafter ICP Response].

⁴The court has granted an additional party's motion to intervene. Frazier Revitalization Inc., a private developer, seeks "to assist in developing a remedy ... and, if necessary, to assert objections and pursue an appeal of the court-ordered remedy." Inclusive Communities Project v. Tex. Dep't. of Hous. & Cmty. Affairs, 2012 WL 2133667 (N.D. Tex. June 12, 2012).

⁵Karisa King & Ryan Murphy, *Affordable Housing Fenced Into Poor Areas*, SAN ANTONIO EXPRESS, Apr. 25, 2012, http://www.mysanantonio.com/news/local_news/article/Affordable-housing-fenced-into-poor-areas-3500680.php.

⁶Karisa King, *State Releases Plan to Rectify Low-cost Apartment Disparity*, SAN ANTONIO EXPRESS, May 23, 2012, http://www.mysanantonio.com/news/local_news/article/State-releases-plan-to-rectify-low-cost-apartment-3577967.php.

⁷Two kinds of credits are available: 9% credits are awarded competitively, while 4% credits are awarded in conjunction with tax-exempt financing, for which there is less competition. Developers sell the credits to investors, who benefit by having their taxes reduced, in exchange for contributing equity to the proposed development. For background information on the LIHTC program, see NHLP, Overview of the Low Income Housing Tax Credit Program (LIHTC), <http://www.nhlp.org/lihtcoverview>.

⁸TEX. GOV'T CODE § 2306.6710 (2012).

⁹In this manner, the lowest point value for any "above-the-line" criterion serves as a maximum number of points that may be assigned to any "below-the-line" criterion, limiting TDHCA's discretion accordingly. The court recognized, however, that overlapping "below-the-line" criteria, in concert, create incentives as powerful as "above-the-line" criteria. For example, an applicant fulfilling the "Community Revitalization" criterion is necessarily eligible for the "Rehabilitation, or Adaptive Reuse" criterion as well. ICP III, 2012 WL 953696, at *10.

¹⁰Telephone Interview with John Henneberger, Co-Director, Texas Low Income Housing Information Service, in Austin, Tex. (June 13, 2012).

¹¹Section 1982 gives all U.S. citizens the same right to lease property as "white citizens."

¹²Inclusive Communities Project v. Texas Dep't. of Hous. & Cmty. Affairs, 749 F. Supp. 2d 486 (N.D. Tex. 2010) [hereinafter ICP II]. See NHLP, *Advocates Win Partial Summary Judgment in Tax Credit Siting Case*, 41 HOUS. L. BULL. 1, 8 (Jan.-Feb 2011).

policy and a lack of less discriminatory alternatives to the policy, finding in favor of ICP's disparate impact claim. TDHCA was given 60 days to propose a remedial plan to remedy the Fair Housing Act violations.¹³

The Remedial Plan

TDHCA's proposed remedial plan discusses limitations on the agency's discretion, highlights changes already made in the approved 2012-13 QAP and offers several changes to be instituted in future plans to address the disparate racial impacts. TDHCA's submission cites several alleged constraints on its authority to revise the plan. First, it asserts that the "above-the-line" criteria dictated by state law largely drive the scoring of development proposals.¹⁴ Second, in 2012, Governor Rick Perry curtailed the agency's authority to "forward commit" future year tax credits to eligible projects that were otherwise unsuccessful through the competitive application process.¹⁵ Finally, TDHCA's plan refuses to propose ICP's requested relief¹⁶—offering set-asides for proposed developments in high opportunity areas, citing uncertainty regarding statutory authority and a mismatch between remedial areas and larger regions created by law, rendering such a strategy "problematic."

ICP challenged the agency's assertion of limited discretion, pointing out that federal and state law allow the agency to use waivers, forward commitments, and set-asides, if necessary, for good cause and with written explanation.¹⁷ Compliance with the Fair Housing Act, ICP argues, is good cause to award tax credits to the highest-scoring proposed family developments in predominantly Caucasian areas.

In the 2012 QAP, TDHCA prohibited LIHTC development proposals that were proximate to undesirable features, such as junkyards and sexually-oriented businesses.¹⁸ TDHCA also adopted a strengthened definition for high opportunity area developments, requiring low poverty levels, above median incomes and access to high quality schools or public transportation. High opportunity area development proposals are granted a 130% basis

boost.¹⁹ Developments meeting these criteria are also eligible for four development location points. However, as the court recognized, because the same four development location points are also available to developments in economically distressed areas, the development location criterion "could further exacerbate the discriminatory impact."²⁰

In response to the court's ruling and its asserted limitations, TDHCA's remedial plan proposes a new "Opportunity Index." Development proposals in census tracts with less than 15% poverty, incomes in the top quartile for the county or metro area, and within the attendance zone for a "recognized" or "exemplary" elementary school will be awarded the full seven points in the category, the maximum points available for any discretionary below-the-line criteria. ICP objected to the index's inclusion of elderly restricted units but otherwise approved of the index's remedial value.²¹

However, development proposals in qualified census tracts²² with a bona fide community revitalization plan in place²³ are eligible for equal incentives in the remedial plan, which the department asserts is necessary to fulfill the requirements of the federal statutory scheme.²⁴ Because qualified census tracts are disproportionately high-minority areas, ICP claims the revitalization incentive could obstruct the remedy and that points for the revitalization incentive should not be a part of the court-ordered remedial plan.²⁵ Instead, ICP indicates that TDHCA may provide the incentives for qualified census tracts in the annual QAP.²⁶

¹⁹The 130% basis boost increases the project value for the purpose of calculating the amount of tax credits for which it is eligible. The 2008 Housing and Economic Recovery Act authorized state agencies greater discretion in granting the award. Pub. L. No. 110-289, tit. I, § 3003, 122 Stat. 2654, 2880 (2008). ICP objects to elderly units' eligibility for the increased basis in the remedial plan. ICP Response, *supra* note 3, at 14.

