

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 AMEND THE REMEDIAL PLAN**

In the process of preparing the Annual Report required under the Remedial Plan, Defendants have identified three elements of the Remedial Plan that they believe should be amended. Because developers who may apply to build projects in the Remedial Area will begin the pre-application process as soon as December, Defendants file this motion, asking for permission to amend the Remedial Plan, rather than wait for the annual review process to play out. As shown in the Certificate of Conference, Plaintiff does not oppose this motion.

**I. Background and Need For Ruling**

After finding Defendants liable for disparate-impact discrimination, the Court ordered Defendants to propose a remedial plan that “sets out how it will bring its allocation decisions into compliance with the FHA.” Doc. 178 at 38. Defendants complied, and the Court approved the Remedial Plan and ordered that Defendants will be subject to the Plan for at least five years. Docs. 193, 194. The Court also created an annual review process within the plan in which Defendants file an annual report with the Court and the other parties are permitted to comment. Defendants may

recommend changes to the remedial plan within the annual report. Doc. 193 at 10.

Defendants filed the required annual report on November 22, 2013. Doc. 218. The other parties in the case have until December 23 to respond, and Defendants may reply by January 22. Doc. 193 at 10. It will, therefore, be late January or February before the Court's process will result in any changes to the Remedial Plan. However, developers begin preparing their pre-applications for low-income housing tax credits in December. Applicants in the Remedial Area would benefit from knowing whether the Plan will be amended as suggested in the Annual Report. Defendants therefore seek the Court's approval to make the following changes to the Remedial Plan, as outlined in the Annual Report, and request a ruling by December 31.

## **II. Proposed Amendments**

Defendants request that three elements of the Remedial Plan be amended. Defendants describe the proposed amendments here and have attached as Exhibits the specific language that Defendants have included in the 2014 Qualified Allocation Plan. Defendants would like to apply this language to the Remedial Area.

### **A. Opportunity Index**

Under the Remedial Plan, Defendants are required to give points to projects in High Opportunity Areas, which are defined in terms of poverty rate, area income, and educational quality. Doc. 193 at 20-22. Defendants propose (1) to update the definition of educational quality, (2) to remove the five-point level for elderly housing in High Opportunity Areas, and (3) to create a separate test for High Opportunity Areas in Rural Areas. The specific language reflecting these proposals appears in Exhibit A.

## **1. Educational Quality**

As it currently stands, projects located in attendance zones of elementary schools rated “Exemplary” or “Recognized” may be eligible for five or seven points, if the poverty and income factors are sufficient. Doc. 193 at 20-22. However, the Texas Education Agency recently altered its school ratings, rendering the ratings “Exemplary” and “Recognized” obsolete. Texas Education Agency, *Commissioner Williams Announces 2013 Accountability System*, available at [http://www.tea.state.tx.us/news\\_release.aspx?id=25769804649](http://www.tea.state.tx.us/news_release.aspx?id=25769804649).

Defendants, therefore, propose to replace the “Exemplary” and “Recognized” criteria with a requirement that the school have “a Met Standard rating and . . . achieve[] a 77 or greater on index 1 of the performance index, related to student achievement.” As described by the Texas Education Agency, a Met Standard rating demonstrates that the school has met all required accountability targets, and the student achievement portion of the performance index “[r]epresents a snapshot of performance across all subjects, on both general and alternative assessments, at an established performance standard.” *Id.* Approximately the same percentage of schools should qualify for points under this amendment as did under the old ratings system. Annual Report at 59.

Use of this new definition will enable the Remedial Plan to stay current with respect to school ratings and allow high-growth/high-opportunity areas with new schools to qualify for points under the Opportunity Index. The amendment of the educational-quality definition should not harm the Plan’s remedial purposes and, to the extent new schools in high-opportunity areas may qualify, should assist in the Plan’s remedial goals.

## **2. Five-Point Elderly Tier**

Next, the Opportunity Index currently permits projects that serve only the elderly to qualify

for five points, if poverty, income, and educational factors are met. Doc. 193 at 20-22. Defendants propose removing this five-point option. General population projects and Supportive Housing that serves all ages will remain eligible for the five-point level. Annual Report at 59-60.

This change will assist the Plan's remedial purposes by providing more incentives to build general population housing, instead of elderly housing. In fact, ICP objected to the inclusion of points for elderly projects in High Opportunity Areas when the Plan was first proposed. Doc. 193 at 21. Thus, this change will not interfere with the Plan's remedial goals.

