

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, *
Leslie Bingham-Escareño, *
Tomas Cardenas, *
C. Kent Conine, *
Dionicio Vidal (Sonny) Flores, *
Juan Sanchez Muñoz, and *
Gloria L. Ray in their official capacities, *
Defendants. *

Civil Action No. 3:08-CV-00546-D

INCLUSIVE COMMUNITIES PROJECT, INC.'S RESPONSE TO
DEFENDANTS' ANNUAL REPORT REGARDING
LOW INCOME HOUSING TAX CREDITS

Summary

ICP agrees that the 2013 9% allocation process achieved a result consistent with the remedial order and objectives. ICP reached this conclusion based on its own analysis. ICP's analysis using units shows that 53% , 412 of 780, of the 9% program units receiving a 2013 tax credit award in the remedial area were in 50% or greater Caucasian census tracts. The elements in the Court approved plan worked to produce a remedial result.

Although the result of the 2013 allocation process is satisfactory, TDHCA's disparate impact analysis using projects, applications, and counties results in a disparate impact analysis of the existing segregation that ignores the nature of the violation, has no connection with the scope of the remedy, and provides no basis for analysis of present or future results.

The 4% program applications would have resulted in a discriminatory allocation had those applications been awarded tax credits instead of being withdrawn. TDHCA may have to exercise its discretion to prevent future 4% allocation decisions that obstruct compliance with the remedy.

The 2013 legislation giving municipalities a veto on 4% applications and making municipal approval the second highest 9% program scoring criteria has the potential to produce a 2014 allocation process result that is not consistent with the remedial order and its objectives. Tex. Gov't Code §§ 2306.6710(b)(1)(B); 2306.67071. There may need to be changes in the remedial order if these changes obstruct the remedial process in 2014.

ICP supports TDHCA's requested changes in the remedial plan and TDHCA's voluntary changes set out in the report. ICP has filed a brief in support of the TDHCA motion to amend the remedial plan order.

ICP's analysis shows that the 2013 9% allocation result was consistent with the remedial objectives.

The TDHCA 2013 9% allocation process achieved a result consistent with the remedial order and objectives. ICP's analysis based on the number of units receiving tax credit awards shows that 53%, 412 of 780, of the 9% program units receiving a tax credit award in the remedial area were in 50% or greater Caucasian census tracts.

TDHCA's 2013 disparate impact analysis ignores the nature of the violation and the scope of the remedy and provides no basis for analysis of present or future results.

Although the results of the 2013 allocation process were consistent with the remedial order, the TDHCA disparate impact analysis is not. Report pages 50 - 59, Figures 35 - 37, 39 - 40. That analysis ignores the nature of the violation - perpetuation of racial segregation in the

Dallas metropolitan area. Instead TDHCA focuses on a county by county analysis of projects and the percentage of census tracts that are majority Caucasian in each county. This approach has never been used by either party or the Court in this case. TDHCA's analysis chooses projects and applications as the basis of its analysis rather than the number of units that are the basis for the liability finding. *The Inclusive Communities Project, Inc. v. The Texas Department of Housing and Community Affairs*, 860 F.Supp.2d 312, 322 (N.D. Tex. 2012); *The Inclusive Communities Project, Inc. v. The Texas Department of Housing and Community Affairs*, 749 F.Supp.2d 486, 493, 496, 499 - 500 (N.D. Tex. 2010). TDHCA cannot show that the disparate impact analysis in the report is 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. *The Inclusive Communities Project, Inc. v. The Texas Department of Housing and Community Affairs*, 2012 WL 3201401, *12 (N.D. Tex. 2012).

The TDHCA disparate impact analysis uses projects and applications rather than units in projects and units in applications. TDHCA also uses the number of projects and applications per county to compare to the number of majority Caucasian census tracts in each of the five counties in the remedial area. None of these elements were used by the Court to determine the prima facie case and liability for the disparate impact of perpetuation of racial segregation. *The Inclusive Communities Project, Inc.*, 749 F.Supp.2d at 493, 496, 499 - 500. The use of units gives a more accurate account of the housing opportunities available. A project or application with 200 units makes more housing opportunities available at a location than a project or application with 50 units.

