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

THE INCLUSIVE COMMUNITIES PROJECT, INC.,	§	
Plaintiff,	§	
VS.	§	Civil Action No. 3:08-CV-0546-D
THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, et al.,	§	
Defendants.	§	

MOTION TO ALTER OR AMEND JUDGMENT OR, ALTERNATIVELY, FOR NEW TRIAL

Defendants the Texas Department of Housing and Community Affairs, its Executive Director, and its Board members respectfully urge the Court to alter or amend its Judgment, entered on August 7, 2012, pursuant to Federal Rule of Civil Procedure 59(e). In the alternative, Defendants move for a new trial on those issues.[1] FED. R. CIV. P. 59(a). The grounds of the motion, which will be fully described in the brief, are as follows:

1. Defendants ask the Court to amend its judgment to require TDHCA to use the Revitalization Index as part of the remedial plan or, alternatively, to permit the use of the Revitalization Index in the Dallas metropolitan area.

2. Defendants ask the Court to amend its judgment to make clear the portions that apply to 4% LIHTCs.

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1. Pursuant to Federal Rule of Civil Procedure 25(d), Defendants note that Tomas Cardenas, C. Kent Conine (Chair), Dionicio Vidal Flores, and Gloria L. Ray, who were sued in their official capacities as TDHCA Board members, are no longer members of the Board. Their positions are now occupied by J. Paul Oxer (Chair), Tom H. Gann, Lowell A. Keig, and J. Mark McWatters. Likewise, Michael Gerber, sued in his official capacity as Executive Director of TDHCA, has been replaced by Timothy Irvine.

3. Defendants ask the Court to amend its judgment to adopt Defendants' proposed tie breaker of distance from other tax credit properties.

4. Defendants ask the Court to amend its judgment to require Defendants to pay only 50% of ICP's taxable costs.

PRAYER

For the foregoing reasons, Defendants respectfully request that the Court alter or amend its judgment or, in the alternative, grant a new trial on the issues raised.

Respectfully,

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I certify that on September 4, 2012, a true and correct copy of Defendants' Motion to Alter or Amend Judgment or, Alternatively, for New Trial was served via the Court's CM/ECF Document Filing System to the following counsel of record:

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Defendants.	§	

BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT OR, ALTERNATIVELY, FOR NEW TRIAL

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Defendants the Texas Department of Housing and Community Affairs, its Executive Director, and its Board members respectfully urge the Court to alter or amend its Judgment, entered on August 7, 2012, for the reasons described below. In the alternative, Defendants move for a new trial on those issues.[1]

I. MOTION TO ALTER OR AMEND

On August 7, 2012, the Court entered a memorandum opinion and order (ECF No. 193, "Mem. Op.") as well as a judgment (ECF No. 194) in this case. Pursuant to the judgment, Defendants must implement a remedial plan regarding the issuance of low-income housing tax credits (LIHTC) in the Dallas metropolitan area. Defendants timely file this motion to alter or amend the judgment under Federal Rule of Procedure 59(e).

Rule 59(e) permits a party to seek to correct manifest errors of law or fact or to prevent manifest injustice. *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989); *Barrow v. Greenville Indep. Sch. Dist.*, 3:00-CV-0913-D, 2005 WL 1867292, at *5 (N.D. Tex. Aug. 5, 2005). A Rule 59(e) motion should not, however, be used to raise arguments that could, and should, have been made prior to the issuance of the judgment. *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003).

As demonstrated below, the arguments made by Defendants could not have been raised earlier, either because the judgment was the first time the issue arose or because the Court's procedure for submission of the proposed remedial plan did not provide Defendants with an

1. Pursuant to Federal Rule of Civil Procedure 25(d), Defendants note that Tomas Cardenas, C. Kent Conine (Chair), Dionicio Vidal Flores, and Gloria L. Ray, who were sued in their official capacities as TDHCA Board members, are no longer members of the Board. Their positions are now occupied by J. Paul Oxer (Chair), Tom H. Gann, Lowell A. Keig, and J. Mark McWatters. Likewise, Michael Gerber, sued in his official capacity as Executive Director of TDHCA, has been replaced by Timothy Irvine.

opportunity to respond to ICP's objections. Consideration of the following arguments is, therefore, permissible, and Defendants urge the Court to alter or amend the judgment as described.[2]

A. The Court Should Amend Its Judgment To Require TDHCA To Use the Revitalization Index as Part of the Remedial Plan or, Alternatively, To Permit the Use of the Revitalization Index in the Dallas Metropolitan Area.

