

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. BRIEF IN  
OPPOSITION TO FRI MOTION TO INTERVENE

**Table of Contents**

Summary of ICP’s opposition to the intervention . . . . . 1

TDHCA’s proposed remedial plan shows that TDHCA  
 continues to adequately represent FRI’s interest in preferential  
 treatment for community revitalization projects . . . . . 3

FRI’s direct interest in obtaining a tax credit allocation has not  
 been affected by any remedial proceedings in this case. All three  
 FRI attempts to obtain tax credits for the Hatcher Square  
 development were made under QAPs adopted months or years  
 before liability in this case was determined . . . . . 4

When FRI receives a tax credit allocation, it will be the ninth  
 tax credit allocation in the FRI designated 2 mile service area.  
 The conditions of slum and blight remain despite the steady  
 infusion of housing tax credits by TDHCA . . . . . 7

Southdale tax credit project . . . . . 9

Eban Village I and II tax credit project . . . . . 9

Southern Terrace tax credit project . . . . . 10

Frazier Fellowship, Wahoo Frazier Townhomes, Mill City Parc Townhomes . . . . . 10

Carpenter’s Point tax credit project . . . . . 11

Hatcher Square site . . . . . 11

The Court has already ruled that a Fair Housing Act remedy for the violations is consistent with the statutory obligation to provide a preference for revitalization projects. FRI’s intervention to re-litigate this position is not justified . . . . . 15

FRI’s claim that the disproportionate use of tax credits in Black neighborhoods should continue with no lessening would require re-litigation of the case and does not support intervention . . . . . 16

The timeliness assertions are inaccurate . . . . . 17

Conclusion . . . . . 19

Signature . . . . . 20

Certificate of service . . . . . 20

**Table of authorities**

**Cases**

*Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, 749 F.Supp.2d 486 (N. D. Tex. 2010) . . . . . 2, 8, 15

*Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, 2012 WL 953696 (N.D. Tex 2012) . . . . . 2, 17

*In re Lease Oil Antitrust Litigation*, 570 F.3d 244 (5<sup>th</sup> Cir. 2009) . . . . . 6

*John Doe No. 1 v. Glickman*, 256 F.3d 371 (5<sup>th</sup> Cir. 2001) . . . . . 15, 17

*New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452 (5<sup>th</sup> Cir. 1984)(en banc) . . . . . 6

*Obregon v. Melton*, 2002 WL 1792086 (N.D. Tex. 2002) ..... 17, 19

*Rigco, Inc. v. Raushcer Pierce Refsnes, Inc.*, 110 F.R.D. 180 (N.D. Tex. 1986) ..... 6

**Statutes**

26 U.S.C. § 42(m)(1)(B)(iii) ..... 16

26 U.S.C. § 42(m)(1)(C)(iii) ..... 16

26 U.S.C. § 45D..... 15

Tex. Gov't Code § 2306.6711(f) ..... 6

**Federal Rules of Civil Procedure**

Fed. R. Civ. P. 23 ..... 17

Fed. R. Civ. P. 24(a) ..... 19

Fed. R. Civ. P. 24(a)(2) ..... 3

Fed. R. Civ. P. 24(b) ..... 19

Fed. R. Civ. P. 24(b)(3) ..... 3

Fed. R. Civ. P. 24(c) ..... 3

**Other authority**

76 FR 70921, 70925, Nov. 16, 2011 ..... 18

Bast, 27 Real Estate Finance Journal, Summer 2011 ..... 18

### **Summary of ICP's opposition to the intervention**

ICP is not and has not been opposed to the continued use of low income housing tax credits in connection with developments in qualified census tracts that contribute to a concerted community revitalization plan. Transcript, Vol. 1, pages 96 - 97, Khadurri testimony. ICP is not and has not been opposed to the continued use of low income housing tax credits in connection with developments just because those developments will be located in non-Caucasian areas. ICP's seeks to end the disproportionate number of units in non-Caucasian areas. Transcript, Vol. 1, page 132, McCain testimony. ICP opposes FRI's intervention for the following reasons.

FRI has not shown that TDHCA does not adequately represent its interests. TDHCA's proposed remedial plan accedes to FRI's position that community revitalization developments should receive the same 9% program point score as units in the high opportunity areas. The proposed plan follows FRI's request and awards the same points for community revitalization projects as for those in the highest income range of high opportunity areas. And the proposed plan goes beyond the FRI request for the same points and provides more points for some community revitalization related applications than are provided for some high opportunity areas. Defendants' Proposed Remedial Plan, Document 181, pages 6, 7, 10.

