

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

ICP’S RESPONSE TO DEFENDANTS’ PROPOSED REMEDIAL PLAN

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The ICP table at Appendix, Tab 1, pages 3 - 5, sets out in summary form the elements of TDHCA's proposed remedial plan and ICP's agreement to some elements, ICP's agreement to some elements if modified, ICP's objections to specific elements, and ICP's objections to the omission of less discriminatory alternatives from TDHCA's proposed remedial plan.

Introduction

TDHCA's proposed remedial plan will not remedy the Fair Housing Act violation. TDHCA inadequately addresses the discriminatory effects of TDHCA's allocation decisions by proposing limited use of only some of the less discriminatory alternatives set out in the Court's liability opinion. The proposed plan leaves in place the prior discriminatory allocation process without bringing TDHCA's decisions under that process into compliance with the Fair Housing Act. ICP does not object to some individual elements as stated or with specific proposed modifications. While these elements could contribute to an adequate remedial plan, the provisions are not enough. For example, ICP agrees that the use of preference points for family units in High Opportunity Areas and the 130% basis boost for family units in High Opportunity Areas should be part of a remedy. But the discriminatory effects will continue without additional remedial elements such as the focused use of discretion, the re-valuing of the 9% selection criteria points, and the effective use of the 4% program. The plan also includes elements that do not address the violation and that do not contribute to a remedy and thus should not be in the remedial plan. ICP objects to the proposed plan.

The violation which must be remedied.

ICP established that TDHCA disproportionately approved tax credits for non-elderly developments in minority neighborhoods and, conversely, disproportionately denied tax credits

for non-elderly housing in predominately Caucasian neighborhoods. *Inclusive Communities Project, Inc. v. TDHCA*, 3:08 CV-0546, Memorandum Opinion and Order, Document 178, page 18 (N.D. Tex. 2012). The summary judgment opinion held that:

According to ICP's evidence, from 1999–2008, TDHCA approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas. ICP also analyzed data produced by defendants in discovery that indicates that 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. v. TDHCA*, 749 F.Supp.2d 486, 499 (N.D. Tex. 2010).

The standards for the remedy

TDHCA was to submit a remedial plan that set out how it will bring its allocation decisions into compliance with the Fair Housing Act. *Inclusive Communities Project, Inc. v. TDHCA*, 3:08 CV-0546, Memorandum Opinion and Order, Document 178, page 38 (N.D. Tex. 2012). The appropriate remedy is injunctive relief enjoining the violation and requiring such affirmative action as may be appropriate to secure compliance. 42 U.S.C. § 3613(c)(1). State law cannot be used as a means to defend a status quo that violates the Fair Housing Act. State laws that purport to require or permit any action that would be a discriminatory housing practice are to that extent invalid. 42 U.S.C. § 3615. The equitable relief must be carefully tailored to be no more intrusive than is necessary to remedy proved statutory violations. For example, the geographic scope of the remedy should not extend beyond the area on which the dispute focused. *Horne v. Flores*, 557 U.S. 433, ___;129 S.Ct. 2579, 2606 - 2607 (2009); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149, 152 - 153 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

Summary of ICP's response to TDHCA's proposed plan

ICP does not object to the following elements if some modifications are made.

TDHCA proposed a plan with elements in 12 numbered sections. As set out at pages 10 - 25 below, ICP does not object to the following relief that includes elements in the TDHCA proposal or that are modifications of an element in the TDHCA proposal:¹

- a Court order requiring implementation of the plan only in the Dallas area counties of Collin, Dallas, Denton, Kaufman, and Rockwall that are the focus of the case.

- The use of TDHCA's discretion to grant waivers, to allocate tax credits taking factors other than points into consideration, and to make other decisions when necessary to prevent future Fair Housing Act violations and remedy the past Fair Housing Act violation.

- The eligibility of family units in High Opportunity Areas for the 130% basis boost and the elimination of all other development location criteria unrelated to location in High Opportunity Areas for the Dallas remedial area.

- An increase in 9% program selection points to the highest value possible for below the line points for family units located in High Opportunity Areas, in two or more Recognized or Exemplary school attendance zones or in municipalities that have never received a tax credit allocation.

- The annual disparate impact analysis and reexamination of the plan with possible court ordered or approved modifications based on the progress made in the Dallas remedial area in the previous year's 9% and 4% tax credit allocation decisions.

¹ ICP's response to TDHCA's plan is based on ICP's position that the appropriate scope of the remedial plan is the area that was the focus of the complaint and that would provide an adequate remedy. ICP objects to the statewide application of the remedial plan.

- Strengthening the criteria for disqualifying proposed sites that would be located in conditions of slum and blight.
- An internet based method to provide effective notice of tax credit housing opportunities that result from the remedial process.
- The use of TDHCA's web site as the method for providing the documents necessary for monitoring TDHCA's compliance with the court ordered plan.
- The timely consideration of challenges to negative scoring caused by letters in opposition or other forms of opposition to proposed allocations with the burden on the party opposing the allocation to support the grounds for opposition.

ICP objects to the following elements of TDHCA's proposed plan.

ICP objects to the inclusion of the following elements of TDHCA's proposed plan in the remedial order. As set out at pages 26 - 32 below, the proposed actions do not address the violation or do not otherwise assist in bringing TDHCA's allocation decisions into compliance with the Fair Housing Act:

- Elderly restricted units receiving High Opportunity Area preference points or other incentives such as eligibility for 130% basis boost in High Opportunity Area locations.
- The Revitalization Index and the increase in points for developments located in QCTs that contribute to concerted community revitalization plans. But if the Revitalization Index and points are in the remedial plan, the TDHCA proposed standard for awarding any preference to developments in QCTs should also be used. That standard does not unnecessarily hinder the award of low income housing tax credits to developments that revitalize low-income areas, even if those developments will be located in predominantly minority areas.

- Debarment and related rules for applicants creating opposition to their own or another's application and preference points for those affected by such a practice.

- Tie breakers that focus on TDHCA's concentration policy or other policies rather than on assisting in the remedial process.

- The proposed provisions in which the Court would order compliance with state law provisions and federal law provisions for the administration of the low income housing tax credit program.

ICP objects to the proposed plan because it omits less discriminatory alternatives.

ICP objects to the proposed plan because it does not use available less discriminatory alternatives in TDHCA's tax credit allocation process. The alternatives available include those mentioned in the Court's liability opinion. As set out at pages 32 - 36 below, these less discriminatory alternatives are not included in the proposed remedial plan.

- Use of TDHCA's discretion to make remedial 9% program allocation decisions when the application of the point system alone would not do so. TDHCA has the discretion to consider factors other than the points in allocation decisions. The use of set asides if necessary to make non-discriminatory allocation decisions can provide an alternative to the use of points alone. While forward commitments are not in the current QAP, the process has been an accepted use of discretion for many years and could be used as a less discriminatory alternative.

- Use of TDHCA's discretion to set threshold criteria that would assist in bringing its allocation decisions into compliance with the Fair Housing Act for both the 9% program and the 4% program .