In the Proposed Remedial Plan, Defendants included a Revitalization Index, which enabled developers who sought to revitalize qualified census tracts (QCTs) to earn points and remain competitive with developers who sought to build in high opportunity areas (HOAs). Proposed Plan at 8-11. The Court concluded that the Revitalization Index was not required by federal law and declined to include the Index in the Court's remedial plan. Mem. Op. at 11-18, 24-25. The Court also ordered, in Section IV.B of its judgment, that Defendants "remove all other 'Development Location' criteria" when scoring applications in the Dallas metropolitan area. Judgment at 2. But the Court indicated in its memorandum opinion that Defendants were permitted to include the Revitalization Index, which is a development location criteria, if it was part of the qualified allocation plan (QAP). Mem. Op. at 25 n.16. Defendants request that the Court amend its judgment either to require the use of the Revitalization Index or to permit Defendants to use the Revitalization Index in the Dallas metropolitan area as part of the QAP.

1. Use of the Revitalization Index is essential to comply with federal law.

In Defendants' Proposed Remedial Plan, Defendants offered to remove all other "Development Location" criteria "unless required by statute." Proposed Plan at 8. At the time, Defendants believed that the Revitalization Index was required by federal law, because Defendants

2. None of these arguments should be construed as an admission by Defendants that the Court's merits ruling—that Defendants' actions created a disparate impact in violation of the Fair Housing Act—is correct.

interpreted 26 U.S.C. §42(m)(1)(B) to require that a preference be given to applications in QCTs, as well as applications serving the lowest income tenants and serving qualified tenants for the longest periods. Proposed Plan at 9.[3] However, when addressing Frazier Revitalization Inc.'s objections to Defendants' proposed plan, the Court concluded that federal law did not require use of the preferences in §42(m)(1)(B) when *selecting* which applications receive LIHTCs, but rather required the preferences only when *allocating* LIHTCs in the event a state agency selected too many applications to fund. Mem. Op. at 14-16. The Court, therefore, declined to include the Revitalization Index in its remedial plan because it concluded that the Index created a preference in the selection process, not the allocation process. *Id.* Defendants assert that this was error.

It is appropriate to raise this issue in a Rule 59(e) motion, because the issue did not arise until the Court issued its memorandum opinion and order on August 7. Until then, Defendants were not on notice that the interpretation of §42(m)(1)(B) was in question. The Court's construction of §42(m)(1)(B) did not come at the request of ICP. Instead, when objecting to the Revitalization Index, ICP argued that TDHCA was not historically consistent in preferring projects in QCTs and that the facts of this case did not support including the Revitalization Index. ICP's Resp. to Defs.'

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3. Section 42(m)(1)(B) reads as follows:

(B) Qualified allocation plan.--For purposes of this paragraph, the term "qualified allocation plan" means any plan--

(i) which sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions,

(ii) which also gives preference in allocating housing credit dollar amounts among selected projects to--

(I) projects serving the lowest income tenants,

(II) projects obligated to serve qualified tenants for the longest periods, and

(III) projects which are located in qualified census tracts (as defined in subsection (d)(5)(C)) and the development of which contributes to a concerted community revitalization plan, and

(iii) which provides a procedure that the agency (or an agent or other private contractor of such agency) will follow in monitoring for noncompliance with the provisions of this section and in notifying the Internal Revenue Service of such noncompliance which such agency becomes aware of and in monitoring for noncompliance with habitability standards through regular site visits.