FRI's interest in obtaining a 2012 tax credit allocation for Hatcher Square is not impacted by the remedial proceedings in this case. The QAP governing the 2012 application was adopted in 2011 and will not be affected by any proceedings in this case. The movant's application has a selection criteria point score that is very high and is likely to result in a tax credit allocation in this 9% allocation cycle. There is nothing its intervention could do to affect the possibility of an allocation of tax credits for its current application.

FRI's claim that only low income housing tax credits will prevent continued slums and blight in low income Black neighborhoods is contradicted by the record showing the lack of revitalization in FRI's service area despite eight previous TDHCA allocations of low income housing tax credits.

FRI asserts as a basis for intervention its claim that continued low income housing tax credits for units that contribute to a concerted community revitalization plan is a legitimate reason for placing a disproportionate number of units in non-Caucasian areas. This claim has already been considered and rejected by the Court. *Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, 749 F.Supp.2d 486, 504 (N. D. Tex. 2010). FRI does not provide any facts or legal reasons that support re-opening that issue. The continued use of low income housing tax credits in connection with housing that contributes to concerted community revitalization plans is not at risk in this case. Neither ICP nor the defendants oppose such use.

FRI claims that the disproportionate allocation of tax credits to minority concentrated, low income areas should continue unabated and uses the claim to justify its intervention in this case. This claim has also been considered and rejected by the Court. Such a policy would violate the Fair Housing Act given the less discriminatory alternatives available. *Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, 2012 WL 953696, 6 - 9 (N.D. Tex 2012).

FRI's interests in asserting primacy for low income minority areas in the allocation of low income housing tax credits have been aggressively represented by the defendants. FRI's interest in obtaining a FY 2012 allocation under a pre-remedy QAP will not be affected by the future

proceedings in this case. Given these facts, the motion does not show an interest that is not already represented by existing parties. Fed. R. Civ. P. 24(a)(2) Intervention of Right.

Intervention to raise issues that have already been fully adjudicated without providing adequate grounds for relitigation would unduly delay the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(3) Permissive Intervention.

The FRI motion and brief are not accompanied by the pleading setting out the claim or defense as required by Fed. R. Civ. P. 24(c). This omission can be fixed by allowing FRI to now file a complaint in intervention or an answer in intervention. However, fairness would also be served by allowing an ICP response based on the belated filing of any such answer or complaint in opposition.

FRI makes numerous fact assertions in support of its motion. Many of these assertions are inaccurate and should not be used to support the intervention or the substantive arguments made by FRI's brief on the merits of the issues. Contrary to FRI's assertions, infusions of tax credits for new housing in blighted areas does not cause revitalization of the underlying conditions of slum and blight. See below at page 7. FRI knew about this case and its possible effect on future TDHCA allocations before December 2011. See below at page 18. The case has not been conducted in private but has been the subject of news media coverage and TDHCA public reports. See below at pages 17 - 18.

**TDHCA's proposed remedial plan shows that TDHCA continues to adequately represent FRI's interest in preferential treatment for community revitalization projects.**

FRI's representative, Mr. Don Williams, sent ICP's attorney a letter on April 18, 2012 with a copy to the Court and to TDHCA. Mr. Williams asked ICP and TDHCA to agree to equal

points for high opportunity areas and community revitalization projects. Appendix, Tab 1, pages 3 - 4, 4-18-12 letter to DBPC from FRI. ICP has not agreed and opposes equivalent points for the two categories. But the TDHCA proposed remedial plan contains just such a provision. TDHCA has proposed higher preferences for community revitalization developments than Mr. Williams requested. The proposed plan provides more points for community revitalization development applications than for all but one of the high opportunity area categories. For example, while developments in tracts in the highest 25% of median household income may be eligible for seven points, High Opportunity Areas in the 50% to 75% quartiles of median household income are only eligible to receive five 9% selection criteria points. However, a proposed development site in a Qualified Census Tract for which there is a concerted community revitalization plan with a budget of \$25,000 per unit will receive seven points. Defendants' Proposed Remedial Plan, Document 181, pages 6, 7, 10. FRI does not need to be a party in this case to have TDHCA represent its interests.