- Use of the 4% program allocation decisions to assist in achieving the remedial result.

TDHCA could limit the use of 4% tax credit and bond funds in minority concentrated areas with high percentages of rental units already receiving tax credit assistance or other forms of low income rental assistance. Tax-exempt bond and 4% tax credit local political support criteria that discourage the use of the credits in non-minority concentrated areas and are not required by law could be eliminated. TDHCA could provide preferences and incentives for locations in areas where new 4% tax credit units would assist in providing a remedy for the Fair Housing Act violation.

- Re-valuing the existing points while maintaining the statutory order of the 9% program selection criteria to allow more weight for below the line criteria that would contribute to bringing TDHCA's allocation decisions into compliance with the Fair Housing Act.

- Elimination of QAP criteria that compete with or otherwise discourage locations that contribute to bringing TDHCA's allocation decisions into compliance with the Fair Housing Act.

ICP objects to the proposed plan to the extent that TDHCA's proposal suggests that TDHCA could make unilateral QAP changes that would have the effect of modifying or nullifying or eliminating elements of the Court approved plan. There is no legal basis for giving a defendant unilateral authority to modify the terms of injunctive relief. The Court's equity power to make reasonable changes upon an appropriate showing is adequate to take changed circumstances into account. Fed. R. Civ. P. 60(b)(5); *Flores*, 557 U.S. at ____, 129 S.Ct at 2593 - 2594 (2009).

ICP's response to TDHCA's introductory statements.

TDHCA continues to make the argument that the violation was caused by the preference for developments in qualified census tracts which developments contribute to concerted

community revitalization plans. This argument has been rejected by the Court. TDHCA's remedy proposal provides no basis for a contrary decision by the Court. TDHCA argues in its plan that the QCT preference needs to have equal treatment with other preference items such as those for High Opportunity Areas. The argument ignores TDHCA's own current and past use of minimal one, two, or no point preferences for QCTs. TDHCA continues to provide higher points for elements not found in federal law. The provisions with these higher points include the 24 maximum points for quantifiable community participation (neighborhood organization input) and seven points for readiness to proceed. Appendix, Tab 2, pages 25 - 27, 32, 39; 2012-2013 QAP § 50.9(b)(23) (one point for community revitalization plan whether in QCT or not, page 56); § 50.9(b)(2) (24 maximum points for neighborhood association support letter as part of Quantifiable Community Participation, pages 42 - 44); § 50.9(b)(11) (7 points for "readiness to proceed", page 49). TDHCA provides no authority for its suggestion that equal points for QCTs and any criteria may be legally required.

TDHCA continues to suggest that state law and the federal tax code supersede the Fair Housing Act. The suggestion is incorrect. *Inclusive Communities Project, Inc.*, 749 F.Supp.2d at 503 - 504.

TDHCA's anticipation that the four highest ranked 2012 applications in Urban Region 3 would be located in remedial area High Opportunity Areas was not justified. Of the twenty one 9% program 2012 applications in TDHCA Region 3, only two applications were for remedial area family projects to be located in Caucasian areas that would have met TDHCA's proposed standards for High Opportunity Areas. According to the June 8, 2012 TDHCA application log, the highest ranked 9% 2012 cycle application in Urban Region 3 was not in the five county area

of Collin, Dallas, Denton, Kaufman, or Rockwall counties.² The highest ranked application was for the Harmon Villas development in Tarrant County. The second highest ranked application was in the five county remedial area and in what would be a High Opportunity Area under the Defendants’ Proposed Remedial Plan. This application was for a location in Sunnyvale, Dallas County. The third and fourth highest ranked applications were in the five county area but were not located in locations that would be High Opportunity Areas under the criteria in the proposed plan and were not in majority Caucasian census tracts. These were the Apple Grove Villas and 1400 Belleview (Central Business District) applications. There was not another application for family units in what would be an High Opportunity Area under the proposed remedial plan until 16th place. This was the Churchill at Northlake application. No project ranked this low will receive a tax credit allocation based solely on points.

<u>Rank</u>	<u>Name</u>	<u>City</u>	<u>County</u>	<u>Score</u>	<u>Remedial Area HOA</u>	<u>% Caucasian</u>
1	Harmon Villas	Fort Worth	Tarrant	219	No	59%
2	Riverstone Trails	Sunnyvale	Dallas	219	Yes	65%
3	Apple Grove Villas	Mesquite	Dallas	218	No	46%
4	1400 Belleview	Dallas	Dallas	218	No	42%
...
16	Churchill at NorthLake	Northlake	Denton	202	Yes	84%

The second highest ranked application for the Sunnyvale location does not represent a situation likely to be repeated. This application in a Caucasian High Opportunity Area received local political support because the local municipality has been held in contempt of a federal court order requiring the Town of Sunnyvale to provide low income housing. The application received local political subdivision contributions worth 18 points from the Town. It received 18 points for

² TDHCA determined the ranking first by score then by a tax credit per person tie breaker.

not being located in an area with an eligible neighborhood association. It received 6 points because the application was supported by the property owners' association for the industrial area where the project will be located. Appendix, Tab 4, pages 56, 58, 59, 61. The Sunnyvale application received 16 points for the local legislator's support letter. Appendix, Tab 3, page 42; Declaration. The local support for the application was tied to the Town of Sunnyvale's efforts to cure its contempt of court for violation of a settlement order requiring the provision of affordable housing units by April, 2008. *Dews v Town of Sunnyvale*, 3:88-CV-1604-O, Order, Document 220, March 22, 2010, pages 2 - 3, 11; *Dews v Town of Sunnyvale*, 3:88-CV-1604-O, Order, Document 236, July 19, 2010, page 2; *The Inclusive Communities Project, Inc., v. Town of Sunnyvale*, 3:88-CV-1604-O, Order, Document 253, July 12, 2011, pages 1 - 2.

The TDHCA proposed plan falls short of its proposed goal to provide maximum permissible incentives for areas that truly reflect the greatest opportunity. TDHCA defines these areas as those with the highest income, lowest poverty, and best public education opportunities. Defendants Proposed Remedial Plan, Document 181, page 3. However, the points for the areas with the highest income, lowest poverty, and best education opportunities, would receive the same or fewer points than areas that are low income, high poverty qualified census tracts with concerted community revitalization plans. *Id.* at 5 - 7, 8 - 11. TDHCA took no action to reform the point values or the point ranges for the above the line and the below the line points. Such changes could have added weight to the points for High Opportunity Areas. TDHCA provided no incentives for the 4% tax credits to be located in High Opportunity Areas. TDHCA did not provide maximum permissible incentives for areas that reflect the greatest opportunity.

ICP does not object to the following relief that includes elements in the TDHCA proposal and modifications of some elements in the TDHCA proposal.

The Court order should require implementation of a remedial plan only in the Dallas area counties that are the focus of the case. These counties are Collin, Dallas, Denton, Kaufman, and Rockwall.

