

Multifamily Finance Department
Illinois Housing Development Authority
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Via E-mail: multifamilyfin@ihda.org

November 19, 2013

RE: **Comments to the Qualified Allocation Plan for CY 2014**

To Whom It May Concern:

We write to you on behalf of a coalition of fair housing and affordable housing organizations in response to the Illinois Housing Development Authority's ("IHDA") request for public comments to its draft Low-Income Housing Tax Credit ("LIHTC") Qualified Allocation Plan ("QAP") for CY 2014. Over the years, many of our organizations have separately raised concerns about IHDA's QAP and how the QAP influences and limits fair housing choice and obstructs integrated living patterns within the State of Illinois. Respectfully, those concerns have largely been ignored by IHDA and/or have failed to be addressed with each new QAP. As a coalition, we ask that our concerns be taken seriously and that we be given the opportunity to further present our concerns in person in order to work together to integrate important fair housing principles into the QAP.

Introduction

The Fair Housing Act applies directly to the Department of Treasury, to all state housing finance agencies ("HFAs") that administer the LIHTC program, including IHDA, and to all owners and managers of tax credit properties. The duty to "affirmatively to further" fair housing, as set out in 42 U.S.C. § 3608(d), and in Executive Order 12892 (Jan. 17, 1994), requires the Department and state HFAs to closely monitor tax credit properties for discriminatory practices; it also requires the Department and state HFAs to affirmatively promote non-discrimination and racial integration in other ways, including but not limited to analyzing the racial concentration effects of LIHTC siting and adopting procedures to avoid perpetuating racial segregation in the program. *See Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970). The duty to affirmatively further fair housing is also delegated to state HFAs and owners by I.R.S. regulation 26 CFR § 1.42-9, which incorporates HUD non-discrimination and site selection rules. LIHTC owners and HFAs are also covered by Title VI of the Civil Rights Act of 1964, and its implementing regulations, which forbid discrimination based on race, color or national origin, either by intent or as a result of a seemingly neutral policy or practice. HUD's Title VI regulations, like the Fair Housing Act,

also obligate HFAs and tax credit owners to administer their programs affirmatively to overcome conditions of discrimination and to take other steps to accomplish the purposes of Title VI. As well, as a recipient of federal housing and community development funds, Illinois, and by virtue of its role receiving and administering such funds, IHDA, have a duty to affirmatively further fair housing, pursuant to 42 U.S.C. §§ 5304(b). Department of Housing and Urban Development, Fed. Red. 5173 (proposed July 19, 2013) (to be codified at 24 CFR pt. 5).

Indeed, other states and state housing finance agencies have been the defendants in lawsuits for failing to abide by their civil rights obligations in the administration of their LIHTC program. For example, in *The Inclusive Communities Project, Inc., v. The Texas Department of Housing and Community Affairs*, 749 F.Supp.2d 486 (2010), a Texas district court found that the state housing finance agency's allocation of tax credits had an adverse racial impact, in violation of 42 U.S.C. 3604(a) and 3605(a) of the Fair Housing Act, because of a disproportionate approval of tax credits for non-elderly developments in minority neighborhoods and a disproportionate disapproval of tax credits for non-elderly developments in predominately white neighborhoods. *Id.*, 1-2. As well, in August 2011 an administrative complaint was filed with the HUD Office of Fair Housing and Equal Opportunity against the State of Maryland and Maryland's Department of Housing and Community Development. The complaint alleges that the State of Maryland and Maryland's Department of Housing and Community Development are in violation of the Fair Housing Act, Title VI of the Civil Rights Act of 1964, and Section 109 of the Housing and Community Development Act of 1974 by administering the LIHTC program in a fashion that permits municipal governments to in effect veto the placement of affordable housing for families in high-opportunity areas. Under the Maryland QAP, all LIHTC applications must include a resolution from the local governing body in support of the project and evidence of a local contribution to the project. The complainants allege that the effect of these policies and practices has been to discriminate against minority families and to perpetuate racial and ethnic segregation in the Baltimore region.