**FRI's direct interest in obtaining a tax credit allocation has not been affected by any remedial proceedings in this case. All three FRI attempts to obtain tax credits for the Hatcher Square development were made under QAPs adopted months or years before liability in this case was determined.**

FRI's current claim that a future remedy in this case is preventing FRI from obtaining tax credits for Hatcher Square is implausible. FRI's attempts to obtain low income housing tax credits for its proposed Hatcher Square project began with its preapplication for the 2010 9% program allocation cycle. In its 2010 preapplication, FRI claimed a score of 161. This was the third lowest score of the 48 developments that filed pre-applications. The highest self score claimed was 187 points. Appendix, Tab 2, pages 8 - 13, 10-RegpreAppLog Excerpt.pdf. There is

no subsequent 2010 application on record for the Hatcher Square project. Defendants' exhibit 133, pages 4 - 6.

FRI applied again in the 2011 9% program funding cycle for the Hatcher Square development at the same site in the 2010 preapplication. FRI's 2011 Hatcher Square application received a final score of 210 points under the 9% program selection criterion. This score was only one point lower than the lowest scoring 2011 application to be awarded tax credits on the basis of the 9% program selection criteria point scoring system. Appendix, Tab 3, page 17, 11-9pctCompregAwards-Waiting List excerpt. FRI's score included four selection criteria points for a location in a High Opportunity Area and one point for a location in a Qualified Census Tract with Revitalization. Appendix, Tab 12, pages 74, 76, 78 - 80, 11098 2011 application excerpt. The High Opportunity Area factor scoring points were awarded solely because there was a public transit facility near the proposed site and not for low poverty or high income factors. The location would not have been eligible for points based on either low poverty rates or higher median incomes. Appendix, Tab 12, pages 78 - 80, 11098 2011 application excerpt; ICP exhibit 581, 2011 QAP, pages 13 (§ 3(D)), 53 (§E).

In its current and still pending Hatcher Square application, FRI claims 175 points. The application is for the same development and on the same site as in the 2010 and 2011 Hatcher Square applications. Appendix, Tab 13, page 101 - 106, 12159 2012 application excerpts. The application will receive an additional 24 points for the homeowner association's support letter from the Bertrand Neighborhood Association. The application will receive an additional 16 points for the letters of support from the state senator and state representative. Appendix, Tab 5, pages 22, 24, Copy of 12=QuantCommParticipationLog. The additional 40 points will give FRI's



application 215 total points. Since a substantial number of the non-elderly applications in Caucasian areas will not receive a 40 point score increase from neighborhood and legislative support, the FRI's Hatcher Square application is likely to score high in the ranking for a 2012 9% tax credit allocation.<sup>1 2</sup>

FRI's economic interest as an applicant for low income housing tax credits does not support intervention. A free standing opportunity to obtain money or similar resources is not enough to constitute the direct, substantial, legally protectable interest necessary to justify intervention. The interest to support intervention must be more and one that the substantive law recognizes as belonging to the movant. *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 466 (5<sup>th</sup> Cir. 1984)(en banc). A harm to only an economic interest does not support intervention as of right. *In re Lease Oil Antitrust Litigation*, 570 F.3d 244, 250 - 252 (5<sup>th</sup> Cir. 2009); *Rigco, Inc. v. Raushcer Pierce Refsnes, Inc.*, 110 F.R.D. 180, 182 (N.D. Tex. 1986).

FRI cannot show that the remedy for TDHCA's violation of the Fair Housing Act has caused any past injury or can cause a present injury to any legally protectable FRI interest. There is no remedy in place, much less one that could cause any injury to any FRI interest. There is

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<sup>1</sup> Three of the higher scoring applications are all located in the Dallas Central Business District and are within a two mile radius of each other. The three applications are 1701 Canton - Evergreen Residences, Cadillac Apartments, and 1400 Belleview. Appendix, Tab 4, pages 19 - 20, 12-CompHTCAppSubmissionLog - 120419 excerpt; Appendix, Tab 6, page 26, TDHCA Existing and 2012 Proposed Projects. All but one of these applications will be ineligible based on the state statute allowing only one 9% allocation per cycle in a two mile radius. Tex. Gov't Code § 2306.6711(f).

<sup>2</sup> TDHCA's schedule for the 2012 9% program states that final scores will be announced in the middle of May, 2012. Appendix, Tab 14, page 125, Pages from 12-13-QAP RelatedRulesLaw excerpt.

only the Court's initial schedule for a remedy proposal from TDHCA and for a response to that proposal from ICP and TDHCA's May 19, 2012 Defendants' Proposed Remedial Plan.