The county by county segregation analysis by TDHCA ignores the scope of the violation

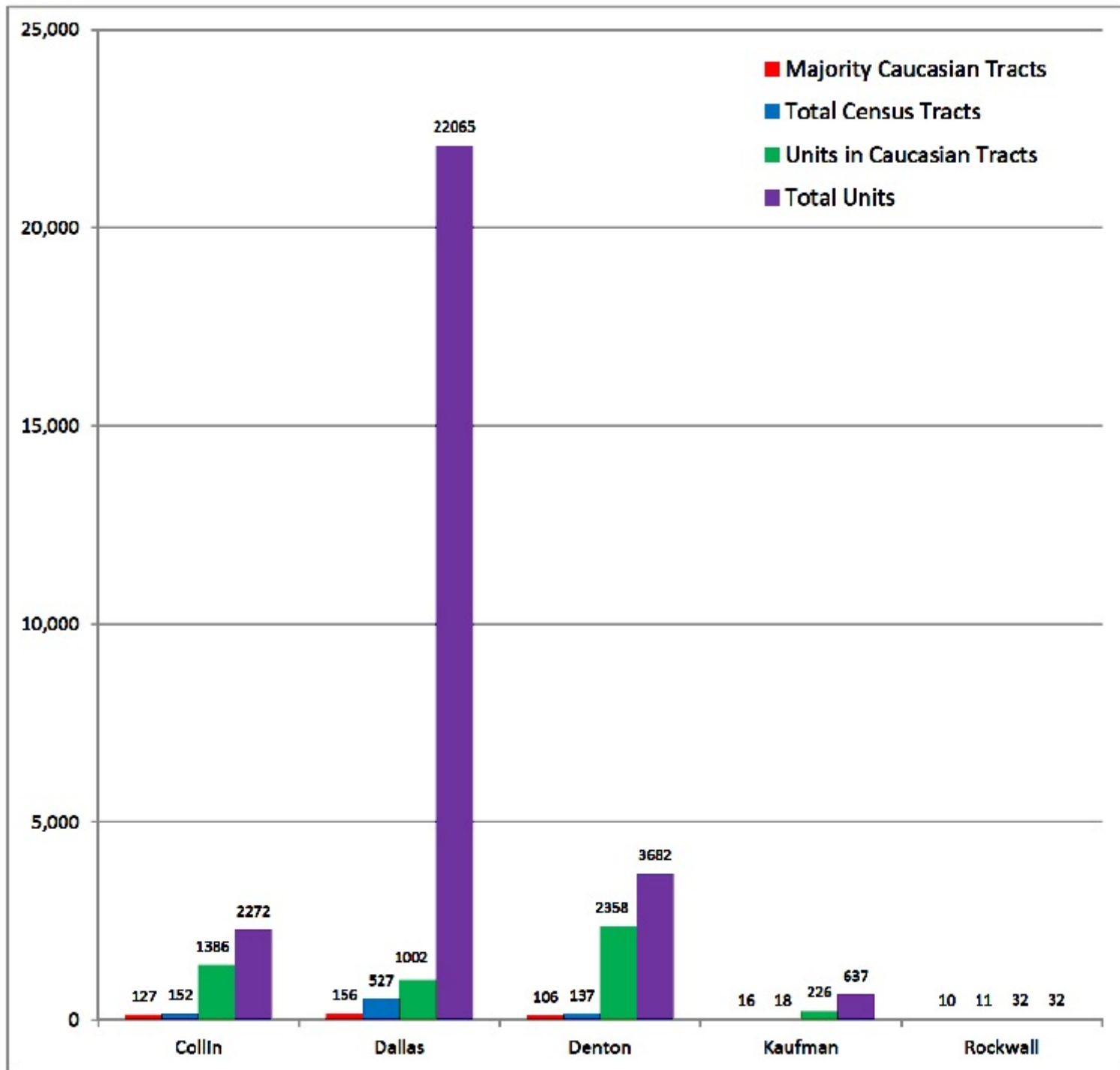
and the necessary scope of the remedy.

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

...
²Although 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. *The Inclusive Communities Project, Inc.*, 2012 WL 3201401, *4.

