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

THE INCLUSIVE COMMUNITIES PROJECT, INC.,	§	
	§	
PLAINTIFF,	§	
	§	
V.	§	
	§	
THE TEXAS TDHCA 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.	§	

BRIEF IN SUPPORT OF MOTION TO INTERVENE
OF FRI REVITALIZATION INC.

Brent M. Rosenthal
Janice R. Pennington
ROSENTHAL PENNINGTON LLP
6116 N. Central Expy., Ste. 301
Dallas, Texas 75206-5153
(214) 453-2500 (phone)
(214) 453-2510 (fax)
brosenthal@rpattorneys.com
jpennington@rpattorneys.com

Counsel for Movant
Frazier Revitalization Inc.

April 30, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

FEDERAL STATUTES AND RULES **PAGE**

INTRODUCTION

As this Court is well aware, this suit by The Inclusive Communities Project, Inc. ("ICP") against the Texas Department of Housing and Community Affairs ("TDHCA") involves the allocation of federally-issued and state-distributed low income housing tax credits ("tax credits" or "LIHTCs") to developer-applicants. ICP alleges that the TDHCA awards tax credits to a disproportionate number of applicants with projects in minority areas, which it says violates the Fair Housing Act. The TDHCA counters that the awards, made without regard to race and to projects that best satisfy transparent and reasonable criteria, do not violate federal law simply because they go mostly to minority (and, not coincidentally, to the most impoverished), areas. Movant Frazier Revitalization Inc. ("FRI"), a non-profit corporation under section 501(c)(3) of the Internal Revenue Code, filed an amicus curiae brief in defense of the TDHCA's allocation of tax credits in a race-blind manner. FRI explained that if the Court were to accept ICP's argument that the state is legally required to promote affordable housing in non-minority areas in allocating tax credits, desperately needed federal funds will be siphoned from community revitalization efforts in black communities to affluent communities that do not need the federal subsidies. FRI and all similarly situated organizations seeking to improve low income neighborhoods, which depend on federal support to revitalize the southern sector of Dallas, will be deprived of an irreplaceable funding source.

On March 20, 2012, this Court issued an order rejecting ICP's allegation that the TDHCA engaged in intentional racial discrimination in awarding tax credits, but further finding that the allocation of a disproportionate number of tax credits to

projects in minority communities had a "disparate impact" on those communities and on ICP and violated the Fair Housing Act. Document No. 178, Mem. Op. 17, 35. The Court ordered the TDHCA to file an alternative plan for allocating tax credits—one which would not violate the FHA—within sixty days of its order. The Court stressed that the plan "need be no more intrusive than is necessary to remedy proved [FHA] violations." Mem. Op. 38, quoting *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3rd Cir. 1977). The Court encouraged the TDHCA and ICP to confer on the plan to be proposed by the TDHCA "so that as many potential objections as possible can be resolved before the plan is submitted to the court for consideration and approval." Mem. Op. 38-39.

After the Court issued its opinion, FRI has conferred with the attorneys for the TDHCA, and has learned that the TDHCA has not yet communicated its proposed plan to ICP. Further, FRI believes that while the TDHCA and its attorneys are acting in the utmost good faith, the TDHCA does not have a tangible incentive to propose a plan that is "no more intrusive than necessary" to comply with the FHA. Simply put, the proponents of affirmative placement of affordable housing in non-minority areas, represented by ICP, and advocates of revitalizing historic minority neighborhoods, represented by FRI, are competing for the same federal funds. The TDHCA is merely a conduit for those funds; it has no inherent institutional interest in doing anything other than taking the path of least resistance in this litigation.

In contrast, FRI does have a direct and tangible interest in the remedy adopted in this case. Any court-ordered remedy that results in excessive awards of low income housing tax credits to projects in non-minority areas will deprive

community revitalization efforts like FRI's and others across the state of federal assistance that is absolutely essential to preserve, improve, and sustain their neighborhoods. The deprivation of funds would have the effect of insuring that these blighted and disadvantaged neighborhoods would remain slums in perpetuity. Moreover, a remedy that takes race into account in the allocation of tax credits risks violating the Equal Protection Clause of the Fourteenth Amendment. FRI thus has a direct, tangible interest, at least as substantial as that of ICP, in the outcome of this case. It deserves a place at the table.