Nor can FRI show that it has a legally protected interest in being free from the effects of any appropriate, least intrusive remedy for the Fair Housing Act violation. If it obtains funding in the current application round, it will not be subject to any of the remedial proceedings. If it does not obtain funding in its third attempt under TDHCA's pre-remedial 9% program selection criteria, the effect of a remedy on a possible fourth FRI attempt at obtaining tax credit funding for the Hatcher Square development is speculative.

**When FRI receives a tax credit allocation, it will be the ninth tax credit allocation in the FRI designated 2 mile service area. The conditions of slum and blight remain despite the steady infusion of housing tax credits by TDHCA.**

FRI asserts an interest in maintaining the flow of low income housing tax credits into blighted low income Black neighborhoods because it claims these credits are essential to ending slum and blight in those neighborhoods. This claim is alleged without providing evidence to support the claim. The assessment of whether or not tax credit housing will contribute to the revitalization of a blighted neighborhood requires specific assessments of a variety of factors including the extent of the problems and the amount of other resources being used in the neighborhoods to control crime, improve services, add retail, upgrade schools, eliminate noxious and hazardous uses, etc. Transcript, Vol. 1, pages 96 - 97, Khadurri testimony. FRI does not attempt to make any such individual assessments. FRI relies on general statements that slum and blight are bad and tax credit housing will eliminate slum and blight. It is uncontested that slum and blight are bad. But the evidence from FRI's own service area shows that even large infusions of tax credit housing by TDHCA do not necessarily revitalize a neighborhood.

TDHCA has made eight allocations of tax credits for 1,148 units in the two mile radius around FRI's proposed Hatcher Square project from 1992 through 2008. ICP exhibits 5, 22, 26 (tax credit allocations in tracts 25 through 39.01). The characteristics of the FRI two mile radius service area do not support FRI's assertion that providing the additional low income tax credit housing units will revitalize the neighborhood. The tax credits have not stopped the area from declining in population, becoming poorer with higher unemployment, suffering from high crime, having few of the expected neighborhood services, and being blighted by industrial uses. Appendix, Tab 7, pages 27 -33, Hatcher Square Area Maps; Tab 8, pages 34 - 41, Declaration of Katherine Lopez.

TDHCA's allocation of tax credits has, to date, clearly served FRI's interest in keeping low income housing tax credits out of Caucasian areas and in minority concentrated areas. 92.29% of LIHTC units in the city of Dallas were located in census tracts with less than 50% Caucasian residents. *Inclusive Communities Project, Inc*, 749 F.Supp.2d at 499. TDHCA's tax credit decisions have clearly served FRI's interests in providing tax credits for units located within FRI's two mile radius service area.<sup>3</sup> TDHCA has already made eight separate allocations totaling \$5,659,387 in annual low income housing tax credits for 1,148 units in that non-Caucasian area. ICP exhibits 5, 22, 198 pages 1 - 2; Appendix, Tab 7, pages 27 -33, Hatcher Square Area Maps; Tab 8, pages 34 - 41, Declaration of Katherine Lopez. These allocations have been for tax credit projects located from within a few blocks of the FRI location (Frazier projects and Southdale) to no more than 1.35 miles away (Eban Village I and II). ICP exhibit ICP exhibit

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<sup>3</sup> The FRI two mile service area is from the FRI Hatcher Square tax credit 2011 application. Appendix, Tab 9, page 42, Hatcher Square 2011 Application Excerpts.

198, pages 1 - 2; Appendix, Tab 7, pages 27 - 33.<sup>4</sup> The tax credit allocations have done little to revitalize the area.

#### **Southdale tax credit project**

The Southdale tax credit project is less than .26 of a mile from the Hatcher Square site. Appendix, Tab 7, page 27. In 1992 TDHCA allocated tax credits for 188 units in the Southdale project located in the FRI service area in census tract 115. Appendix, Tab 8, pages 34 - 41.

- In the 2000 census, the population in that tract was 0% Caucasian, 62% below poverty, and had an 11% unemployment rate.

- In the 2010 census, the population in that tract was 0.9% Caucasian, had declined in total population by 36%, a decrease of 1,771 persons, was 61% below poverty, and had an unemployment rate that had increased by 36.8% to 15.6%.