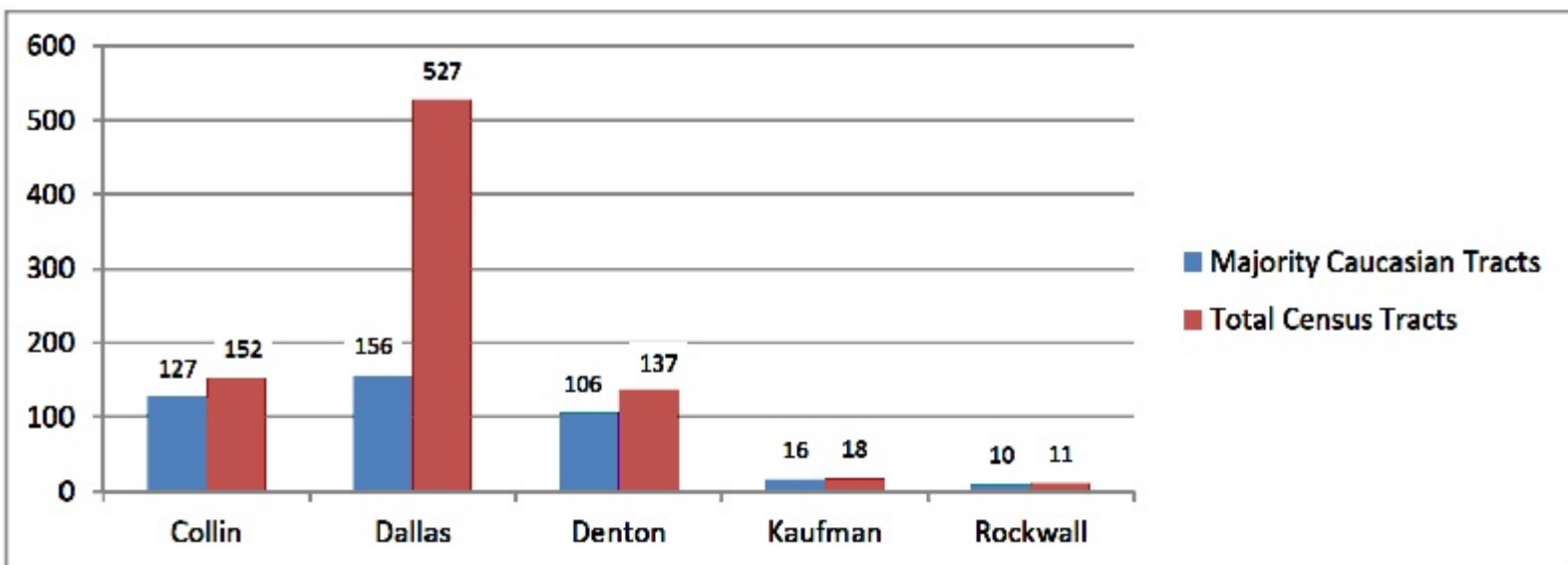
The tax credit program is racially segregated throughout the remedial area. Tax credit units have been segregated out of Caucasian areas throughout the multi-county region and segregated into the minority areas of the City of Dallas. See the map at page ___.

TDHCA seems to be suggesting that the need for additional non-discriminatory allocation cycles is eliminated or at least mitigated by a loose association amongst the percent of each county's tax credit properties in majority Caucasian tracts, the percentage of applications for properties to be located in majority Caucasian tracts, and the percentage of census tracts in each county that are majority Caucasian. Report, pages 52 - 59, Figures 35 - 37, 39 - 40. Figures 36 and 40 appear to claim that 65% of the TDHCA projects are in Collin County, 6% in Dallas County, 65% in Denton County, 62% in Kaufman County, and 100% in Rockwall County. While this is not arithmetically possible, the visual image in Figure 36 conveys the impression. The impression is false. Dallas County has the vast majority, 77%, of the tax credit units in the Remedial Area.



Source: TDHCA LIHTC Property Inventory as of November 2012. American Community Survey 2006 - 2010 table B03002.