These two cases represent a growing public recognition that the policies and administration of the LIHTC program by a state housing finance agency must not only comply with civil rights laws but take action to promote racial integration and reduce impediments for other protected classes. Jill Khadurri, *Creating Balance in the Locations of LIHTC Developments: The Role of Qualified Allocation Plans*, 11-14 (2013); Casey J. Dawkins, *Exploring the Spatial Distribution of Low Income Housing Tax Credit Properties*, 8-9 (2011); *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d. Cir. 1973). (“...Action must be taken to fulfill, as much as possible, the goal of open integrated residential housing patterns and to prevent the increase of segregation...”). Such actions must begin with critical changes to longstanding provisions within the QAP. Currently, many LIHTC projects in Illinois, especially in metropolitan areas, are concentrated in low-opportunity areas and in neighborhoods whose combined Black and Latino population average exceed the averages for that region. LIHTC units are often clustered together - approximately 41% of LIHTC units in Illinois are located in Chicago – and are located in or near racially concentrated area of poverty, especially in Cook County and its neighboring counties.

The QAP provides Illinois and IHDA with the opportunity to take meaningful action to overcome impediments to fair housing choice for all protected classes, increase integration and reduce segregation (generally and of LIHTC projects) within Illinois. Such meaningful action will include creating a process within the QAP for creating more balance in the location of non-senior LIHTC projects throughout Illinois. We urge IHDA to take this letter seriously and make the proposed revisions we set forth below.

Mandatory Provisions Requiring Local Support and Approval

The level of local control over the potential siting of LIHTC projects can greatly influence the ultimate location of potential LIHTC projects. Therefore, we have serious concerns regarding certain mandatory provisions for applications contained in Section XIII, beginning at page 36. These provisions are a serious impediment to fair housing and must be changed and/or eliminated immediately.

The most troubling provision in IHDA's QAP is the **Section XIII(C) Certification of Consistency with the Consolidated Plan** requirement. *This requirement must be eliminated entirely.* Section 42, which governs the low-income housing tax credit program, requires that a local chief executive officer be notified of the proposed project. It does not require prior local approval or receipt of a Certificate of Consistency.

The "Certification of Consistency with the Consolidated Plan" threshold requirement, contained on page 37 of the QAP, will have a disparate impact on a range of protected classes, inasmuch as it (1) is inconsistent with the local-involvement standard set out in the Internal Revenue Code for the LIHTC program, (2) establishes an institutional mechanism for local "NIMBY" opposition to LIHTC housing without regard to the worthiness of the project, (3) allows local governments a pocket veto over LIHTC allocations by simply failing to provide a Certificate of Consistency even if the proposed project is objectively consistent with the Consolidated Plan, (4) deters developers from even considering sites in communities resistant to affordable housing and, as a consequence, (5) constitutes an impediment to fair housing that is clearly in violation of the State's certification that it will affirmatively further fair housing and comply with the FHA. Indeed, this threshold requirement specifically prevented the Aurora Housing Authority from receiving preliminary approval for tax credits in 2011 because the City of Aurora refused to issue a certificate of consistency *even though the proposed redevelopment was clearly consistent with Aurora's Consolidated Plan.* Aurora's failure to supply the certificate was directly tied to its opposition to the redevelopment of family affordable housing.

As the undersigned have heard from many developers, the certification of consistency requirement is, in effect, a pocket veto, easily exercised by local officials based on the exclusionary views of some citizen opponents (or merely the fear that the project will stir up exclusionary opposition), which deters developers from expending resources in areas where they know it will be futile to seek local approval based on their own past experience, or the experience of others in the industry.

The State's threshold certification of consistency requirement deters non-profit and for-profit developers alike from proposing to build affordable LIHTC family housing in many high-

opportunity neighborhoods in the Chicago metropolitan area. It also operates to severely chill the interest of any developer in proposing LIHTC affordable housing for families with children in most high-opportunity communities in the Counties of Kane, DuPage, McHenry and Lake.