As the Certificate of Conference for this Motion To Intervene indicates, the TDHCA does not oppose FRI's motion to intervene in these proceedings. The TDHCA's decision not to object reflects its well-reasoned conclusion that it simply does not have as much incentive as FRI to protect the real interests at stake in this case. FRI seeks intervention to assist in crafting the relief to be ordered by the Court; if necessary, to assert objections to the relief ordered by the Court; and, if necessary, to appeal the Court's order to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

I. FRI HAS A RIGHT TO INTERVENE UNDER RULE 24(A).

Rule 24(a) provides that the court must grant a timely motion to intervene if the movant "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." FED. R. CIV. P. 24(a)(2). As the language

of the rule directs, "intervention of right must be measured by a practical rather than technical yardstick," and the analysis "is a flexible one, which focuses on the particular facts and circumstances surrounding each application." *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1999) (internal quotation marks and citations omitted). In general, intervention should be allowed when "no one would be hurt and greater justice could be attained." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (internal quotation marks and citations omitted).

In deciding a motion to intervene as of right, the court focuses on four considerations: (1) timeliness; (2) an interest relating to the action; (3) whether the interest would be impaired or impeded by the case; and (4) whether the interest is adequately represented by existing parties. *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 247 (5th Cir. 2009). Each of these considerations supports FRI's right to intervene at this stage of the proceedings.

A. Under the Circumstances of This Case, FRI's Motion is Timely.

The Fifth Circuit has identified four factors to be considered in determining whether a motion to intervene as of right is timely: (1) the length of time between the movant's learning of his interest and the petition to intervene, (2) the extent of prejudice to existing parties from allowing late intervention, (3) the extent of prejudice to the movant if the motion to intervene is denied, and (4) any unusual circumstances. *Stallworth v. Monsanto Co.,* 558 F.2d 257, 264-66 (5th Cir. 1977); *see also Lease Oil*, 570 F.3d at 247-48. Each of these factors support the conclusion that FRI's motion to intervene is timely.

1. Time between knowledge of interest in the litigation and filing of the motion to intervene

The timeliness of a motion to intervene as of right is measured not from the time that the movant becomes aware of the litigation or even becomes aware that his interest will be affected, but from the time that his interest will not be adequately represented. See *Lease Oil*, 570 F.3d at 248 (the "timeliness clock does not start running until the putative intervenor also know that class counsel will not represent his interest"); *Sierra Club,* 18 F.3d at 1205 (promptness of motion to intervene is judged by "the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties"); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977) ("the time that the would-be intervenor first became aware of the pendency of the case is not relevant to the issue of whether his application was timely"). The requirement of timeliness "is not a tool to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner." *Sierra Club*, 18 F.3d at 1206.

The Fifth Circuit has found motions to intervene to be timely that were filed long after the stage of the proceedings at which FRI seeks to intervene here. In *Lease Oil*, the State of Texas moved to intervene after final judgment in a nationwide class action over oil and gas royalties. 570 F.3d at 247. The court decided to distribute unclaimed settlement proceeds to a third party under the *cy pres* doctrine. Texas had advised the parties and the court that it might intervene to object to a *cy pres* distribution since March of 2006, but did not move to intervene until after the court issued its final order approving the distribution in December of

2007. The Fifth Circuit noted that the state "should have acted sooner," but nevertheless ruled that the district court erred in disallowing intervention because the other timeliness factors tipped the balance in favor of intervention. 570 F.3d at 250.

In *Sierra Club v. Espy*, two trade associations representing logging interests sought to intervene in a suit brought by the Sierra Club against the United States Forest Service some ten years after the litigation began and almost two months after the court issued an injunction affecting the loggers' timber sales. 18 F.3d at 1204. The associations moved to intervene after the Forest Service announced in a letter that it would follow the injunction even as to timber sales that were not specifically challenged in the litigation. The court held that because the associations "legitimately believed" that the Forest Service would defend its interests and did not become aware that the Forest Service would not do so until after the Forest Service published its letter, the proposed intervention was timely. 18 F.3d at 1206.

In this case, FRI became aware of the TDHCA's lack of interest in zealously preserving a race-blind system for distributing tax credits when it learned of the TDHCA's delay in formulating a remedial plan to present to ICP. FRI certainly was aware of the litigation prior to that date—it filed an amicus curiae brief in support of the challenged plan for distributing tax credits—but the need for involvement as a party became clear only in the absence of prompt remedy proposals by the state. The need for intervention was confirmed by conversations with the TDHCA's counsel, who expressed no opposition to FRI's proposal to intervene. Intervention prior to this time would have been premature. *See, e.g.*, *Sierra Club*, 18 F.3d at 1206

("Courts should discourage premature intervention that waste judicial resources."). Under these circumstances, the short time between FRI's knowledge of its interest in the case and the filing of this motion supports the conclusion that the motion is timely.