- While the tract was less than 1% Caucasian in 2010, the Black population had declined by 68% to 30.9% of the population. Appendix, Tab 8, pages 34 - 41.

#### **Eban Village I and II tax credit project**

The Eban Village I and II project is 1.35 miles from the Hatcher Square site. Appendix, Tab 7, page 27.

TDHCA allocated tax credits for 110 units at Eban Village I in the FRI service area in census tract 35 in 1995. Another allocation for 220 units at Eban Village II in the same tract was made in 1999. Appendix, Tab 8, pages 34 - 41.

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<sup>4</sup> The larger market area shows the same concentrations throughout the southeast section of Dallas. ICP exhibit 350, St. Augustine Apartments 2005 underwriting analysis report excerpt included in Appendix, Tab 10, page 48; ICP exhibit 350, Frazier Fellowship 2004 underwriting analysis report excerpt included in Appendix, Tab 10, at page 49.

- The 2000 census population for the tract was 2.5% Caucasian, 38% below poverty, and the unemployment rate was 6%.

- The 2010 census population for the tract was 5.9% Caucasian, total population had increased by 30%, 585 persons, along with an increase in the poverty rate from 38.4% to 51.9% and an unemployment rate of 20.4%, a 234% increase. Appendix, Tab 8, pages 34 - 41.<sup>5</sup>

### **Southern Terrace tax credit project**

The Southern Terrace tax credit project is .58 mile from the Hatcher Square site. Appendix, page 9. In 2003 TDHCA allocated tax credits for 234 units at Southern Terrace in the FRI service area in census tract 39.01. Appendix, Tab 8, pages 34 - 41.

- In the 2000 census, the tract's population was 1.9% Caucasian, 43.2% below poverty, and the unemployment rate was 9.4%.

- The 2010 census population for the tract was 0.9% Caucasian, was 47.2% below poverty, and the unemployment rate had increased to 38.1%. Appendix, Tab 8, pages 34 - 41.

### **Frazier Fellowship, Wahoo Frazier Townhomes, Mill City Parc Townhomes**

These three projects are .4 mile from the Hatcher Square site. Appendix, Tab 7, page 27. TDHCA allocated tax credits for the 76 unit Frazier Fellowship project in 2004. It allocated tax credits for the 118 unit Wahoo Frazier Townhomes in 2005. It allocated tax credits for the 116 unit Mill City Parc Townhomes in 2006. All 310 units are in the FRI service area in census tract 27.01. Appendix, Tab 8, pages 34 - 41.

- In the 2000 census the tract's population was 0.7% Caucasian, 53.8% below poverty,

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<sup>5</sup> 2000 census tract 35 became part of a new 2010 census tract 203. The 2010 census data is for tract 203. Appendix, Tab 8, pages 34 - 41.

and the unemployment rate was 11.6%.

- The 2010 census population for the tract was 0.7% Caucasian, 71.1% below poverty - a 32% increase - and the unemployment rate was 23.3%, a 100% increase. Appendix, Tab 8, pages 34 - 41.

#### **Carpenter's Point tax credit project**

The Carpenter's Point project is .79 mile from the Hatcher Square site. Appendix, Tab 7, page 27. In 2008 TDHCA allocated tax credits for 150 units of elderly housing at Carpenter's Point in the FRI service area in census tract 25. Appendix, Tab 8, pages 34 - 41.

- In the 2000 census the tract's population was 3.01% Caucasian, 32.5% below poverty, and the unemployment rate was 7.6%.

- The 2010 census population for the tract was 3.4% Caucasian, the total population had declined by 8%, -482 persons, 26% below poverty, a 6.5% decrease, and the unemployment rate was 11.1%, a 46% increase. Appendix, Tab 8, pages 34 - 41.

#### **Hatcher Square site.**

The FRI proposed Hatcher Square site is in census tract 27.02. Appendix, Tab 8, pages 34 - 41.

- The 2000 census population for the tract was 4.64% Caucasian, 37.4% below poverty, and the unemployment rate was 10%.

- The 2010 census population for the tract was 1.2% Caucasian, total population had declined by 17%, - 315 persons, was 35.8% below poverty, a 1.6% decrease, and had an unemployment rate of 21.3%, a 113% increase. Appendix, Tab 8, pages 34 - 41.

The declining population, along with the concentration of low income tax credit units,

and the continuing high poverty population with an increasing unemployment rate contradict FRI's assertion that one more tax credit development, its Hatcher Square project, would revitalize the neighborhood.