While 91%, 10 of 11, of the census tracts in Rockwall County are majority Caucasian, Dallas County has 156 majority Caucasian tracts, 14 times the total number of all tracts in Rockwall County. Rockwall County is not the exception. Dallas County has more majority Caucasian census tracts than the number of total tracts in any of the other four counties. Dallas County’s 156 majority Caucasian tracts outnumber the 11 total tracts in Rockwall County, the 18 total tracts in Kaufman County, the 137 total tracts in Denton County, and the 152 total tracts in Collin County.



Source: American Community Survey 2006 - 2010 table B03002.

The discriminatory impact caused by TDHCA’s disproportionate allocation process is the perpetuation of racial segregation. The measure of this discriminatory effect was the percentage of LIHTC non-elderly units in majority Caucasian census tracts compared to the percentage of LIHTC non-elderly units in predominantly minority census tracts. The geographic scope of the violation was measured for the City of Dallas and for the Dallas metropolitan area. *The Inclusive Communities Project, Inc. v. The Texas Department of Housing and Community Affairs*, 749

F.Supp.2d 486, 493, 496, 499 - 500 (N.D. Tex. 2010). TDHCA's analysis does not mention LIHTC non-elderly units but instead uses projects and applications. TDHCA's analysis does not mention the racial segregation by units in the City of Dallas or the metropolitan area or the Remedial Area. TDHCA's analysis of individual counties has never been used to determine the existence of or the extent of racial segregation by either party or the Court in this case. The racial segregation at issue was the exclusion of LIHTC units from Caucasian areas in all the counties. The racial segregation at issue was the steering of the LIHTC units into the minority areas of the City of Dallas.

TDHCA's analysis does not measure the existing discriminatory racial segregation of its low income housing tax credits and cannot serve as the legal benchmark for progress in achieving the remedial goals. TDHCA's report claims to but does not consider comparison data from arguments demonstrated in 749 F.Supp.2d 486, (evidence gathered from the Inclusive Communities Project between 1999-2008 upon which the court based its ruling).

TDHCA's Figure 41 on page 56 is not discussed in the report. As it is drawn, Figure 41 seems to claim that the 2013 awards raised: a) the percentage of the total TDHCA properties in 50% + Caucasian tracts from 24% to 57%; b) the percentage of the total TDHCA properties in Income Quartile 1 from 6% to 57%; and c) the percentage of the total TDHCA properties that are General or non-elderly from 24% to 57%. The three non-elderly projects in majority Caucasian tracts awarded tax credits in the 2013 cycle could not have such major effect. Using TDHCA's data, these three projects increased the total non-elderly projects in the remedial area from 178 to 181, an increase of 1.7%. The three projects increased the non-elderly projects in majority Caucasian areas from 37 to 40, an increase from 21% to 22% of the total non-elderly projects. TDHCA does not provide the total number of projects in Income Quartile 1, only the number of

2013 awards. Report pages 24, 56. There is no evidence that the total number of non-elderly projects in Quartile 1 Opportunity Index tracts increased from 6% to 57%.

TDHCA's assertion that the 160 units awarded tax credits for the Wynnewood Family Housing project located in predominantly minority tract should not count in the disparate impact analysis is false. The allocation clearly perpetuates racial segregation in the LIHTC program in the Dallas area. The fact that there are HUD vouchers in use at the project now and will be in use in the future does nothing to change the perpetuation of racial segregation by an award of tax credits for 160 units in a predominantly minority census tract. TDHCA Report page 157, appendix with census tract demographics.

The 4% tax credit program may present future impediments to successful results under the remedial plan.

Had the 4% program applications filed during 2013 been awarded tax credits, the result would have been different. There were 610 units in three 4% program applications that were all to be located in over 50% minority areas. The three applications - Fairmont Crossing, St. James Place, and People's El Shaddai - were withdrawn. The addition of the units in these applications would have reduced the percentage of units given tax credits in Caucasian areas as a percent of all units awarded tax credits from 53% to 30%. This disproportionate result would have perpetuated racial segregation.

TDHCA states that it has less discretion to award 4% tax credits than to award 9% tax credits. Report page 17. The statement is incorrect. The evidence shows that TDHCA has more, not less discretion in the 4% program. This discretion may be needed in providing future remedial actions. Memorandum Opinion and Order, Document 178, 3/20/12, n. 31 page 35.