Proposed Remedial Plan (ECF No. 186) at 27-31. ICP did not suggest an alternative interpretation of §42(m)(1)(B) and, even if it had, Defendants had no opportunity to respond under the procedures established by the Court. Mem. Op. & Order of Mar. 20, 2012 (ECF No. 178) at 39. The Court, therefore, made its decision without the benefit of briefing by Defendants. Defendants now respectfully assert that the Court's interpretation of §42(m)(1)(B) is not correct, and given the potential far-reaching effect of the Court's decision, Defendants ask that the Court revisit its ruling and amend its judgment.

To begin with, the Court's interpretation of §42(m)(1)(B) nullifies congressional intent in any State that, like Texas, selects only as many projects as it can fund through the LIHTC program. Section 42 shows a clear congressional preference for assisting those with the lowest incomes, serving low-income tenants for long periods of time, and placing projects in QCTs. Aside from the explicit preference in §42(m)(1)(B), §42(d)(5) extends the 130% basis boost to projects in QCTs and difficult to develop areas. To be a qualified low-income housing project, the project must have a certain percentage of rent-restricted units that are occupied by individuals whose income is 50-60% below the area gross median income. 26 U.S.C. §42(g)(1). Thus, Congress clearly intended that LIHTCs should be used to help low-income tenants for long periods of time and to revitalize low-income areas. The Court has suggested that Texas's system does not give effect to that intent.

The Court held that the only way a State may implement the congressional preference is by adopting a two-step process: first, selecting too many projects to fund, and second, allocating more LIHTCs to projects in QCTs (or projects that reflect the other preferences in subsection (B)). Mem. Op. at 14-15. While it would certainly be permissible for Texas to adopt that process, it is not the only way to satisfy §42(m)(1)(B)'s requirements. Texas's one-step process is equally acceptable

and, as described below, more economically feasible. By selecting only as many projects as it can allocate LIHTCs to, Texas's allocation decision for each project is all or nothing. Texas gives effect to the federal preference by making it easier for projects in QCTs to be selected, and therefore, receive an allocation. Stated differently, "among the selected projects" in Texas, Texas expresses its preference by making an allocation of LIHTCs in the first place. Texas accomplishes this by giving those applications more points to enable them to be selected. This process fully complies with federal law.

This may seem like semantics, but it is of extreme importance to the State and the industry. The Court's ruling—which is the only interpretation of §42(m)(1)(B) by any court that Defendants can find—calls into question whether Texas law, which requires this process, *see* TEX. GOV'T CODE §§2306.6710, .6711, meets federal standards. Mem. Op. at 18 n.11. It also calls into question the QAPs in any other State that, like Texas, selects only as many projects as it can fund.

The Court's two-step process is not workable as a legal or practical matter. As envisioned by the Court, a State must select too many projects to fund and then prefer those projects described in §42(m)(1)(B) when allocating LIHTCs. Because federal law bars funding a project beyond what is necessary for the project to be financially feasible, 26 U.S.C. §42(m)(2), a State is prohibited from expressing its preference by *over*-allocating or providing extra funds to preferred projects. Another option, then, is to fully fund the preferred projects and *under*-allocate LIHTCs to non-preferred projects, which, by definition, will leave them not financially feasible—a result that helps no one and could even hurt low-income individuals by providing them with financially shaky housing or no housing at all, if the project cannot be built. The practical need to fund projects up to the point of financial feasibility is in line with the testimony presented at trial, which emphasized the financial

feasibility of a project as a key factor in determining whether a project would receive funds. 2.RR.91-92.

As a third option, a State could "select" one or more extra projects and then show a preference by making no allocation to them. But this is substantively no different than what Texas already does. Texas simply skips the empty formality of selecting projects that will receive no funds. Congress surely did not intend Texas to undertake such a meaningless task. Indeed, the Supreme Court has held that "it is well settled that in reading . . . taxation statutes, 'form should be disregarded for substance and the emphasis should be on economic reality.'" *United States v. Eurodif S.A.*, 555 U.S. 305, 317-18 (2009) (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)). Texas's system demonstrates the required preference, albeit in a form different than the one envisioned by the Court. That is sufficient to meet federal standards.