TDHCA's 2008 underwriting report made the following findings concerning the Carpenter's Point project site and neighborhood:

Regarding the site inspector's "questionable" rating, the inspector wrote, "The neighborhood is unkempt and has many abandoned retail buildings as well as run down houses in the area. Directly South of the site is a railroad track. High voltage lines are present within 300' of site. Approximately ½ mile down road to the North is a large manufacturing facility for Schepps. Beyond railroad tracks to the south are two nice low income housing Projects Wahoo Frazier on the left and Mill City Parc on the right. There is a large cemetery across the street to the East. West of the site are low income houses in various conditions. ICP exhibit 350, Carpenter's Point report page 4.

TDHCA's 2003 underwriting report made the following findings concerning the Southern Terrace Apartments neighborhood:

Adjacent Land Uses:

Northwest: Hatcher Street, a community center, and an abandoned apartment building, with single-family residential beyond.

Southeast: single-family residences and Vannerson Drive, with an abandoned meat processing facility and vacant land beyond. ICP exhibit 350, report page 3.

Despite TDHCA's eight allocations of tax credits for projects in that service area, it remains an industrially impacted area with declining total populations, rising poverty rates, increasing unemployment, diminished or non-existent neighborhood facilities such as grocery stores, and high rates of criminal victimization.

The FRI service area includes large industrial sites and is surrounded by other industrial sites. ICP exhibit 45. The Hatcher Square site is adjacent to a large industrial use area as are the Southdale Apartments and the Southern Terrace Apartments. Appendix, Tab 7, page 29.

The record evidence shows that the census tracts within which the existing tax credit projects in the FRI area are located had 2004 annual crime rates for the combined crimes of murder, aggravated assault, simple assault, robbery, and car jacking far in excess of the City of Dallas annual rate of 35 per 1,000 persons for these combined crimes. (Eban Village tract 35, combined crime rate 224; Wahoo Frazier Townhomes, Mill City Parc Apartments, Frazier Fellowship, tract 27.01, combined crime rate 160; Southdale Apartments, tract 115, combined crime rate 120; Southern Terrace Apartments, tract 39.01, combined crime rate 119.) ICP exhibit 220. The FRI area, the Hatcher Square site, and most of the existing tax credit units in the FRI area are in City of Dallas Police Department Crime Hot Spots. Appendix, Tab 7, page 31, Tab 21, Declaration of Abigail Self.

FRI's 2011 application shows that TDHCA's allocation of millions of dollars in tax credits from 1992 through 2008 has not resulted in the provision of the services and facilities expected in a revitalized residential neighborhood. The "Retail Centers" listed in FRI's 2011 application include pawn shops, thrift stores, discount tire services, used furniture stores, a convenience store, and a church sponsored social work agency. The major employers in the two mile service area are day labor companies and similar entities. While these are important services for a poverty stricken neighborhood, grocery stores, pharmacies, banks, restaurants, hardware stores, and other such services are not present in the neighborhood. Appendix, Tab 9, pages 42 - 44, Hatcher Square 2011 Application excerpts. FRI's 2012 application does not list any services or facilities in the two mile service area but rather claims points under the QAP provision for transit facilities. Appendix, Tab 13, pages 89 - 121, 117 - 118, 12159 2012 application excerpts. TDHCA apparently included this scoring provision on the assumption that a transit facility will



allow residents to travel to other communities for important services such as pharmacies, grocery stores, etc. Appendix, Tab 14, pages 128 - 129 Site Characteristics, Pages from 12-13-QAP-RelatedRulesLaws.

The FRI 2012 application claims a preference for contributing to a concerted community revitalization plan. The FRI application provides no specific information on the neighborhood improvements, services, and facilities that are in any concerted Frazier area community revitalization plan for which FRI claims the preference. Appendix, Tab 13, pages 110, 89 - 121, 12159 2012 application excerpts.

FRI asserts that its Hatcher Square project is part of the City's revitalization plan for the Frazier Area. FRI's 2011 tax credit application did not cite any such plan in its claim for preference as a development to be located in a qualified census tract that will contribute to a concerted community revitalization plan. The section in FRI's 2011 application claiming these points refers to a City of Dallas letter that states that the provision of affordable housing is a City priority. There is no reference to any specific revitalization plans for the Frazier area. Appendix, Tab 12, pages 76 - 77, 11098 2011 application excerpt.