²⁰ICP III, 2012 WL 953696, at *9.

²¹ICP Response, *supra* note 3, at 16.

²²Qualified census tracts must either consist of 50% or more households with incomes less than 60% of the area median gross income or have a poverty rate of at least 25%, as certified by HUD. 26 U.S.C. § 42(d)(5)(B)(ii)(I).

²³The community revitalization plan must receive specified levels of local government funding, have a reasonable likelihood to bring about revitalization, and have been developed with public input and cooperation from other relevant public entities. Remedial Plan, *supra* note 1, at 10-11, 15-17. According to HUD analysis, tax credit allocations in qualified census tracts should be supported by careful planning and the commitment of adequate additional resources. LIHTC investment alone will not revitalize severely distressed neighborhoods and may even further depress home values over the long term. See Jill Khadduri & David Rodda, HUD Office of Policy Development & Research, Making the Best Use of Your LIHTC Dollars: A Planning Paper for State Policy Makers 19-22 (2004), <http://www.huduser.org/Publications/pdf/LIHTCDollars.pdf>.

²⁴26 U.S.C. § 42(m)(1)(B)(ii)(III) (requiring a preference for projects that are located in qualified census tracts "and the development of which contributes to a concerted community revitalization plan").

²⁵ICP Response, *supra* note 3, at 16, 27-31.

²⁶*Id.* at 31.

¹³TDHCA's remedial plan was not explicit on the question of statewide application. ICP seeks a remedy that applies only to the five-county Dallas area, which was the focus of the case. ICP Response, *supra* note 3, at 10.

¹⁴ICP responded that state law and the federal tax code do not supersede the Fair Housing Act. ICP Response, *supra* note 3, at 7, 32.

¹⁵ICP also argued that Governor Perry's statement does not eliminate TDHCA's discretion. ICP Response, *supra* note 3, at 10-11.

¹⁶ICP III, 2012 WL 953696, at *8.

¹⁷ICP Response, *supra* note 3, at 5, 10-14.

¹⁸Texas Department of Housing and Community Affairs, Housing Tax Credit Program: 2012-2013 Qualified Allocation Plan, <http://www.tdhca.state.tx.us/multifamily/htc/docs/12-13-QAP-RelatedRulesLaws.pdf> [hereinafter 2012 QAP].

Other changes proposed by TDHCA include restricting the development location bonus of four points to high opportunity areas. Additional points will be awarded for any development proposal located in a recognized or exemplary school zone (three points), located in a municipality or county not having previously received LIHTC credits (two points), or receiving support from a neighborhood organization that previously opposed a LIHTC development proposal (two points). The plan also would expand the prohibition on siting developments near certain undesirable features to include, among other items, blighted structures and gang activity.²⁷

Despite these changes, neighborhood groups retain substantial power in the QAP to block proposed developments. This clout is often responsible for halting developments in affluent communities, where residents quickly organize against low-income housing. Even after the proposed remedial plan's changes take effect, community support, worth more than 20% of available points, is much more valuable to a proposed development than location in an integrated area.

ICP outlined a point scheme that the agency could use to de-emphasize those "above-the-line" criteria "posing the highest barrier to non-discriminatory allocation decisions," while adhering to statutory prescriptions.²⁸ By narrowing the range of assigned point values, TDHCA could increase the relative weight of discretionary "below-the-line" criteria—from 25% of maximum points in TDHCA's proposal to 35% in ICP's suggestion.²⁹

Texas Low Income Housing Information Service's Henneberger pointed out that fear of community opposition has an additional chilling effect on the initiation of projects by developers apart from the incentives in the QAP. He accordingly believes that set-asides are the "only way to get projects in affluent communities."³⁰ Though stopping short of expressly finding set-asides prohibited by law, TDHCA nevertheless refused to incorporate the approach in its remedial plan. Characterizing the agency's proposal as "tepid," Henneberger predicted that it "just won't get the job done."³¹ However the court rules, the resulting remedial plan will have a profound effect on the distribution of new affordable housing units in the Dallas area. ■

²⁷Remedial Plan, *supra* note 1, at 13-14. ICP objected to the 1,000-foot radius contemplated by TDHCA, arguing that a risk assessment is more appropriate. ICP Response, *supra* note 3, at 23-24.

²⁸ICP Response, *supra* note 3, at 35.

²⁹*Id.* at 20-21.

³⁰Telephone Interview with John Henneberger, *supra* note 10.

³¹*Id.*