The focus of the litigation is a subset of the counties included in the federally defined Dallas-Plano-Irving Metropolitan Division. Transcript Vol. 1, pages 129 - 131. TDHCA's proposed plan makes statements consistent with limitation of the geographic scope of the remedial plan to this five county Dallas remedial area. Defendants' Proposed Remedial Plan, Document 181, pages 5 - 6. The proposed plan also contains statements indicating that TDHCA may apply some of the remedial concepts to other parts of the state. *Id.* at 5, 6, 19. But the proposed plan does not explicitly seek a court order either limiting the remedy to the five county area or expanding it statewide. ICP seeks a remedy that applies only within the five county Dallas remedial area: Collin, Dallas, Denton, Kaufman, and Rockwall. A statewide plan would be beyond the scope of the violation found in the Dallas area.

The use of TDHCA's discretion to grant waivers or take other action when necessary to prevent future Fair Housing Act violations and remedy the past Fair Housing Act violation should be an element of the remedial plan.

The first element in TDHCA's proposed remedial plan is captioned "1. Use of discretion - waivers." The text of the element does not propose any specific use of discretion as part of the proposed remedial plan. TDHCA's failure to use its discretion in a less discriminatory manner was part of the discriminatory effect violation. *Inclusive Communities Project, Inc.*, Memorandum Opinion and Order, Document 178, page 27. TDHCA provided no authority to support excluding discretion from the remedial process. TDHCA simply makes the statement that Texas Governor Rick Perry determined that TDHCA should not make any forward

commitments in 2012 and that any decision to waive any provision of the QAP should be done only when necessary to further a purpose or policy enunciated in Tex. Gov't Code Chapter 2306. The Governor's statement does not eliminate TDHCA's statute based discretion.

The limitation to Chapter 2306 purposes and policies as the basis for discretion and waivers does not exclude the discretion and waivers necessary to prevent and remedy racially discriminatory effects in TDHCA's low income housing tax credit program. Tex. Gov't Code § 2306.065 specifically includes the need to prevent persons from being subjected to racial discrimination in any activity funded in whole or in part under Chapter 2306 as a purpose and policy.

Sec. 2306.065. DISCRIMINATION PROHIBITED. An individual may not, because of that individual's race, color, national origin, or sex, be excluded from participation, be denied benefits, or be subjected to discrimination in any program or activity funded in whole or in part with funds made available under this chapter. Tex. Gov't Code § 2306.065

While the state and federal statutes regulate TDHCA's discretion, the same statutory schemes make it clear that TDHCA does have considerable discretion in the tax credit program administration. The Texas Government Code specifically provides for and refers to TDHCA's authority to use discretion in making tax credit awards. The Board only has to document the reasons and explain "all discretionary factors used in its determination." Tex. Gov't Code § 2306.6725(c)(1). The TDHCA Board needs only "good cause" to depart from the TDHCA's staff recommendation on allocation decisions. Tex. Gov't Code § 2306.6731(a).

TDHCA's QAP continues to provide for the exercise of TDHCA Board discretion. The current 2012 - 2013 QAP explicitly recognizes that any input "the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair

housing will not be considered.” § 50.9(b)(2)(B)(iii); § 50.9(b)(13)(D). Appendix Tab 2, pages 25 - 27, 34 - 35. The current QAP specifically includes the authority to consider discretionary factors in any determination to award tax credits. § 50.10(a)(1). Appendix, Tab 2 page 40.

TDHCA also admits that it has the discretion to waive rules. 2012 QAP § 50.16. Appendix Tab 2, page 41. The federal tax code specifically provides that allocations of tax credits can be made that are not in accordance with the established priorities and selection criteria of the agency so long as a written explanation is made available. 26 U.S. 42(m)(1)(A)(iv).

The Texas Attorney General recognizes the broad scope for discretion left open to TDHCA under the state and federal statutory schemes. When the mandatory point provisions for the 9% program took effect in 2003, TDHCA argued that in doing so the state legislature had overstepped its bounds and usurped executive authority. The Texas Attorney General found that these provisions detracted little from TDHCA’s discretion in allocating low income housing tax credits. While the specific above the line factors and the ranking of these factors were mandatory, the specific point value and range of values was left to TDHCA’s discretion. The Texas Attorney General ruled and TDHCA admitted that whether or not the mandatory factors required under the 9% LIHTC process could be the deciding factor in a decision is only a possibility. The Texas Attorney General held that, given TDHCA’s broad discretion, any determinative quality associated with the scoring of a tax credit application is not imposed by the legislature but only by the choice of TDHCA. Defendants’ exhibit 49, Tex. Atty. Gen.Op. GA-0455, 2006 WL 2689634 (Tex. A.G. 2006), pages 2-3.

The Fair Housing Act provides good cause for the TDHCA’s exercise of discretion. 42 U.S.C. § 3613(c) (remedial elements of injunctive relief) and 42 U.S.C. § 3615 (Effect on state

laws.) The Texas Government Code governing TDHCA's implementation of the tax credit program similarly provides a state law purpose and policy that justifies remedial exercises of discretion to prevent or remedy racial discrimination in that program. Tex. Gov't Code § 2306.065. TDHCA staff currently admits that the state law incorporates Fair Housing concerns that can support a waiver under the existing QAP. Appendix, Tab 5, page 74; May 2012 Board Book excerpt.

TDHCA can and should use its discretion to remedy the violation. TDHCA can consider the need for its discretion in making allocation decisions that accomplish the remedial purpose of the plan. For example, assume that no application in a 9% program cycle would provide non-elderly units in a predominantly Caucasian neighborhood in the remedial area based solely on the applications as ranked by the total points awarded. TDHCA could use its discretion and allocate tax credits to the highest scoring eligible non-elderly 9% application whose location would achieve a non-discriminatory result.

TDHCA could use its discretion and include the need for a remedy in this case as one of the factors used to allocate tax credits by regions and subregions. Tex. Gov't Code § 2306.1115 sets consistency with federal requirements and limitations as one factor in the regional allocation formula. The need to bring the Dallas remedial area housing tax credit allocation decisions into compliance with the Fair Housing Act is a federal requirement.

TDHCA can exercise its discretion and set threshold eligibility criteria in the 4% and in the 9% programs to encourage applications for units in locations that contribute to non-discriminatory allocation decisions. Memorandum Opinion and Order, Document 178, page 35 n. 31.

The Governor's modifications to the proposed 2012 QAP are not a reason to hold that TDHCA cannot use its discretion to make allocation decisions in compliance with the Fair Housing Act.

. . . there is no evidence that the Governor would decline to approve a change necessary for TDHCA to comply with a federal court order directing defendants to remedy a violation of the FHA. Memorandum Opinion and Order, Document 178, n. 27, page 30.

TDHCA's exercise of its discretion will be an important element in the provision of any remedy in this case. The discretion exists under state and federal law including the Fair Housing Act. The remedial plan should insure the exercise of that discretion in a manner that brings TDHCA's allocation decisions into compliance with the Fair Housing Act.

ICP supports the 130% basis boost for family units in High Opportunity Areas.