The 2012 application cites the inclusion of the Frazier Neighborhood in the City of Dallas Neighborhood Improvement Program as the grounds for the assertion that the development will contribute to a concerted community revitalization plan. Appendix, Tab 13, pages 110, 113 - 116, 12159 2012 application excerpts. Neither City of Dallas resolution cited provides any details about the City's plans for the neighborhood nor the role that the Hatcher Square project might play in those plans. Appendix, Tab 15, pages 132 - 133, Dallas City Council Resolution 08-2559 Sept 24 2008; Dallas City Council Resolution 10-2374 Sept 22 2010.

The Fair Park South Dallas Neighborhood Element in the City's Comprehensive Plan Forward! Dallas does not recommend or mention additional multifamily housing in the area. Appendix, Tab 11, pages 50 - 58. The only housing element in that part of the plan is the community input that:

5) Continued rehabilitation of the existing housing stock was important, including programs that assist local area renters to purchase their first homes. Appendix, Tab 11, page 54.

The specific improvements requested by the Fair Park South Dallas neighborhood in the Neighborhood Element included street improvements, retail and other service facilities including grocery stores, and improved park facilities. Appendix, Tab 11, pages 55 - 58. These improvements and the other costs of community revitalization are not eligible for low income housing tax credit funding. 26 U.S.C. § 42m. Other programs can and should provide such funding. 26 U.S.C. § 45D, New Markets Tax Credits.

FRI's general allegation that the use of low income housing tax credits is essential for the revitalization of low income Black neighborhoods is not supported by the facts from its own neighborhood.

**The Court has already ruled that a Fair Housing Act remedy for the violations is consistent with the statutory obligation to provide a preference for revitalization projects. FRI's intervention to re-litigate this position is not justified.**

FRI claims that the federal preferences for units that contribute to a concerted community revitalization plan exempts TDHCA from the Fair Housing Act. This claim has already been considered and rejected by the Court. *Inclusive Communities Project, Inc.*, 749 F.Supp.2d at 504. FRI has no right to relitigate issues already decided. *John Doe No. 1 v. Glickman*, 256 F.3d 371, 378 (5th Cir. 2001). FRI has not provided any facts or legal reasons that support re-opening that

issue.

The continued use of low income housing tax credits in connection with housing that contributes to concerted community revitalization plans is not at risk in this case. The federal statute specifically condones the use of tax credits in connection with such efforts. 26 U.S.C. § 42(m)(1)(B)(iii); 26 U.S.C. § 42(m)(1)(C)(iii). Neither ICP nor the defendants oppose the continued use of low income housing tax credits in connection with developments that demonstrably contribute to concerted community revitalization plans and are able to show the contribution based on objective evidence. ICP's expert Dr. Jill Khadurri recommended prudence and realism in any decision about whether or not any specific development would actually contribute to community revitalization. She did not recommend against using tax credit developments for community revitalization if adequate resources were actually available to make revitalization likely. Transcript, Vol. 1, pages 96 - 97. ICP's Director of Advocacy, Demetria McCain, testified that ICP did not intend for the remedy in the case to end future approval of housing tax credit units in non-Caucasian areas. ICP's interest is to end the disproportionate number of units in non-Caucasian areas. Transcript, Vol. 1, page 132. TDHCA has given no sign that it intends to end the use housing tax credits for developments that contribute to concerted community revitalization plans.

**FRI's claim that the disproportionate use of tax credits in Black neighborhoods should continue with no lessening would require re-litigation of the case and does not support intervention.**

The legal basis for another interest asserted by FRI - that the disproportionate allocations of low income housing tax credits in minority concentrated, low income areas should continue - has also been considered and rejected by the Court. Such a policy would violate the Fair Housing

Act given the less discriminatory alternatives available. *Inclusive Communities Project, Inc.*, 2012 WL 953696 at 6 - 9. FRI's motion and brief provide no legal support for re-opening the liability issue. *John Doe No. 1*, 256 F.3d at 378.

The fact that TDHCA litigated and lost this issue does not make TDHCA an inadequate representative of those interests. FRI cannot show that TDHCA has pursued a different interest or objective on these issues or colluded with ICP or was guilty of nonfeasance in pursuing the interest. TDHCA is adequately representing the same interests pursued by FRI. *Obregon v. Melton*, 2002 WL 1792086, \*3 (N.D. Tex. 2002).