### **3. Rural Areas**

Finally, Defendants propose to add a new element to the Opportunity Index to address projects in Rural Areas. As described in the Annual Report, census tracts in rural areas are larger than in urban areas. Annual Report at 59. Thus, projects in High Opportunity census tracts may be located far from essential community assets, such as grocery stores, schools, and medical facilities, that would be of benefit to low-income residents. *Id.*

To ensure that low-income projects are located near such facilities, Defendants propose a two-step Opportunity Index for projects in Rural Areas. *Id.* at 59-61. First, to be eligible for any points under the Opportunity Index, the project must meet the threshold poverty, income, and educational requirements. *Id.* The project may then earn up to seven points based on its proximity to schools, day care facilities, grocery stores, senior centers, and health-related facilities. *Id.*

Defendants believe this amendment will assist in meeting the Plan's remedial objectives by recognizing the differences presented by Rural Areas and creating a process to ensure that those areas are eligible for points only if the projects will truly benefit low-income individuals.

**B. Educational Excellence**

The Educational Excellence element of the Remedial Plan awards points as follows:

Location within the attendance zone of a public school with an academic rating of “Recognized” or “Exemplary” (or comparable rating) by the Texas Education Agency (up to 3 points):

A. 1 points if it is both an elementary school, and either a middle school or high school; or

B. 3 points if it is an elementary school, a middle school, and a high school.

Doc. 193 at 22. As noted above, the Texas Education Agency no longer uses the “Recognized” and “Exemplary” ratings for schools. Thus, Defendants propose to substitute the language identified above— “a Met Standard rating and has achieved a 77 or greater on index 1 of the performance index, related to student achievement.” *See* Exhibit B. This will enable the Remedial Plan to stay current with school ratings and enable projects near new schools, which are often in high-growth/high-opportunity areas, to qualify for an award of points.

**C. Underserved Areas**

Finally, the Remedial Plan includes points for underserved areas as follows:

A municipality or, if outside of the boundaries of any municipality, a county that has never received a competitive tax credit allocation. The application must also comply with all other anti-concentration provisions (2 points for general use/family or supportive housing; 1 point for elderly).

Doc. 193 at 22-23. Defendants propose removing the one point available for elderly projects. *See* Exhibit C. Given the focus of the lawsuit and the Remedial Plan on general population projects, as opposed to elderly projects, this amendment will not hinder the Plan’s objectives, but will enable general population projects to be even more competitive.

### **III. Conclusion**

For the foregoing reasons, Defendants request that the Court grant its motion to amend the Remedial Plan as outlined above and provided in the attached exhibits.

Respectfully,

**GREG ABBOTT**  
Attorney General of Texas

**DANIEL T. HODGE**  
First Assistant Attorney General

**JONATHAN F. MITCHELL**  
Solicitor General

**JAMES “BEAU” ECCLES**  
Assistant Attorney General  
Chief—General Litigation Division

/s/ Beth Klusmann  
**BETH KLUSMANN**  
Assistant Solicitor General  
State Bar No. 24036918

**OFFICE OF THE ATTORNEY GENERAL**  
P. O. Box 12548 (MC 059)  
Austin, Texas 78711-2548  
[Tel.] (512) 936-1914  
[Fax] (512) 474-2697  
[Beth.Klusmann@texasattorneygeneral.gov](mailto:Beth.Klusmann@texasattorneygeneral.gov)

**COUNSEL FOR DEFENDANTS**

## CERTIFICATE OF CONFERENCE

I certify that I conferred with counsel for Plaintiff on December 11, and Plaintiff does not oppose entry of the requested order. I certify that I attempted to confer with counsel for Intervenor on December 10 and 12 by e-mail and on December 13 by phone, and was unable to determine if Intervenor will oppose this motion.

/s/ Beth Klusmann  
Beth Klusmann





# **Exhibit A**

## **Opportunity Index**

Opportunity Index. The Department may refer to locations qualifying for points under this scoring item as high opportunity areas in some materials.

(A) For Developments located in an Urban Area, if the proposed Development Site is located within a census tract that has a poverty rate below 15 percent for Individuals (or 35 percent for Developments in Regions 11 and 13), an Application may qualify to receive up to seven (7) points upon meeting the additional requirements in clauses (i) - (iv) of this subparagraph. The Department will base poverty rate on data from the five (5) year American Community Survey.

(i) the Development targets the general population or Supportive Housing, the Development Site is located in a census tract with income in the top quartile of median household income for the county or MSA as applicable, and the Development Site is in the attendance zone of an elementary school that has a Met Standard rating and has achieved a 77 or greater on index 1 of the performance index, related to student achievement (7 points);

(ii) the Development targets the general population or Supportive Housing, the Development Site is located in a census tract with income in the second quartile of median household income for the county or MSA as applicable, and the Development Site is in the attendance zone of an elementary school that has a Met Standard rating and has achieved a 77 or greater on index 1 of the performance index, related to student achievement (5 points);

(iii) any Development, regardless of population served, if the Development Site is located in a census tract with income in the top quartile of median household income for the county or MSA as applicable (3 points); or

(iv) any Development, regardless of population served, if the Development Site is located in a census tract with income in the top two quartiles of median household income for the county or MSA as applicable (1 point).