For the same reasons enumerated above, **Section XIII(D) Local Support** should be eliminated or substantially revised. Again, there is no provision in the LIHTC authorizing statute to require local support. The local support requirement streamlines and simplifies the process for local governments, including those responding to citizen opposition to the placement of low- and moderate-income housing for discriminatory reasons, to block such housing. *The state policy permits a municipality to withhold local approval without any formal announcement or explanation. Nor does it require the locality to offer any reason, let alone a non-discriminatory reason, for withholding support.*¹

In the alternative, IHDA could implement would be to allow a local jurisdiction to submit a letter to *oppose* a proposed project for specific and limited reasons. Such permissible reasons could include proposed projects that would perpetuate segregation or be built in floodplains. In this manner, local officials would be required to make public the reasons for their opposition, which would have to be factual and clearly related to a jurisdiction's rational interests in the "sticks and bricks" of the project, and not the demographics of the future residents. Moreover, the opposition must be consistent with the jurisdiction's treatment of non-affordable housing plans. Any selective opposition by a jurisdiction cannot be accepted or considered by IHDA.

Section XIII(A) Application Certification provides that all applicants must certify that they will take actions to affirmatively further fair housing. The certification, from IHDA's website (revised 2/8/2013) merely states "the undersigned will document the actions taken to affirmatively further fair housing." Nowhere in the application materials or FAQs provided by IHDA is there an explanation of what affirmatively further fair housing means and requires. As stated above, the requirement to affirmatively further fair housing is rooted in 42 U.S.C. §3608, a subsection of the federal Fair Housing Act. This obligation is not limited to the Department of Housing and Urban Development; rather it applies broadly and means that government agencies spending housing and community development funds – and recipients of government grants – must use those funds in way that helps create integrated, healthy neighborhoods. This would include IHDA and its recipients.

At a minimum, IHDA recipients must articulate *how* their proposed development affirmatively furthers fair housing². This would include an analysis of the current demographics of the project

¹ The local approval requirement also fails to provide any means by which supporters of affordable housing, and families who might benefit from it, can express their support. As the Presidential Commission on Regulatory Barriers to Affordable Housing pointed out, "Those advocating more affordable housing in a community cannot, in the same way, point to a precise location on the map where benefits of affordable housing are being deliberately withheld and particular households are being disadvantaged." *Not in My Backyard: Removing Barriers to Affordable Housing*, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing, (1991) at 2-1

² IHDA itself should review data on the location of LIHTC family and elderly developments based on area poverty rates and racial/ethnic composition to evaluate whether its LIHTC programs are affirmatively furthering fair housing.

area and an analysis of the income eligible demographics in the area. It should also include the projected demographics of the project once it is developed. The Treasury regulations specify that LIHTC properties must operate in a manner consistent with housing policy governing non-discrimination, as evidenced by HUD rules or regulations. [26 C.F.R. §1.42-9(a)] HUD regulations require that the “site must promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low income persons.” [24 C.F.R. §941.202]. Thus the applicant must demonstrate that it will not perpetuate racial, ethnic or economic segregation. Additionally, the proposal should also include an analysis of the income eligible persons with disabilities and demonstrate that it meets the needs of those persons.

Secondly, the certification requires that the applicant give preferential treatment to persons on the PHA waiting list. This requirement should be clarified for preferential treatment to persons on *any* PHA waiting list eligible under PHA portability provisions³. Making this revision will provide important integrative opportunities to households on PHA waitlists in low opportunity communities.