Section 42(m)(1)(C), which identifies neutral elements that must be considered as selection criteria in a QAP, does not alter the preferences expressed in subsection (B). The Court concluded that, because the preferences established in §42(m)(1)(B) are not mentioned in subsection (C), Congress did not intend the preferences in (B) to be part of the selection process. Mem. Op. at 15-16. But Congress's decision to identify general QAP elements in subsection (C) does not nullify the preferences in subsection (B). Rather, it is up to each State, based on its own unique population and demographics, to determine how best to give effect to the preferences in (B) through the criteria required in (C). *See* 26 U.S.C. §42(m)(1)(B)(i) (noting that a QAP must have selection criteria "appropriate to local conditions").

Texas is not alone in this interpretation of §42(m)(1)(B), as States across the country use the same method of allocation—selecting only as many projects as the State can fund. For example,

Tennessee ranks projects but makes only "complete" awards and provides a process in which a project that cannot be fully funded may wait to see if more LIHTCs become available to enable a complete award.[4] New Jersey explicitly states that it "does not award partial allocations."[5] Likewise, Nevada awards credits until the amount left is too small to fund the next project and will only make a partial commitment in conjunction with a forward commitment for the remaining amount.[6] Missouri's 2013 QAP shows that under-allocation is not an option as it provides that federal and state law "require that MHDC allocate to a development the tax credit amount that MHDC determines is necessary to ensure the financial feasibility of the development and its viability as a qualified low-income housing development throughout the credit period."[7] Many other states have waiting lists and tie breakers, which indicate that partially funding (or under-funding) projects is not a feasible solution.[8] Under the Court's order, none of these States would be compliant with federal law because none of them select too many projects to fund, thereby prohibiting them from giving effect to the preferences in §42(m)(1)(B) as interpreted by the Court.

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4. TENN. HOUS. DEV. BD., Low Income Housing Tax Credit: 2011 QAP at 25, *available at* http://www.thda.org/DocumentView.aspx?DID=1834.

5. N.J. HOUS. & MORTGAGE FIN. AGENCY, Proposed 2012 Qualified Allocation Plan at 19, *available at* http://www.njhousing.gov/dca/hmfa/media/download/tax/qap/tc_qap_proposed_qap.pdf.

6. NEV. HOUS. DIV., 2012 Qualified Allocation Plan for Low Income Hous. Tax Credits at 12-13, *available at* http://www.nvhousing.state.nv.us/tax_credit/NHD%202012%20Qualified%20Allocation%20Plan%20for%20 LIHTC%20-%20Adopted%20Dec%205%2011.pdf.

7. MO. HOUS. DEV. COMM'N, 2013 Qualified Allocation Plan for MHDC Multifamily Homes at 7 (2012), *available at* http://www.mhdc.com/rental_production/2013_FY_items/QAP_FY13.pdf.

8. Low Income Hous. Tax Credit Program, MICH. STATE HOUS. DEV. AUTH., 2013-14 Qualified Allocation Program, *available at* http://www.michigan.gov/documents/mshda/mshda_li_qap_2013_2014_qap_final_391276_7.pdf; 2012 Low Income Hous. Tax Credit Qualified Allocation Plan for the State of N. C., N.C. HOUS. FIN. AGENCY, available at http://www.nchfa.com/Rental/RD2012qap.aspx; Housing Tax Credits, S.D. HOUS. DEV. AUTH., *available at* http://www.sdhda.org/sdhda-main-website/developer/housing-tax-credits/housing-tax-credits.

The Court should permit Texas to implement the allocation preferences in §42(m)(1)(B) when selecting projects to receive allocations in the first place. The Revitalization Index is necessary for Texas to show those preferences in the Dallas metropolitan area and remain compliant with federal law. The Court should amend its judgment and include the Index.