2. Extent of prejudice to existing parties

This inquiry focuses on the prejudice to the existing parties caused by the timing of the intervention rather than on the intervention itself, because any prejudice caused by the intervention "would have occurred regardless of whether the intervention was timely." *Lease Oil*, 570 F.3d at 248; see also *Sierra Club*, 18 F.3d at 1206 ("prejudice must be measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervenor to participate in the litigation."). In this case, the TDHCA acquiesces in the intervention; any objection by ICP likely will be directed at FRI's participation itself, not the timing of the motion. The existing parties will not be prejudiced by the timing of the intervention.

3. Extent of prejudice to the movant

If its motion to intervene is denied, FRI will be unable to participate in the formulation of a plan that will remedy the harm alleged by ICP while complying with the dictates of the legislation creating low income housing tax credits (26 U.S.C. § 42) and the Fourteenth Amendment. More formally, it will be unable to challenge any proposal put before the Court, and will be unable to appeal if the court denies its objections to the relief proposed. FRI could challenge the legality of the TDHCA's method of allocating tax credits in a separate suit, but that approach would "create a

legal morass" involving potentially conflicting court orders similar to that envisioned by the Fifth Circuit in *Lease Oil*, 570 F.3d at 249. As in *Lease Oil*, "[i]ntervening in the existing federal lawsuit is the most efficient, and most certain, way for [the movant] to pursue its claim." *Id*. at 249-50. Denying that intervention would prejudice FRI. *Id*.

4. Unusual circumstances

"The final factor in determining the timeliness of the intervention is the existence of unusual circumstances militating either for or against a determination that the application is timely." *Sierra Club*, 18 F.3d at 1207. At least one such circumstance, militating in favor of the timeliness of FRI's proposed intervention, is present here. Although this litigation involves matters of public policy, the interpretation and application of federal housing law, and constitutional requirements for state action, ICP pursued this case solely as private litigation. No notice of this case was issued to any class potentially affected by the litigation—not to the class of community revitalization groups like FRI who would lose funding if tax credits are automatically awarded to projects in non-minority neighborhoods, not to the class of low income residents who would be displaced or disadvantaged by the lack of adequate housing in minority neighborhoods, and not to other groups that would be affected by a change in the way tax credits are distributed.

Actions to vindicate the rights of persons protected by the fair housing laws and the Equal Protection Clause of the Fourteenth Amendment are often pursued as class actions, with notice required to absent class members both of the pendency of the action and of any particular proposed settlement. *See, e.g.*, *Walker v. United*

States Dep't of Hous. & Urban Dev., 734 F. Supp. 1289 (N.D. Tex. 1989); FED. R. CIV. P. 23. In this case, no such notice was issued, and the case received little if any publicity in the public media. FRI found out about this litigation only when it was denied low income tax credits in December of 2011. The absence of notice to any person or organization potentially affected by the litigation should militate in favor of a determination that the intervention proposed by FRI is timely and should be granted.

B. FRI Has an Interest Relating to This Action Sufficient To Warrant Intervention as of Right.

A party seeking to intervene in an existing lawsuit must demonstrate a direct, substantial and legally protectable interest in the litigation. *In re Lease Oil*, 570 F.3d at 250-51. The interest asserted must "be one that the substantive law recognizes as belonging to or being owned by the applicant." *Edwards v. City of Houston*, 78 F.3d 983, 1004 (5th Cir. 1996). The interest need not be a vested interest; in *Edwards*, the court held that "prospective interference with promotion opportunities can justify intervention." *Id*.

FRI has at least as much of an interest in the way that TDHCA distributes tax credits as does ICP. ICP predicates its standing to bring this action on the assertion that the challenged method of distribution makes it harder for ICP's clients to obtain desired low income housing and more expensive for ICP to fulfill its mission. See Mem. Op. Sept. 28, 2010, Document No. 112, at 11-12 (ICP has demonstrated "injury in fact" by showing that the unavailability of tax credit units in non-minority areas "drains the organization's resources."). In contrast, FRI is a direct applicant for low

income housing tax credits. See, e.g., Appendix 16 to ICP's Motion and Brief for Leave to File Brief in Response to FRI's Amicus Brief, Document No. 176 (attaching excerpts from FRI's application for tax credits for its Hatcher Square development). The adjustment of the TDHCA's method for allocating tax credits has a direct and critical financial impact on FRI. FRI's interest in this action is self-evident and is sufficient to support intervention.