IHDA Denial of Projects Determined to Have A Discriminatory Effect

On page 10 of the draft QAP, IHDA recognizes the application of the Fair Housing Act to the LIHTC program, including the prohibition of housing practices “with a discriminatory effect, even where there has been no intent to discriminate.” QAP at 10. The draft QAP states that “[a]pplications for Projects determined to have a discriminatory effect in violation of the Fair Housing Act will be denied.” *Id.* Yet there is no explanation of how IHDA will determine that a project will have a discriminatory effect on protected classes, at what stage in the application process will this determination be made, and what consideration will IHDA give to the fact that the discriminatory effect may in part be caused by IHDA’s administration of the LIHTC program. Because this is not a new provision, it is also unclear if IHDA has ever denied an application for projects determined to have a discriminatory effect. Given the current siting of LIHTC projects in Illinois, it is doubtful IHDA is actually denying such projects. To fully implement this provision, in the context of racial and ethnic concentration, IHDA should evaluate each proposed project to determine the existing level of concentration within the proposed area for the project, as well as the likelihood that racial and ethnic minorities will be the residents of the proposed project, after considering what groups may be disproportionately eligible for the proposed housing. IHDA’s process for determining if a project has a discriminatory effect on protected classes should be directly spelled out in the QAP and IHDA should report this information to the public on an annual basis.

IHDA’s Right To Waive Any QAP Provision In Order to Affirmatively Further Fair Housing

Also on page 10 of the QAP, it states that “the Authority reserves the right to waive any provision or requirement of the QAP in order to affirmatively further fair housing.” QAP at 10.

³ Local PHA residency preferences should be prohibited unless a demographic analysis demonstrates that such preferences will not discriminate and/or perpetuate segregation.

While we appreciate the recognition that IHDA has a duty to affirmatively further fair housing, provisions or requirements within the QAP that impede fair housing choice and therefore violate IHDA's duty to affirmatively further fair housing (among other civil rights violations) should not be in the QAP. Nothing within federal law provides IHDA with the discretion to determine when it will or will not comply with civil rights laws. Any provisions or requirements of the QAP, such as those set forth in Sections XIII(C) and (D), that impede fair housing choice should affirmatively be removed. Without the affirmative removal of these provisions or requirements, the QAP will continue to have a chilling effect on the interest of developers to propose LIHTC affordable housing for protected classes in high opportunity communities.

Scoring

To improve the QAPs impact on creating housing in high opportunity areas, IHDA should implement the following recommendations regarding scoring.

Regarding the 3 available points available for enhanced accessibility, these points should be available only to projects with the proposed standards and that also provide a plan for, and commitment to, affirmatively market their projects using FHA/AFFH requirements. This would increase the likelihood that persons in need of enhanced accessibility would actually have access to the housing.

Regarding the 7 available points related to transportation assets, we are concerned that the large number of points available for this criteria will have the unintended consequence of discouraging projects in high-opportunity areas and encouraging projects in segregated, higher poverty communities. Therefore, the number of points awarded in this category be far fewer.

Regarding the specific use of the walk score, this may in fact be a poor data source with little information regarding its methodology. More importantly, based on looking at some sample communities, the overall effect of applying the walk score would be to discourage projects in high-opportunity areas and encourage projects in segregative, higher poverty communities. For example, the walk score for Lake Forest is 19 and the walk score for Calumet City is 52. Lake Forest is comprised of 88.9% white residents and 1.0% black residents, and Calumet City is comprised of 15.5% white residents and 69.8% black residents.⁴ The median household incomes of the cities, respectively, are \$133,264 and \$41,978.⁵ In a decision between competing projects in the two cities, then, using the walking score as a metric for awarding points would lead to a project based in a low-opportunity area benefiting over one in a high-opportunity area.

Regarding the 5 points awarded for Community Assets Indicators, these points would better promote projects in high opportunity areas if the points were awarded based on factors related to opportunity rather than proximity to physical sites. Examples of factors based on high opportunity include high quality (or performing) schools, low levels of poverty, high-income census tracts, close proximity to jobs, and low amounts of existing affordable housing. A potential data source for these types of factors is HUD's Prototype Geospatial Tool for the

⁴ Data from ACS 5-Year Totals, 2007-2011, Table DP05: Demographic and Housing Characteristics.

⁵ Data from ACS 5-Year Totals, 2007-2011, Table DP03: General Economic Characteristics

Proposed Affirmatively Furthering Fair Housing available at http://www.huduser.org/portal/affht_pt.html.