2. Use of the Revitalization Index should otherwise be permitted.

After stating that the Revitalization Index was not required by law, the Court noted that Defendants could include the Revitalization Index in the QAP through the usual processes. Mem. Op. at 25 n.16. However, the Court also ordered Defendants to eliminate any other development location criteria in its judgment. Judgment at 2. As a result, Defendants are unsure whether they are permitted to use the Revitalization Index, a development location criteria, in the Dallas metropolitan area if it was enacted as part of the QAP.

Even if not required by federal law, Defendants desire to use the Revitalization Index in the Dallas metropolitan area for several reasons. To being with, it will enable applications in QCTs to remain competitive with applications in HOAs. Defendants do not understand the Court's remedial plan to require 100% of the LIHTCs awarded in the Dallas metropolitan area to be in HOAs. But without the Revitalization Index, it will be difficult for applications in QCTs to achieve the scores necessary to receive tax credits. If a balance is not maintained, groups with different policy goals than ICP, such as FRI, may argue that Defendants' actions under the Remedial Plan have created a disparate impact in favor of white communities. Defendants seek to avoid that result by providing points to all communities.

Moreover, there remains a clear federal policy that favors projects in QCTs. 26 U.S.C. §42(d)(5)(B) (providing 130% basis boost to projects in QCTs); §42(m)(1)(B)(iii). The Court's

judgment, however, precludes the use of development location criteria in the Dallas metropolitan area, even if enacted as part of a QAP. Consequently, Defendants request that the Court alter or amend its judgment at Section IV.B to permit the inclusion of the Revitalization Index in the Dallas metropolitan area if part of the QAP.

B. The Court Should Amend Its Judgment To Make Clear the Portions That Apply to 4% LIHTCs.

In Section IV of the Judgment, the Court listed nine "affirmative actions" that Defendants must implement regarding the award of 4% and 9% LIHTCs in the Dallas metropolitan area. Judgment at 2-3. Although the Court indicated in its memorandum opinion that not all nine affirmative actions would apply to the 4% deals, Mem. Op. at 32-33, Defendants request that the Court amend the judgment to make clear that, at most, only subparts D (undesirable site features) and E (fair housing choice disclosure) will be enforced as to the 4% LIHTCs.

As has been explained to the Court, Defendants have very little control over the distribution of 4% LIHTCs, as most aspects of those deals are controlled by federal law. *See, e.g.*, 26 U.S.C. §42(5)(B)(v) (prohibiting States from extending 130% basis boost to 4% projects that are not in QCTs or difficult to develop areas). Stated simply, Defendants do not have the ability to encourage HOA applications for 4% LIHTCs—developers either apply or they don't. At most, Defendants can attempt to limit the number of QCT applications through the undesirable site features element. *See* Judgment at 2-3. To ensure that Defendants are not in violation of the Court's judgment, they

request that the Court amend the judgment to make clear that only subparts D and E apply to the 4% LIHTCs.[9]

C. The Court Should Amend the Judgment To Adopt Defendants' Proposed Tie Breaker—Distance from Other Tax Credit Properties.

In Section IV.H of the judgment, the Court ordered Defendants to "adopt a tie breaker, in the event of a tie in scoring a 9% application, that favors an application proposing a development in an HOA." Judgment at 3. Defendants request that the Court alter its judgment and use the tie breaker proposed by Defendants—distance from another LIHTC development.[10]

First, as a practical matter, the HOA tie breaker proposed by ICP will be entirely ineffective if both applications are in HOAs or neither application is in an HOA. Second, the HOA tie breaker runs the risk of prompting lawsuits under the Fair Housing Act. ICP chose the HOA criteria because ICP prefers locating tax credits in primarily white communities, and HOAs typically have a higher percentage white population. If Defendants were to use the HOA as a tie breaker, the developer who lost could bring a challenge to that decision under the FHA. Although Defendants would vigorously defend any such lawsuit, the Fifth Circuit has previously held that remedial court orders can violate the Equal Protection Clause if they are race-conscious and not narrowly tailored. *Walker v. City of Mesquite*, 169 F.3d 973, 985 (5th Cir. 1999) (holding that district court could not implement a race-conscious measure as part of a remedial plan).