**The timeliness assertions are inaccurate.**

ICP did not file a class action lawsuit. The class action notice requirements did not apply. Fed. R. Civ. P. 23. Had ICP filed a lawsuit seeking to represent a class of those eligible for or residing in TDHCA funded tax credit housing, FRI would not have been a member of the class and would not have been entitled to receive notice of any such class action. FRI is not a present or future tax credit renter family or household. The suggestion that ICP was required to follow the class action notice requirements is wrong.

FRI states that this case was litigated in private causing FRI to be ignorant of the case until December, 2011.

FRI found out about this litigation only when it was denied low income tax credits in December of 2011. FRI, Brief, page 12.

Neither assertion is correct. The news media and the low income housing tax credit industry provided a respectable amount of coverage at important points in the proceedings. The Dallas Morning News reported on the filing of the case in 2008 and its possible impact on the

future distribution of tax credits between Caucasian and non-Caucasian areas. Appendix, Tab 16 page 136, Civil-rights group sues over housing DMN by Kim Horner. The Affordable Housing Finance magazine in Washington, D.C., picked up the news that the lawsuit had been filed and that it involved allegations of racial segregation into predominantly minority areas. Appendix, Tab 16, page 136, AHF Online Article re 2008. Nixon Peabody, LLP, a Washington D.C. and New York City law firm, noticed when the Court granted summary judgment in 2010. The firm issued a internet Alert. Appendix, Tab 16, page 162, Tax\_Credit\_Alert\_10\_14\_2010 Nixon Peabody. The Austin American Statesman published an article at the same time. Appendix, Tab 16, pages 140 -141, 10-1-10 Federal suit challenging locations of aff moves. The Affordable Housing News published an article about the summary judgment opinion. Appendix, Tab 16, page 152 - 153, AHN 2010 Texas court case raises LIHTC allocation issues. The American Bar Association published an article about the lawsuit in 2009. TDHCA exhibit 214. In its summer of 2011 issue, The Real Estate Finance Journal advised that the summary judgment opinion

indicates that a state housing finance agency should balance its responsibility under federal law to serve the most impoverished areas with its responsibility under the Fair Housing Act and the Equal Protection Clause to ensure that the award of tax credits does not have a discriminatory effect. Bast, 27 Real Estate Finance Journal, Summer 2011, page 81

The lawsuit was described in TDHCA reports and planning documents. Appendix, Tab 18, pages 156 - 158, Pages from ICP exh 383; Appendix, Tab 19, pages 159 - 161, Pages from re exh 568-10-stratplanFY11-15-2. The summary judgment opinion was cited by the U.S. Department of Housing and Urban Development in support of the proposed rule making on disparate impact and discriminatory effect under the Fair Housing Act. 76 FR 70921, 70925, Nov. 16, 2011. This was not a case conducted in private.

FRI knew about the lawsuit before December 2011. Mr. Don Williams, the founder and inspiration for FRI, called ICP's attorney on October 26, 2011 to discuss the effect this lawsuit might have on the 2011 FRI application for Hatcher Square in connection with the CopperRidge application. Subsequently Ms. Lisa Blue, the head of the legal team for FRI, called ICP's attorney to discuss this lawsuit and the Hatcher Square application. Appendix, Tab 17, page 155, Email from Don Williams to MD 11-1-11 Re-Frazier Workout Plan redacted. FRI's Nov. 4, 2011 letter to TDHCA reportedly stated that this lawsuit should not be construed to block tax credits for Hatcher Square. Appendix, Tab 16, page 146, 1-15-12 Dallas developers battle over affordable housing and gov. ICP's attorney communicated again with another member of the FRI legal team on November 15, 2011. Appendix, Tab 16, pages 142, 11-15-11 Tim Perkins emails redacted.

### **Conclusion**

The Court has broad discretion to allow intervention and to set the terms for the intervention under either Fed. R. Civ. P. 24(a) or (b). *Obregon*, 2002 WL 1792086, \* 3. If future developments present the need, the Court can consider the appropriateness of intervention. The motion should be denied.

Respectfully Submitted,

/s/ Michael M. Daniel

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Certificate of Service

I hereby certify that on May 21, 2012 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; Michael C. Kelsheimer, William B Chaney, George Tomas Rhodus, James D MacIntyre, Brent M Rosenthal.

s/ Michael M. Daniel