ICP supports the eligibility of family units in High Opportunity Areas for the 130% basis boost and the removal of all other development location criteria in the QAP that are unrelated to location in High Opportunity Areas for the Dallas remedial area. ICP objects to the inclusion of elderly or supportive housing units in the eligibility for the increased basis as part of the remedial plan. The provision of the 130% basis boost for elderly and supportive housing will not remedy the violation of disproportionately allocating non-elderly units to locations in predominantly minority areas.

Even though ICP supports the use of the High Opportunity Area concept in the remedial plan, a substantial number of the tracts eligible for High Opportunity Area status as defined by TDHCA's poverty and median household income data are predominantly **non-Caucasian** census tracts. There are 241 census tracts in the remedial area eligible for High Opportunity Area status based on the 15% poverty and top quartile of median household incomes by tract data. 21 of

these tracts, 9%, are more than 50% minority. There are 182 census tracts in the remedial area eligible for High Opportunity Area status based on the 15% poverty and second highest quartile of median household incomes by tract data. 59 of these tracts, 32%, are more than 50% minority. Appendix, Tab 3, pages 43 - 44. Allocations made in these non-Caucasian High Opportunity Areas will not remedy the racially discriminatory effects caused by TDHCA's violation. However, providing the incentives for applications in High Opportunity Areas does increase the likelihood of applications in predominantly Caucasian locations. This may assist in bringing TDHCA's allocation decisions into compliance with the Fair Housing Act.

TDHCA proposes to eliminate preference scoring points for "All other Development Location incentive criteria in the current QAP" in order to maintain high incentives to target High Opportunity Areas. Defendants' Proposed Remedial Plan, Document 181, page 8. ICP agrees with this proposal. The same rationale used to eliminate these preference points also supports ICP's proposed modification that limits the optional 130% basis boost to applications for family units in High Opportunity Areas as defined by income, poverty, and school quality measures. Defendants' Proposed Remedial Plan, Document 181, pages 6 - 7.

The proposal for additional points for High Opportunity Areas based on additional school quality measures and the lack of tax credit housing has some additional remedial value.

TDHCA proposes to award a sliding scale of points from 1 to 7 for units based on the type of High Opportunity Area and whether the units are for families or restricted to the elderly. TDHCA also includes QCTs for which there is in effect a concerted community revitalization plan in its Opportunity Index. Defendants' Proposed Remedial Plan, Document 181, pages 7 - 8. The provision of preference points for family units in the higher median income tracts that are

also within higher quality school attendance zones may have some effect in bringing TDHCA's allocation decisions into compliance with the Fair Housing Act. The additional points for the elderly restricted units and the QCTs will not have any remedial effects and should not be part of the remedial plan.

The TDHCA Opportunity Index includes up to 7 points for any units to be located in a QCT for which there is a concerted community revitalization plan. These points on page 7 of the proposed plan seem to be in addition to the points in the Revitalization Index on pages 10 and 11 of the proposed plan. If this is the proposal, then developments in QCTs for which there is in effect a concerted community revitalization plan would receive double the points given for High Opportunity Areas. This is not equal treatment. Whether or not TDHCA intends to either match or double the High Opportunity Area points for QCTs, ICP objects to the inclusion of additional preference points for any units in QCTs as part of the remedial plan. Those points will have no effect in remedying TDHCA's Fair Housing Act violation. The QCT points do nothing to encourage development in the highest income and lowest poverty areas of the remedial area since QCTs are by definition low income and high poverty areas.

The one or three points in the Opportunity Index for units based solely on the median income status of the locations are unlikely to have any remedial effect. These are minor points and have not worked to boost 9% program point totals in the past. ICP exhibit 1, Talton Report, page 14.

TDHCA proposes one, two, or three point increases in 9% program selection points for family units located in High Opportunity Areas and that are within Recognized or Exemplary elementary, middle school, and high school attendance zones, or in counties and municipalities

that have never received a tax credit allocation. Defendants' Proposed Remedial Plan, Document 181, pages 7 - 8. These points should be included. The points will provide at best a small incremental remedial effect. All of the Dallas remedial area counties have received at least one tax credit allocation and none would be eligible for the point. The small point increases for the other categories are unlikely to outweigh the effect of the local opposition generated by applications in those areas.

The additional High Opportunity Area points will not work as a remedial element unless TDHCA implements additional less discriminatory alternatives.

None of the High Opportunity Area point categories in the proposed Opportunity Index are likely to result in allocation decisions for units in Caucasian areas if those decisions are based solely on the current 9% program point totals for the other unmodified criteria. The current QAP provides four points for High Opportunity Areas. Appendix, Tab 2, pages 36 - 37; 2012 - 2013 QAP § 50.9(b)(16). The proposed increase of one point or three points is not a substantial increase. As pointed out by TDHCA, under the existing point value ranges, the use of preference points for higher income areas has a "tendency to create more local opposition" and have only a "limited effect on a development's completed score." ICP exhibit 1, Talton Report, page 14. TDHCA's reference to the limited effect on the completed score is accurate. The below the line points for high income, low poverty, and quality schools are insignificant in comparison to the above the line points that are usually available to applications to which there is no local opposition and that receive local community support. Those points substantially exceed the four, five, or seven points for High Opportunity Areas.

There is a 74 point range in above the line elements that is based on local community support. This includes:

- the 0 to 24 points for local homeowner association or other organization support or opposition, Appendix Tab 2, pages 25 - 27; 2012 - 2013 QAP § 50.9(b)(2);
- the 18 points from the local municipality decision whether to support the application with the provision of additional funding, Appendix Tab 2, pages 28 - 30; 2012 - 2013 QAP § 50.9(b)(5) ; and
- the 32 point swing from -16 points for letters of opposition from the local State Representative or Senator to + 16 points for letters of support from the local State Representative or Senator. Appendix, Tab 2 pages 30 - 31; 2012 - 2013 QAP § 50.9(b)(6). TDHCA just increased these points from + or - 14 points in the 2012 - 2013 QAP. There was no explanation for the increase and no corresponding increase in the below the line four points for High Opportunity Areas. Appendix, Tab 7, pages 85, 89, 93; pages from 111004-book-110930 2012 qap.pdf.

According to TDHCA, the three forms of local community support and the accompanying points are usually all present together. That support would be shown by the presence of all key elements showing community support. Those elements are letters of support from the State Senator and the State Representative, support from the local government including local political subdivision participation in financing the development, and support of the neighborhood organizations. ICP exhibit 393, Gouris 30(b)(6) deposition pages 106 - 107. TDHCA's past Board Chair claimed that the vast majority of TDHCA deals "enjoyed broad community support" and were "broadly acknowledged by the overall community including elected officials and the development's neighbors." Defendants' exhibit 222, Anderson report, page 7. TDHCA told the State Legislature that local communities must be part of a consensus on the issue "that housing is

needed, wanted” or TDHCA will exercise its discretion and not approve tax credits for a property.