Regarding the 3 points available to projects located in an area with a Revitalization Plan, the definition and standards are far too broad to be meaningful and may award points to projects in areas with plans that have minimal chances of being implemented. The points should also only be awarded if it is a “concerted” community revitalization plan. Therefore, as is further set forth below, points should only be awarded to projects where it can be demonstrated that the project is tied to a revitalization initiative that has been recently completed, in process, or planned with an implementation timeline roughly parallel to the project.

We provide the following examples of where points could be awarded for factors that promote opportunity and that are not contained in the draft QAP. As we have recommended that the number of points awarded for transportation be reduced, IHDA should consider reallocating transportation points to factors such as:

- High-income census tracts.
- "New markets" defined as areas in which IHDA’s resources have not been used within the past 10 years.
- Areas with a high percentage of housing units that are owner occupied.
- Communities that are not covered within the Affordable Housing Planning and Appeals Act set aside but that have a relative low percentage of affordable housing (e.g., 20% or less affordable housing).

Regarding tiebreaker criteria, we feel that the first tiebreaker of lower development costs may have the unintended consequence of discouraging projects in high opportunity areas that have high land acquisition costs. We also urge the department to consider making the second tiebreaker a factor related to promoting development in high opportunity areas.

Promoting the Siting of LIHTC Developments in High Opportunity Areas

Many non-senior LIHTC developments provide housing in neighborhoods with little opportunity and relatively high rates of economic and racial concentration. To enable access to opportunity for low-income households and to ensure that patterns of segregation are not further exacerbated, there needs to be a better balance between locating LIHTC projects in high-opportunity communities and locating them in neighborhoods where substantial numbers of low-income households and minorities currently live. To improve the balance, affirmatively further fair housing, and create affordable options in high-opportunity areas, we recommend the following:

- Define “high-opportunity” in the Qualified Allocation Plan according to the previously stated metrics: high quality (or performing) schools, low levels of poverty, high-income census tracts, close proximity to jobs, and low amounts of existing affordable housing.
- Create an incentive for locating projects in high-opportunity neighborhoods. For example, Pennsylvania awards points and has a set-aside of tax credits for proposed projects in high-opportunity locations while other states such as Georgia, Ohio, and

Texas offer points for project proposals in high-opportunity neighborhoods. We recommend that IHDA also offer points for project proposals in high-opportunity areas and/or a set aside.

- Georgia, Texas, and Ohio also provide a basis boost, as permitted now under the Housing Economic Recovery Act, for project proposal in high opportunity neighborhoods. We also recommend that IHDA offer that same eligible basis boost for LIHTC proposals in high-opportunity areas. It is likely that developing in these areas will cost more due to its desirability and commercially valuable location, as well as potential zoning barriers. Providing this boost highly incentivizes developers to build in more opportune areas and enables developers to submit proposals for projects in locations that otherwise would be out of reach.
- IHDA should set an annual deconcentration goal, in order to further engage developers willing to submit non-senior housing proposals in high opportunity areas.
- Provide a Fair Housing Equity map with opportunity areas well-defined, to educate developers on where areas of opportunity are located and as a way for developers to easily state whether or not their proposed project is in a high-opportunity neighborhood.

Affirmative Fair Housing Marketing Plan

Regarding the Affirmative Fair Housing Marketing Plan (AFHMP), we suggest the following in order to clarify the intent of a marketing plan.

For Section III, Direction of Special Marketing Activities, further instruction is necessary. Currently IHDA simply asks applicants to consider several factors without any direction on how to consider them. IHDA should add additional explanation to aid applicants' analysis of this data. Currently, it only asks applicants to "indicate which groups you **believe** are least likely to apply without special outreach" (emphasis added). More effective guidance would ask the applicant to "explain how your **analysis determined** which groups are least likely to apply without special outreach".