There is no information about the affirmative marketing plans for the 2013 approved projects.

Element F. of the order setting the contents of the annual report requires a reasonably detailed summary of the Affirmative Marketing Plans used by 4% and 9% projects approved during the fiscal year covered by the report. The report includes no mention of the affirmative marketing plans. This may be because no 2013 approved project has progressed to the stage of adopting an affirmative marketing plan. But the report does not provide sufficient information to make any determination about compliance with this element of the reporting requirements.

TDHCA did not apply the plan required standard for pre-clearance of undesirable site and area features.

The remedial plan element for pre-clearance of undesirable site and area features prohibits approval of an application in conditions that are of a nature that would not be typical in a neighborhood that would qualify for points under the Opportunity Index. Amended Judgment, Document 208, 11/08/12, page 3, attachment page 14. TDHCA failed to use this standard in at least one instance where tax credits were awarded, application 13234, Parks at Wynnewood.

Additionally, crime in the area did not appear to be an outlier compared to nearby neighborhoods (based on crime data provided for 2011 and 2012). Page 43.

This application was for units to be located in a 24% poverty, 10.8% Caucasian area. Report page 44, Figure 33. TDHCA did not compare the crime with crime that would be typical in a Opportunity Index neighborhood.

ICP agrees to the proposed method of providing fair housing choice disclosure.

The remedy order requires TDHCA to

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;

The Inclusive Communities Project, Inc., 2012 WL 3201401, *4.

ICP agrees that TDHCA's process to provide the notice before entering the lease or before expiration of the lease is adequate to accomplish the purpose of the remedial order

provision.

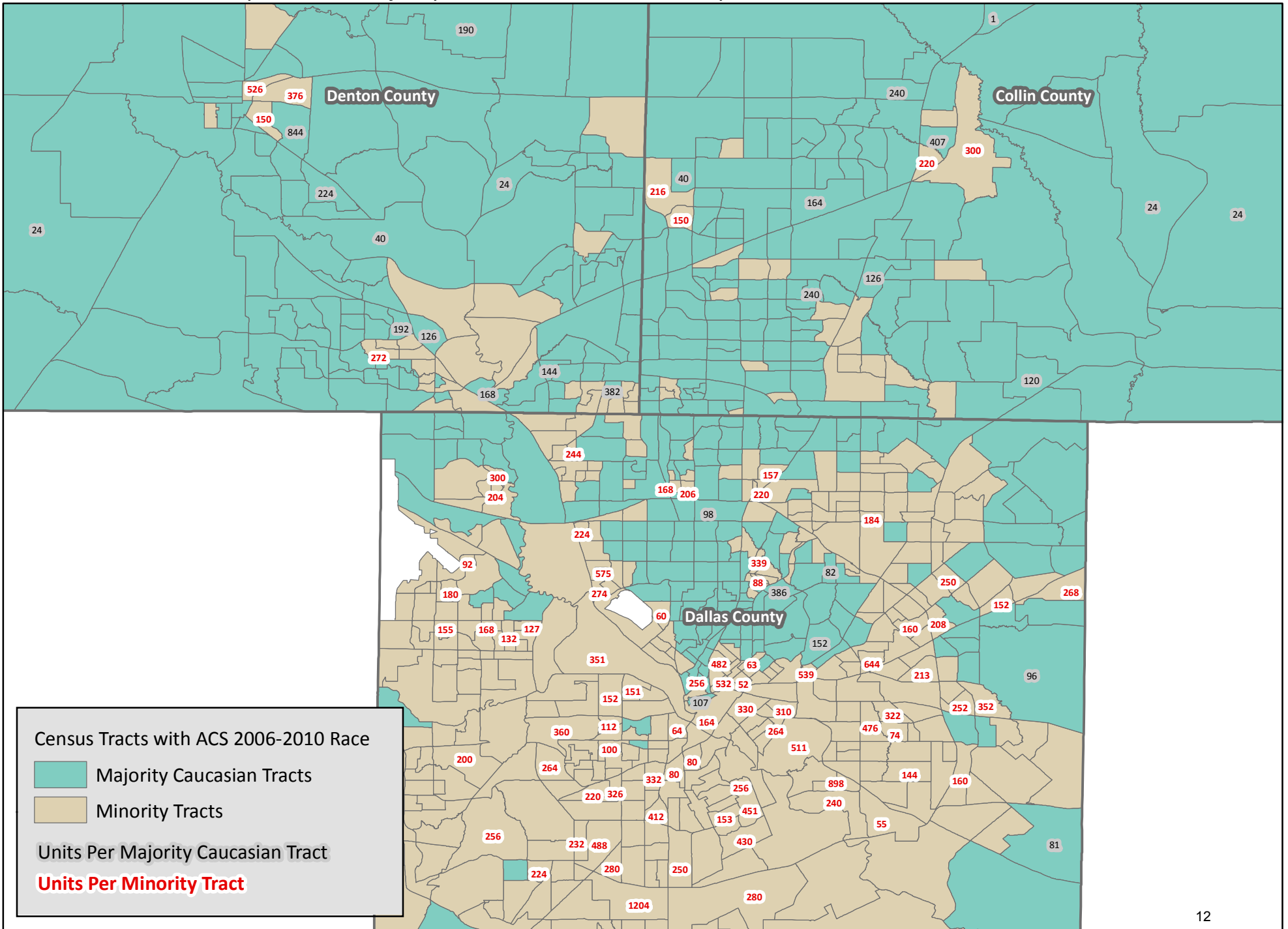
The Local Government Support 9% program element has potential discriminatory impacts.