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9. The issue of how to treat 4% LIHTCs will also arise in the annual report, contemplated by subsections F and I. Judgment at 3. But the Court has provided deadlines for the parties to argue and object to the elements of that report, so Defendants will reserve their arguments regarding the annual report until then.

10. When the Court ordered Defendants to propose a remedial plan, it set a deadline for the proposed plan and a deadline for ICP to object. Mem. Op. & Order of Mar. 20, 2012 at 39 (ECF No. 178). It did not, however, permit Defendants to reply to ICP's objections, stating that the Court would determine whether further proceedings were necessary. *Id.* This is, therefore, Defendants' first opportunity to make this argument regarding ICP's proposal.

While Defendants have similar concerns regarding whether the rest of the court-ordered remedial plan will result in a violation of the FHA, the other plan elements simply encourage applications in HOAs by awarding points to such applications. ICP's HOA tie breaker is the only plan element in which the location in an HOA is dispositive. If the HOA tie breaker is determined to be a race-conscious remedy, it will likely be found unconstitutional as it is not narrowly tailored. *See id.* at 982. ICP has not demonstrated a need for this particular remedy, and no race-neutral alternatives have been shown to be less effective. *Id.* at 982-85. Indeed, given ICP's premise that there are too few LIHTC developments in HOAs, it seems likely that a tie breaker focused on distance from another LIHTC development would favor HOAs.

Defendants must walk a fine line in attempting to address the racial disparity found by the Court with race-neutral solutions. The tie breaker ordered by the Court threatens to push Defendants towards a race-conscious solution that may not be sustainable under federal law. The Court should alter its judgment and use Defendants' proposed tie breaker—distance from another LIHTC development.

D. The Court Should Amend Its Judgment To Require Defendants To Pay Only 50% of ICP's Taxable Costs.

In Section VIII of its judgment, the Court ordered that "ICP shall recover 50% of its taxable costs of court . . . from defendants" and that "Defendants shall bear the remaining 50% of ICP's taxable costs of court." Judgment at 5. Defendants, thus, must pay 100% of ICP's costs, even though ICP prevailed on, at most, 50% of its lawsuit. Defendants ask that the judgment be amended so that Defendants bear only 50% of ICP's taxable costs of court.[11]

11. Defendants could not have raised this issue earlier because it did not arise until the Court issued its judgment. Therefore, it is appropriate for resolution under Rule 59(e).

Defendants recognize that the award of costs is a matter of discretion for the Court. 42 U.S.C. §3613(c)(2); FED. R. CIV. P. 54(d)(1). However, Defendants prevailed on at least 50% of ICP's claims—the Court found that ICP failed to prove intentional discrimination under the Fourteenth Amendment and §1983. Defendants should not, therefore, be required to pay 100% of ICP's costs and ask that the judgment be amended accordingly. *See, e.g.*, *Wesley v. Yellow Transp., Inc.*, Nos. 3:05–CV–2266–D, 3:05–CV–2271–D, 2010 WL 3606095, at *3 (N.D. Tex. Sept. 16, 2010) (ordering defendant to bear only 50% of plaintiffs' costs because court dismissed several of plaintiffs' claims).

II. ALTERNATIVE MOTION FOR NEW TRIAL

Defendants alternatively move for a new trial on the issues described above, to the extent the Court's rulings depended on the evidence taken during the bench trial. FED. R. CIV. P. 59(a); *See Artemis Seafood, Inc. v. Butcher's Choice, Inc.*, 1999 WL 1032798, at *1 (N.D. Tex. Nov.10, 1999) (holding that a motion for new trial is appropriate only when there has been a jury trial or bench trial). Although Defendants believe this motion can be resolved without a new trial, as the issues are primarily legal ones, Defendants are willing to present evidence should the Court desire to hear more on the above-argued issues.

PRAYER

For the foregoing reasons, Defendants respectfully request that the Court alter or amend its judgment or, in the alternative, grant a new trial on the issues raised.

Respectfully,

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