C. FRI's Interest in Receiving Tax Credits Could Be Impaired or Impeded by the Outcome of This Case.

It is beyond dispute that FRI's ability to receive tax credits could be impaired or impeded by the outcome of this case. FRI's mission is to encourage renewal and improvement in minority areas such as the Frazier Courts neighborhood. By definition, a plan that would shift tax credits from minority to non-minority neighborhoods would divert essential federal assistance from FRI to other applicants. Even though FRI could challenge the allocation of tax credits in a subsequent lawsuit, "because of the precedential effect of the district court's decision, an adverse resolution of the action would impair [FRI's] ability to protect [its] interest." *Sierra Club*, 18 F.3d at 1207. The direct practical effect that an unfavorable resolution of this litigation would have on FRI's ability to obtain desperately needed tax credits justifies FRI's intervention in this case.

D. At This Stage of the Proceedings, FRI's Interest Is Not Adequately Represented by Existing Parties.

The Fifth Circuit has recognized that the "government must represent the broad public interest," not the economic or social interests of private persons or

organizations. *Sierra Club*, 18 F.3d at 1207. As long as the TDHCA was defending its race-blind distribution of tax credits, it arguably adequately represented the FRI's interest in maximizing funds allocated to neighborhoods that need them most. The TDHCA wanted dismissal of the action and so did FRI. Now that the Court's order requires the TDHCA to craft a new system for awarding tax credits, the TDHCA no longer adequately represents FRI's interests. As the court noted in Sierra Club, an applicant for intervention need only show that existing representation "may be" inadequate, and the burden is "minimal." *Id*., *quoting Trbovich v. United Mine Workers*, 404 U.S. 538 n.10 (1972). FRI's showing that it has a compelling practical need for tax credits, and the TDHCA's effective concession that it is merely a conduit for such federal assistance, satisfies the requirement for a minimal showing that FRI's interests are not currently adequately represented by existing parties in this proceeding.

II. THE COURT SHOULD, IN ITS DISCRETION, PERMIT FRI TO INTERVENE UNDER RULE 24(B).

Rule 24(b)(2) permits intervention "[u]pon timely application" when "an applicant's claim or defense and the main action have a question of law or fact in common [and] the intervention will [not] unduly delay or prejudice the adjudication of the rights of the original parties." FED. R. CIV.P. 24(b)(2). The threshold question of whether the applicant's claim have a question of law or fact in common with the case is a question of law; the decision of whether to permit intervention if a common question exists is purely discretionary. *Stallworth v. Monsanto Co.,* 558 F.2d 257, 269 (5th Cir. 1977).

The same reasons for granting FRI's motion to intervene as of right should convince the Court to grant FRI permissive intervention under Rule 24(b)(2). Under the circumstances described, FRI's application to participate in the case is timely, and its claims have questions of law and fact—specifically, the degree to which race may be taken into account in allocating tax credits—in common with the underlying action. Moreover, allowing FRI to participate at this stage of the case would avoid duplicative litigation and save judicial resources. In the alternative, then, the Court should permit FRI to intervene in this action permissively under Rule 24(b)(2).

CONCLUSION AND PRAYER

FRI has demonstrated that it has a vital interest that could be impaired by the modification of the criteria for awarding low income housing tax credits contemplated by the Court's order of March 20, 2012. FRI has shown that the TDHCA "may" not be an adequate representative of FRI's interest, and the TDHCA effectively agrees by declining to object to this motion. FRI has also shown that under the circumstances of this case, its motion to intervene at this stage of the proceedings is timely, and that unusual circumstances—the public nature of the issues involved and the private posture of the litigation—warrant intervention. Finally, FRI has demonstrated that this Court should exercise its discretion to allow FRI to intervene. FRI therefore respectfully urges the Court to grant it leave to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure, or, alternatively, to grant it leave to intervene under Rule 24(b) of the Federal Rules.

Respectfully submitted,

/s/ Brent M. Rosenthal
Brent M. Rosenthal
Counsel of Record
Texas State Bar No. 17281075
Janice R. Pennington
Texas State Bar No. 17096150
ROSENTHAL PENNINGTON LLP
6116 N. Central Expy., Ste. 301
Dallas, Texas 75206-5153
(214) 453-2500 (phone)
(214) 453-2510 (fax)
brosenthal@rpattorneys.com
jpennington@rpattorneys.com

CERTIFICATE OF SERVICE

I certify that on April 30, 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
Brent M. Rosenthal