Any unbalance causes concern within the Department that a deal may not be feasible in a particular community, which leads to the Governing Board exercising its discretion and not approving a property. ICP exhibit 1, page 14.

The connection between the local neighborhood organization support and the support of the State Senator or Representative is clear. If the application receives a neighborhood letter in opposition then support from the local State Representative or Senator is unlikely to be available. The combined neighborhood and State Representative or Senator support is usually given for elderly unit applications and all units in applications for non-Caucasian census tracts. The neighborhood support and the support from the local State Representative or Senator are less likely to be available if the application is for a predominantly Caucasian location. ICP exhibit 1, Talton Report, page 14; ICP exhibit 168, Board document containing Munsch Hardt Voelker proposal, pdf pages 2, 4, 18 - 20.

For example, the 2012 9% program Quantifiable Community Participation (QCP) (local neighborhood organization support or opposition) and Senator-Representative letter TDHCA logs to date show this pattern. 95 family unit applications received letters in support from the local State Representative or Senator. The census tract locations for these 95 applications averaged 44% Caucasian. Only four of the 95 applications with legislator support also received QCP opposition letters. No family unit application in a census tract with less than 50% Caucasian population received a letter in opposition from the local State Representative or Senator. The two family unit applications that did receive letters in opposition from the local State Representative or Senator were in majority Caucasian census tracts. Both of these applications also received

QCP opposition letters. Appendix, Tab 3, page 44; Declaration.

The 2011 9% application cycle shows a similar pattern. 76 family unit applications received letters in support from the local State Representative or Senator. The census tract locations for these 76 applications averaged 37% Caucasian. 59 of the 76 applications received QCP letters in support. Only two applications received QCP opposition letters. The one family unit application that received a letter in opposition from a State Senator or Representative was in a 60% Caucasian census tract. That application also received two QCP letters in opposition. Appendix, Tab 3, page 44; Declaration. 44 elderly unit applications received letters in support from the local State Representative or Senator. The census tract locations for these 44 applications averaged 55% Caucasian. None of these applications received QCP opposition letters. 30 of these 44 elderly unit applications received QCP letters in support. Appendix, Tab 3, page 44; Declaration.

The addition of below the line points for High Opportunity Areas will continue to be trumped by the above the line local community opposition points. The effect of these opposition points could be avoided by the exercise of TDHCA's discretion to consider factors other than points. In addition, the effect could be mitigated by TDHCA re-valuing the above the line point values, adding relevant factors such as High Opportunity Areas to the below the line criteria, and changing the below the line point scores. Memorandum Opinion and Order, Document 178, pages 30 - 31.

An example of re-valuing the above the line criteria and adding below the line criteria and points is in the Appendix, Tab 10, page 98; Current and Example 9% Point Options. In the example, the 2012 - 2013 9% criteria and points are compared to an example system that lowers

the above the line point values and eliminates the gaps in the point values for those criteria. In addition, several less discriminatory alternatives such as High Opportunity Areas, census tracts with little low income assisted housing of any kind, low crime rates, and additional quality of education criteria and points are added to the below the line criteria. The Concerted Community Revitalization Plan criteria from the TDHCA proposed plan is valued with the same point score as High Opportunity Areas. Other criteria such as points for the federal tax code preference for families with children are also added. While the above the line criteria remain in the statutory order, the relative point value of those criteria declines. The total maximum points is 230, which is only 2 points higher than the current maximum point total. No below the line criteria has a point value equal to or greater than any above the line point value.

The next two pages in the Appendix compare a possible High Opportunity Area application with a minority area application and a concerted community revitalization plan area application. The comparison is under the 2012 - 2013 QAP point system and under the example system. Appendix, Tab 10, pages 99 - 100. Under the current QAP point system, the High Opportunity Area application score is the lowest because it loses local political support points to both the minority area and the QCT area applications. Under the example point system, the High Opportunity Area application scores higher than the hypothetical minority area application but lower than the QCT application. These are only hypothetical examples of scoring criteria and the application of the criteria. The examples do show that the 9% program could be altered using less discriminatory alternatives that would bring TDHCA's tax credit allocation process into compliance with the Fair Housing Act. The proposed plan that only adds below the line criteria and points to the current system will not bring the allocation process into compliance.

ICP supports the annual reexamination of the plan based on the progress made in the Dallas remedial areas in the previous year's 9% and 4% tax credit allocation decisions.

TDHCA proposes an annual analysis of the operation and results of the plan in preventing and eliminating disparate racial impacts. Defendants' Proposed Remedial Plan, Document 181, Introduction and Background, page 2; § 8, page 18. The proposal would require an annual disparate impact analysis. Then, depending on the results of the analysis, there could be changes proposed in order to avoid present or potentially developing disparate impact and to achieve a broad and race neutral dispersion of tax credit properties in the remedial area. Defendants' Proposed Remedial Plan, Document 181, page 2. ICP agrees that an annual disparate racial impact analysis is appropriate under the court ordered plan. The analysis should include the race of the census tract for the locations of the proposed, approved, and unapproved applications in the remedial area. The analysis should include a disparate racial impact analysis of the results of both the 9% and 4% program allocation decisions. The parties can then make joint or separate requests for modification of the Court ordered remedial plan under the appropriate equitable principles. Fed. R. Civ. P. 60(b)(5); *Flores*, 557 U.S. at ____, 129 S.Ct at 2593 - 2594 (2009).

The caption on page 18 of TDHCA's proposed plan refers to development and enhancement of a policy of avoidance of over-concentration of low income housing units. The evidence shows that TDHCA uses the terms concentration and over-concentration of low income housing units in a very precise and limited definition. Any analysis using this restricted and race neutral definition of concentration and over-concentration will not assist in bringing TDHCA's allocation decisions into compliance with the Fair Housing Act. Transcript Vol. 2 pages 41, 48 - 51, Gouris testimony; Transcript Vol. 1 pages 226 - 228, McIver testimony; Transcript Vol. 2, pages 5- 7, 17 - 19, McIver testimony. TDHCA considers low income tax credit housing to be

concentrated or over-concentrated only when the addition of new tax credit units in a market area would jeopardize the success of other recently added tax credit units in the same market area.

The terms and the related analysis have no connection to measures of racial disparate impact or discriminatory effect. ICP exhibit 183, July 12, 2007 TDHCA Board meeting transcript pages 97 - 101; Transcript Vol. 2 pages 29 - 31, Gouris testimony; Transcript Vol. 3, pages 140 - 142, Anderson testimony. The analysis and recommendations for changes must be based on a disparate racial impact standard in order to address the Fair Housing Act violation.

Strengthening the criteria for disqualifying proposed sites that would be located in conditions of slum and blight would assist in bringing TDHCA's allocation decisions into compliance with the Fair Housing Act.

Strengthening the criteria for disqualifying proposed sites located in conditions of slum and blight would be a less discriminatory alternative with no additional costs to TDHCA. Many of the sites contributing to the discriminatory effect violating the Fair Housing Act were located in minority census tracts and were marked by conditions of slum and blight. ICP's Initial Post Trial Proposed Findings and Conclusions of Law, Document 159, pages 45 - 49, 153 - 156.