The Connecticut Fair Housing Center has published a guide to affirmative fair housing for housing providers that includes a section on how to determine who is least likely to apply⁶. It includes a spreadsheet with protected class demographics and geographies. Applicants can use this spreadsheet to determine which protected groups are least likely to apply. (See the attached matrix for an example.)

By showing the differences in population proportions for the first two columns with the last three columns, the applicant can make a reasonable determination of which groups would be least likely to apply. If IHDA required applicants to use this matrix, the least likely groups to apply would be clearly identified.

Applicants should also be asked to reference the historical patterns of segregation and their influence demand in the neighborhood where their proposal is/will be sited. Academic research

⁶ <http://www.ctfairhousing.org/wp-content/uploads/CFHC-AffirmFurthGuideProviders.pdf>

from around the nation has shown that racial segregation patterns influence housing choices. Other important affirmative marketing policies IHDA should advance include the following:

- Affirmative marketing should include more than simply advertising in media with high minority circulation; owners should also be required to solicit applicants from existing assisted housing waitlists and from among Section 8 voucher holders.
- Clear affirmative marketing expectations should be supplemented by economic incentives to developers who meet or exceed their affirmative marketing goals.
- Affirmative marketing efforts should also be targeted to regional housing mobility programs, to ensure that low income city residents are encouraged to take advantage of and actually benefit from developments in lower-poverty areas.
- Owners in predominantly white communities should be required to maintain and submit evidence that they have aggressively marketed units in nearby minority communities (equivalent data should be reported for projects in predominantly minority communities).
- The state HFA responsible for the development should routinely assess and report the number of units rented to voucher holders at each project address and begin to “test” those developments that are seriously underrepresented.

For Section V, Experience, Staff Training, and Evaluation, IHDA should include a sub-section requiring applicants to identify a fair housing organization that the applicant has chosen to work with. This will ensure that the applicant will have the necessary expertise to implement affirmative marketing. It will also provide an additional assurance that the applicant will comply with fair housing law.

Projects Located in Qualified Census Tracts

We understand the statutory preference for projects located in Qualified Census Tracts, where the development contributes to a concerted community revitalization plan. IHDA should revise page 12 of the Introduction to add the word “concerted”. Under the draft QAP, 9% and 4% projects located in a Qualified Census Tract are eligible for a boost, though this section is missing the required language “where the development of which contributes to a concerted community revitalization plan.” It is essential that “concerted community revitalization plan” be included here and be defined by measurable outcomes.

Without a well defined concerted community revitalization plan, the siting of LIHTC projects in low-opportunity QCTs will only continue in Illinois. Of the 646 QCTs in Illinois in 2013, there is strong evidence of concentration within those tracts and the surrounding community areas. Of the total populations of these counties, 42.0% of residents are black, while only 27.6% are Hispanic and 27.8% are white.⁷ Concentrations within individual QCTs are even starker: 49.2% (318 of 646) QCTs are at least 40% comprised of black residents, a commonly recognized threshold for racial concentration.

“Revitalization Plan” is defined within the Scoring section, but as set forth above, more should be stated to ensure that developers of projects in QCTs demonstrate that such projects are part of

⁷ All data from ACS 2007-2011 5-Year Estimates, Table DP05: Demographic and Housing Estimates.

an effective, real and comprehensive neighborhood improvement plan. To meet those objectives, a concerted community revitalization plan should include potential sources of funding for the plan; a clearly delineated targeted area that includes the proposed project site; detailed policy goals (as opposed to a statement that the project will contribute to housing policy goals within the revitalization plan area); implementation measures along specific time frames for the achievement of such policies and housing activities (these timeframes and measures must be current and ongoing); and assessment of the existing physical structures and infrastructures of the community.⁸

Conclusion

We thank you for the opportunity to provide these comments to IHDA's draft QAP. We look forward to working with IHDA to improve its fair housing practices and more importantly, provide increased quality housing opportunities for racial and ethnic minorities, people with disabilities, and families with children throughout Illinois.

Sincerely,

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⁸ Georgia 2013 Qualified Allocation Plan, 12.

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