(B) For Developments located in a Rural Area, an Application may qualify to receive up to seven (7) cumulative points based on median income of the area and/or proximity to the essential community assets as reflected in clauses (i) - (v) of this subparagraph if the Development Site is located within a census tract that has a poverty rate below 15 percent for Individuals (35 percent for regions 11 and 13) or within a census tract with income in the top or second quartile of median household income for the county or MSA as applicable or within the attendance zone of an elementary school that has a Met Standard rating and has achieved a 77 or greater on index 1 of the performance index, related to student achievement.

(i) The Development Site is located within the attendance zone and within one linear mile of an elementary, middle, or high school with a Met Standard rating. (For purposes of this clause only, any school, regardless of the number of grades served, can count towards points. However, schools without ratings, unless paired with another appropriately rated school, or schools with a Met Alternative Standard rating, will not be considered.) (3 points);

(ii) The Development Site is within one linear mile of a center that is licensed by the Department of Family and Protective Services specifically to provide a school-age program (2 points);

(iii) The Development Site is located within one linear mile of a full service grocery store (2 points);

(iv) The Development Site is located within one linear mile of a center that is licensed by the Department of Family and Protective Services to provide a child care program for infants, toddlers, and pre-kindergarten, at a minimum (2 points);

(v) The Development is a Qualified Elderly Development and the Development Site is located within one linear mile of a senior center (2 points); and/or

(vi) The Development Site is located within one linear mile of a health related facility (1 point).

(C) An elementary school attendance zone for the Development Site does not include schools with district-wide possibility of enrollment or no defined attendance zones, sometimes known as magnet schools. However, in districts with district-wide enrollment an Applicant may use the lowest rating of all elementary schools that may possibly be attended by the tenants. The applicable school rating will be the 2013 accountability rating assigned by the Texas Education Agency. School ratings will be determined by the school number, so that in the case where a new school is formed or named or consolidated with another school but is considered to have the same number that rating will be used. A school that has never been rated by the Texas Education Agency will use the district rating. If a school is configured to serve grades that do not align with the Texas Education Agency's conventions for defining elementary schools (typically grades K-5 or K-6), the school will be considered to have the lower of the ratings of the schools that would be combined to meet those conventions.

# **Exhibit B**

## **Educational Excellence**

Educational Excellence. An Application may qualify to receive up to three (3) points for a Development Site located within the attendance zones of public schools that have achieved a 77 or greater on index 1 of the performance index, related to student achievement, by the Texas Education Agency, provided that the schools also have a Met Standard rating. Points will be awarded as described in subparagraphs (A) and (B) of this paragraph. An attendance zone does not include schools with district-wide possibility of enrollment or no defined attendance zones, sometimes known as magnet schools. However, in districts with district-wide enrollment an Applicant may use the lowest rating of all elementary, middle, or high schools, respectively, which may possibly be attended by the tenants. The applicable school rating will be the 2013 accountability rating assigned by the Texas Education Agency. School ratings will be determined by the school number, so that in the case where a new school is formed or named or consolidated with another school but is considered to have the same number that rating will be used. A school that has never been rated by the Texas Education Agency will use the district rating. If a school is configured to serve grades that do not align with the Texas Education Agency's conventions for defining elementary schools (typically grades K-5 or K-6), middle schools (typically grades 6-8 or 7-8) and high schools (typically grades 9-12), the school will be considered to have the lower of the ratings of the schools that would be combined to meet those conventions. In determining the ratings for all three levels of schools, ratings for all grades K-12 must be included, meaning that two or more schools' ratings may be combined. For example, in the case of an elementary school which serves grades K-4 and an intermediate school that serves grades 5-6, the elementary school rating will be the lower of those two schools' ratings. Also, in the case of a 9th grade center and a high school that serves grades 10-12, the high school rating will be considered the lower of those two schools' ratings. Sixth grade centers will be considered as part of the middle school rating.

(A) The Development Site is within the attendance zone of an elementary school, a middle school and a high school with the appropriate rating (3 points); or

(B) The Development Site is within the attendance zone of an elementary school and either a middle school or high school with the appropriate rating (1 point).

# **Exhibit C**

## **Underserved Areas**

Underserved Area. (§§2306.6725(b)(2); 2306.127, 42(m)(1)(C)(ii)) An Application may qualify to receive two (2) points for general population or Supportive Housing Developments if the Development Site is located in one of the areas described in subparagraphs (A) - (D) of this paragraph . . .

(C) A Place, or if outside of the boundaries of any Place, a county that has never received a competitive tax credit allocation or a 4 percent non-competitive tax credit allocation for a Development that remains an active tax credit development; or

(D) For Rural Areas only, a census tract that has never received a competitive tax credit allocation or a 4 percent non-competitive tax credit allocation for a Development that remains an active tax credit development serving the same Target Population.