The 2013 Legislative session added the Local Government Support element to the 9% program point scoring system. Tex. Gov't Code 2306.6710(b)(1)(B). This element and the points assigned to the element were not part of the *ICP v. TDHCA* liability or remedial proceedings. Under the new 2014 QAP the 17, 14, or 0 points that can be awarded under this element have the potential for perpetuating racial segregation in the Dallas area. These 17 new points for municipal or county support can be an insurmountable barrier for projects that do not receive either approval or a resolution of non-objection. Granting credits in non-Caucasian areas because of these local government approval points can perpetuate racial segregation as much as denying credits in Caucasian areas because of objections or failures to act. For example, the City of Dallas could make several projects in non-Caucasian areas eligible for the 17 local government support points. These points would place those projects ahead of Caucasian area projects in suburbs with the local government opposing or not supporting those projects.

The potential for segregative effects is shown by hypothetically applying the 17 points to the 2013 Region 3 applicants. The addition of the 17 points for municipal approval to the 2013 application round would have made a significant difference. Since it did not get municipal approval, the Millennium - McKinney application for units in a Caucasian area would not have received an allocation under the new legislation. It did receive a 2013 allocation without municipal approval. Having obtained City of Dallas support, Patriot's Crossing's 9% application for units in a low-income minority area in Oak Cliff would have been given the 9% allocation with the new municipal approval points.

As with the 9% program local government support approval element, the discriminatory impact potential is high for the new statutory element requiring municipal approval before a 4% application can be filed. Tex. Gov't Code 2306.67071.

Pre-2013 Non-Elderly Units Per Majority Caucasian Tracts or Minority Tracts in Collin, Dallas, and Denton Counties



Sources: American Community Survey 2006-2010 Table B03002, TDHCA LIHTC Property Inventory as of November 2012, 2010 Census Tracts.

Respectfully Submitted,

/s/ Michael M. Daniel

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Certificate of Service

I hereby certify that on December 20, 2013 I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case files system of the court. The electronic case files system will send a "Notice of Electronic Filing" to the following individuals who have consented in writing to accept this Notice as service of this document by electronic means: Timothy E. Bray, Assistant Attorney General, State of Texas; Shelly Dahlberg, Assistant Attorney General, State of Texas; James "Beau" Eccles, Assistant Attorney General Deputy Chief - General Litigation Division, State of Texas; Beth Klusmann, Assistant Solicitor General, State of Texas Michael C. Kelsheimer, William B Chaney, George Tomas Rhodus, James D MacIntyre, and Brent M. Rosenthal,

s/ Michael M. Daniel