Restricting the availability of such sites may have a remedial effect.

TDHCA's proposal includes a loophole that would eliminate any remedial effect if the condition is caused by adjoining or nearby hazardous waste sites or emissions or similar conditions. The issue is the risk to future residents from such sites or emissions. TDHCA proposes to allow such housing on sites if the hazard is more than 1,000 feet from the proposed family housing site. Defendants' Proposed Remedial Plan, Document 181, page 13. This is not an adequate measure of risk. Depending on the nature of the nuisance or hazardous use, the 1,000 feet may or may not be enough to eliminate serious risks to residents. The analysis should be on

whether the condition poses such risks. If such off-site contamination presents a risk to the site or the residents of the project, the site should not be acceptable. This standard already applies to any tax credit projects using HUD multifamily mortgage assistance. The off-site contamination risks make the site ineligible for HUD mortgage insurance. ICP exhibit 575, HUD Multifamily Manual, pdf page 38, G. Off-site Contamination. The remedy plan should incorporate the same standard. Neither residents nor investors want sites subject to the risks of slum and blight.

Transcript Vol. 2 page 22, McIver testimony; Defendants' exhibit 223 McIver report, page 9.

An internet based method to provide effective notice of tax credit housing opportunities that result from the remedial process will not change TDHCA's allocation decisions.

TDHCA proposes requiring notice of alternative housing choices and other fair housing information to prospective tax credit tenants signing a lease for an existing tax credit unit. The notice will include only units for which the allocation decision has already been made and implemented. Defendants' Proposed Remedial Plan, Document 181, page 18, § 7. TDHCA already provides an online housing tax credit project vacancy listing service.

<http://hrc-ic.tdhca.state.tx.us/hrc/VacancyClearinghouseSearch.m>. The proposed notice will not affect TDHCA's allocation decisions and will not contribute to bringing those decisions into compliance with the Fair Housing Act. The notice will not be given at time conducive to the use of information. Prospective tenants may be reluctant to turn down an available unit in order to continue searching.

ICP agrees that some form of this notice that would be tailored for use in the Dallas remedial area would be appropriate once there are more tax credit units in Caucasian areas. However, Attachment A to the TDHCA proposed plan is not adequate for the purpose. It should

be specific to the Dallas remedial area. The attachment does not state the actual sources of information that would be included in the notice. The attachment does not contain a description of a process that will insure that the receiving family is realistically able to use the information given in a timely manner. The parties should be able to agree on the content of a notice that would be useful to those seeking units in Caucasian areas.

The use of TDHCA's web site may serve as an adequate method for providing the documents necessary to monitor TDHCA's compliance with the court ordered plan.

TDHCA proposes to use its internet web site as the method by which it will produce program and remedial plan implementation documents. The documents to be provided could also include other documents necessary to monitor compliance with the Court ordered plan.

TDHCA's web posting could be an effective way to provide these documents. Defendants' Notice of Proposed Remedial Plan, Document 181, § 11, page 20. The sufficiency of the process will depend the data and documents to be provided.

ICP supports the timely consideration of challenges to negative scoring or opposition to proposed allocations with the burden on the party opposing the allocation to support the grounds for opposition.

The first paragraph of § 9 in Defendants' Proposed Remedial Plan, page 19, sets out a process for raising and resolving challenges to applications if those challenges are contrary to existing local government findings. If a neighborhood association letter opposes an application on the grounds that the area is not appropriate for multifamily housing for various reasons, the opposition can be challenged if the land is zoned for multifamily. The opponents would then be required to support the accuracy of its claim that the municipal zoning decision was wrong. Similar challenges could be made to opposition based on school capacity, traffic, overloaded infrastructure, etc. This element of the proposed plan incorporates the exercise of TDHCA's

existing discretion to not score and not take into account opposition not justified by the facts.

The second paragraph of § 9 in Defendants' Proposed Remedial Plan, pages 19 - 20, proposes a remedy for actions that were not part of the case or related to the violation. TDHCA can provide the additional points for anyone adversely affected by the notices and debar offenders on its own. The extraneous provision should not be in the remedial plan.

ICP objects to the elements of TDHCA's proposed plan that do not address the violation.

ICP objects to the inclusion of the following elements of TDHCA's plan on the grounds that the proposals do not address the violation or otherwise assist in bringing TDHCA's allocation decisions into compliance with the Fair Housing Act.

The eligibility of elderly restricted units for High Opportunity Area preference points and for the 130% increased basis are not connected to the violations and do not provide a remedy.

TDHCA's proposed plan provides for High Opportunity Area preference points and 130% increased basis eligibility for elderly units in High Opportunity Areas and other locations. Defendants' Proposed Remedial Plan, Document 181, § 2, pages 6 - 7. These elderly restricted unit preferences and incentives do not address the violation and will not assist in bringing TDHCA's allocation decisions into compliance with the Fair Housing Act. The violation affected family units by disproportionately allocating tax credits to family units in minority concentrated areas. Memorandum Opinion and Order, Document 178, page 18; *Inclusive Communities Project*, 749 F.Supp.2d at 493, 499 - 500. Elderly units were disproportionately approved in Caucasian areas. *Id.* at 502. Elderly units are much less likely to face political opposition. ICP exhibit 190, TDHCA Nov. 8, 2007 Board meeting transcript page 201, Conine statement. Providing remedial incentives for elderly units to be located in Caucasian areas is likely to

decrease the incentives for family units to be located in Caucasian areas. Memorandum Opinion and Order, Document 178, pages 29 - 30.

TDHCA's Revitalization Index increase in points for developments located in QCTs that contribute to concerted community revitalization plans does not address the violation and does not contribute to the remedy.

ICP objects to including any increase in points in the Court ordered plan for developments located in QCTs that contribute to concerted community revitalization plans. TDHCA cannot show that the lack of equal points for QCTs and High Opportunity Areas contributed to the violation. TDHCA does not claim that the equal points for QCTs and High Opportunity Areas will assist in bringing TDHCA's allocation decisions into compliance with the Fair Housing Act. Instead, TDHCA asserts that equal points may be required as a matter of law. The current and past status of TDHCA's points for QCTs does not support its assertion. However, if points for the concerted community revitalization plan are included in the remedial order, ICP does not object to TDHCA's proposed standard for determining the adequacy of any plan asserted to justify the preference points.

The current 2012-2013 QAP provides one point in the 9% selection criteria for locations in QCTs that are part of a community revitalization plan in any tract, QCT or not. 2012 - 2013 QAP, §50.9(b)(23), page 56 of 74. There is no other preference in the current QAP for QCTs that contribute to a concerted community revitalization plan. The one point is less than the current four points for a Development Location in the 2012 - 2013 QAP version of a High Opportunity Area. The decision was made without any discussion of whether that the QCT revitalization preference could or should equal the points for High Opportunity Areas as defined in that QAP. Appendix, Tab 2, pages 9 - 10, 36 - 37; 2012 - 2013 QAP, § 50.2(15); §50.9(b)(16); Tab 7, pages

84 - 94; Board Book excerpts.

The past QAP selection criteria points for applications in QCTs that contribute to concerted community revitalization plans have consistently been low. There were years in which no points and only tie breaker status were provided in the QAP for QCTs which contributed to concerted community revitalization plans. ICP exhibit 69, document page 29 of 53. The 2003 and 2004 QAPs gave zero points for location in a QCT that contributes to a concerted community revitalization plan. ICP exhibit 70, document pages 24 - 25, 30; ICP exhibit 71, document pages 29 - 30, 38. The 2004 QAP did not even include the QCT preference as a factor that could be considered in TDHCA's discretion. ICP exhibit 121, document page 39. From 2001 to the present, TDHCA gave projects located in qualified census tracts contributing to a concerted community revitalization plan a minor preference of points ranging from 7 to 0. ICP exhibit 64, QAPs for 2001 and after. TDHCA provides no credible authority for its suggestion that QCT selection criteria points must now equal High Opportunity Area selection criteria points.

While TDHCA argued that the preference for such developments in QCTs explained the disparate impact of its allocation decisions, the Court rejected the argument at the summary judgment stage. *Inclusive Communities Project*, 749 F.Supp.2d at 506. TDHCA provided no additional evidence to show that the disparate impacts and the resulting discriminatory effects were caused by the preference for QCTs.

Even though there has been little disparate impact from the QCT preference in the past, the provision of the equal points could possibly obstruct the remedy. The QCTs are disproportionately minority and thus are likely to garner the local political support points necessary for approval. By providing incentives for units to be located in non-Caucasian areas,

TDHCA could be decreasing the incentives for family units to be located in Caucasian areas facing local political opposition. If such a discriminatory pattern does appear, then the annual disparate impact review and remedy modification process could address the issue. TDHCA asserts that the proposed new requirements for the preference will not perpetuate the discriminatory patterns.

It is envisioned that the revitalization incentive will set a very high threshold, making it unlikely to yield a number of successful applicants in QCTs such that would perpetuate any discriminatory patterns found to have occurred unintentionally. Defendants' Proposed Remedial Plan, page 4.

But even if TDHCA's prediction is true and the points do not perpetuate discriminatory patterns, there is no basis to include the points in the remedial plan. TDHCA stated that the QCT preference must be in the plan and must be equal to the High Opportunity Area points because the preference is mandated by the federal tax code. TDHCA does not provide any authority for this statement. If there was a valid legal argument that each item required by the tax code must also be in the remedial plan, then the remedial plan would have to include elements that are required by the tax code but have been ignored by TDHCA and are not in the QAP. Federal law requires that the qualified allocation plan must include specific selection criteria missing from the 2012 - 2013 QAP. The federal code requires that

qualified allocation plan must include - . . . (ii) housing needs characteristics, . . . (vi) public housing waiting lists, (vii) tenant populations with children, 26 U.S.C. § 42(m)(1)(C)(ii), (vi), (vii).

These selection criteria are not in the current TDHCA QAP. 10 TAC § 50.9. The housing needs characteristic provided up to six points in the 2011 QAP. Defendants's exhibit 17, 2011 QAP, § 50.9(b)(13) Housing Needs Characteristics, page 50 of 79. The housing needs characteristics selection criterion and the points for that criterion were removed from the 2012

QAP. TDHCA acknowledged the federal requirement for housing needs characteristics as a selection criterion as it was eliminating the criterion from the QAP. Appendix, Tab 8 , page 95; Tab 9, page 96; Board Book Excerpt. TDHCA is not proposing the inclusion of the housing needs characteristics or the other tax code required preferences or all of the tax code required selection criteria in the remedial plan. The suggestion that inclusion and equal points are required for the QCT preference is without credence.

TDHCA asserts that the QCT preference must be in the plan because without it there may not be a prospective race neutral distribution. There is no evidence in support of this statement. There is a grossly disproportionate distribution of family tax credit units in low income minority concentrated census tracts in the Dallas area. The evidence that an equal preference for high income/low poverty census tracts and for low income/high poverty census tracts is necessary to achieve a race neutral distribution does not exist.³

TDHCA asserts that the need for tax credit units is highest in QCTs. TDHCA does not explain what need is being asserted. TDHCA does not support the assertion with evidence. There was no such evidence in the trial record or the summary judgment record. There are QCTs with high percentages of the units already participating in one form or another of assisted housing programs including public housing, Section 8 vouchers, HUD assisted multifamily units, and tax credits. There is no obvious need for more tax credits in these areas. Other QCT areas need massive revitalization before any more people, poor or not, should be steered into those locations by adding to the supply of assisted housing.

³ “ICP also analyzed data produced by defendants in discovery that indicates that 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.

The points for the QCT preference do not contribute to the remedy. The lack of such points were not part of the violation. There is no basis to include the higher points for QCTs in the remedial plan. *Flores*, 557 U.S. 433, ___;129 S.Ct. at 2607. TDHCA can continue to comply with federal law and provide a preference for developments that contribute to a concerted community revitalization plan without a provision in the remedial plan to that effect. 26 U.S.C. § 42(m)(1)(B)(ii)(III). TDHCA can continue to place the preference for qualified census tracts that contribute to a concerted community revitalization plan in the annual QAP.

ICP's position is that the Revitalization Index, the concerted community revitalization plan standards, and the points do not need to be in the remedial plan. Whether in the plan or not, the TDHCA proposal should not unnecessarily hinder the award of low income housing tax credits to developments that revitalize low-income areas.

Tie breakers that focus on TDHCA's concentration policy rather than on assisting in the remedial process should not be in the Court ordered plan.

TDHCA proposes a tie breaker preference for the developments that are located the greatest distance from the nearest tax credit development. Defendants' Proposed Remedial Plan, Document 181, § 10, page 20. The use of distance alone is a TDHCA concentration policy, not a policy that would address the violation. For example, if a development in a predominantly Caucasian High Opportunity Area is one mile away from another tax credit project, it would lose a tie to a development in a predominantly minority low income and high poverty area that was 1.1 mile away from another tax credit project. Such a result does not contribute to bringing TDHCA's allocation decisions into compliance with the Fair Housing Act and should not be in the Court ordered remedial plan. TDHCA could use less discriminatory alternatives for tie breakers. An application for a family unit development in a High Opportunity Area the funding

of which would be consistent with an allocation decision in compliance with the Fair Housing Act could be preferred over an application without those characteristics.

TDHCA's proposal to include compliance with state law provisions and other legal requirements of the low income housing tax credit program as part of the Court ordered plan is not narrowly tailored to remedy the violation.

TDHCA seems to be proposing that court ordered compliance with state and federal law governing the administration of the tax credit program should be in the remedial plan.

Defendants' Proposed Remedial Plan, Document 181, pages 20 - 21, § 12. TDHCA does not claim that non-compliance with the requirements of state and federal law for the operation of the low income housing tax credit program was part of the violation of the Fair Housing Act. Nor does TDHCA point out any contribution that compliance with state and federal law would make towards bringing its allocation decisions into compliance with the Fair Housing Act. Without a connection to the violation or the appropriate remedy, there is no basis for a Court order to require compliance with state and federal laws governing the general administration of the program. *Flores*, 557 U.S. at, ____, 129 S.Ct. at 2607.

The remedial plan order should recognize the Court's authority under the remedial provisions of the Fair Housing Act, 42 U.S.C. § 3613(c) (remedial elements of injunctive relief) and 42 U.S.C. § 3615 (Effect on state laws) and should not contain provisions that could be interpreted to limit such authority.

TDHCA's proposed plan does not include less discriminatory alternatives that could be effective remedies for its disproportionate allocation of tax credits to family units in minority concentrated areas.

ICP objects to the proposed plan insofar as it continues the violation by omitting the less discriminatory alternatives that have been and are still available for use in the administration of

TDHCA's tax credit allocation process.

TDHCA has proposed no changes in the 4% program allocation and decision process. This leaves in place the failure to use less discriminatory alternatives that were part of the violation. For example, TDHCA could eliminate the 4% program selection and ranking criteria that contributed to TDHCA allocation decisions disproportionately allocating tax credits to units in minority areas. The current TDHCA regulations for the tax exempt bond program incorporate many of the above the line 9% program selection criteria such as local community support into the 4% program. Appendix, Tab 6, pages 79 - 82; 2012 - 2013 Multifamily Housing Revenue Bond Rules, § 33.5(d)(11) Notifications, § 33.5(e)(8) local community support or opposition. The 4% tax credits with tax exempt bonds are not required by state law to use those scoring criteria. Memorandum Opinion and Order, Document 178, page 35 n. 31.

Another unused less discriminatory alternative upon which liability was based was the failure to use the threshold criteria to mitigate the discriminatory impact of the above the line points. The threshold criteria for the 9% and the 4% programs are not bound by the Texas Government Code provisions limiting TDHCA's discretion concerning above the line 9% program selection criteria. TDHCA proposes only one limited use of the threshold criteria. Currently developments within 300 feet of hazardous waste facilities and other noxious and nuisance uses are ineligible. 2012 - 2013 QAP, § 50.4 (d)(13). TDHCA's proposed plan would widen the exclusion zone to 1,000 feet. Defendants' Proposed Remedial Plan, Document 181, pages 11 -14, §5. Threshold criteria that prohibited risks to prospective residents from nuisance conditions and dangerous uses would have more effect on TDHCA's allocation decisions than the arbitrary 1,000 feet standard. ICP exhibit 575, HUD Multifamily Manual, pdf page 38, G.

Off-site Contamination. This expanded use of the threshold criteria should be in the remedial plan.

TDHCA omits the use of threshold criteria more directly connected to bringing its allocation decisions into compliance. Threshold criteria are currently used to make census tracts ineligible for the 130% QCT basis boost where tax credit units are equal to more than 30% of the households in the tract. 2012 - 2013 QAP, § 50.5 (e)(1). TDHCA set threshold criteria prohibiting any tax credit allocations in a census tract that has more than 30% Housing Tax Credit units per total households. 2012 - 2013 QAP, § 50.8 (2)(C). TDHCA could set lower thresholds prohibiting 9% and 4% tax credit allocations in census tracts with a substantial number or percentage of Housing Tax Credit units per total households. The presence of large numbers or percentages of units assisted by other low income rental assistance programs also indicate problems of racial and poverty segregation. TDHCA could use threshold criteria to prohibit allocations in census tracts presenting these problems. It could set threshold eligibility criteria on a variety of site and neighborhood characteristics that would encourage development proposals in locations with the potential to bring TDHCA's 4% and 9% allocation decisions into compliance with the Fair Housing Act.

TDHCA's proposal relies on below the line points and discourages the use of discretion to consider factors other than points. The efficacy of below the line points to encourage non-discriminatory decisions is limited. ICP exhibit 1, Talton Report, page 14. Another less discriminatory alternative would be to change the point values in a manner that lessens the effect of the above the line points while still complying with the required order and ranking of those criteria. Memorandum Opinion and Order, Document 178, pages 30 - 31. A 65% above the line

point percentage with a 35% below the line point percentage could substantially improve the efficacy of the below the line points to encourage non-discriminatory decisions. TDHCA's witnesses admitted TDHCA's discretion to set the point value. The Texas Attorney General agrees that TDHCA has this discretion. Defendants' exhibit 49, Tex. Atty. Gen.Op. GA-0455, 2006 WL 2689634 (Tex. A.G. 2006), pages 2-3. If the above the line points currently constitute 75% of the total 9% program maximum points, re-valuing those points by lowering the maximum points, eliminating the gaps and raising the below the line points could reduce the effect of the criteria posing the highest barrier to non-discriminatory allocation decisions. See pages 20 - 21, above. Appendix, Tab 10, pages 98 - 100; point options.

Even with significant changes to the point system, TDHCA will need to use its discretion in the allocation of its tax credits rather than rely only on the 9% point scores. Memorandum Opinion and Order, Document 178, pages 33 and 34. The discretion to base allocation decisions on good cause leaves a variety of less discriminatory alternatives open for use. The Talton Report proposed the use of TDHCA's discretion for a set aside of credits for "affirmatively furthering assimilation outside of impacted areas." ICP Ex. 1 at 48-49. TDHCA has recognized that good cause for discretion includes compliance with the Fair Housing Act. TDHCA explicitly listed fair housing laws as one discretionary factor that the Board was authorized to take into account in the 2004, 2005, and 2006 QAPs. ICP exhibit 121, 2004 QAP, page 39; ICP exhibit 122, 2005 QAP, page 42; ICP exhibit 123, 2006 QAP page 45; ICP exhibit 94 transcript Nov. 14, 2003, pages 153 - 154, 199 - 200. The elimination of racial discrimination in TDHCA's programs is an explicit purpose of the state law governing TDHCA's programs and good cause for the exercise of its discretion. Tex. Gov't Code. § 2306.065. Appendix, Tab 5, page 74; Board Book excerpt.

Conclusion

The ICP table at Appendix, Tab 1, pages 3 - 5, sets out in summary form TDHCA's proposed remedial plan, ICP's position on the specific elements, and ICP's objections to the proposed remedial plan. TDHCA's discriminatory effect liability is based on the disparate impacts of its allocation decisions and its failure to adopt less discriminatory alternatives for use in the decision process. Memorandum Opinion and Order, Document 178, page 35. TDHCA's proposed plan leaves in place most of the same procedures with which it made the disproportionate allocations of tax credits to family units in predominantly minority areas. The proposed plan continues to leave unused the less discriminatory alternatives that could bring TDHCA's allocation decisions into compliance with the Fair Housing Act. The proposed plan does not meet the standard for a remedy under the Fair Housing Act. Memorandum Opinion and Order, Document 178, page 38.

Respectfully Submitted,

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Certificate of Service

I hereby certify that on June 18, 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