

***Building Opportunity:
Civil Rights Best Practices in the
Low Income Housing Tax Credit Program***
*An Updated Fifty-State Review of
LIHTC “Qualified Allocation Plans”*

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**Poverty & Race Research Action Council
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INTRODUCTION AND ACKNOWLEDGEMENTS

Four decades after the 1968 Fair Housing Act, housing segregation in American metropolitan areas remains a serious and continuing problem. In addition to problems of lingering discrimination and racial steering in the housing market, the lack of significant quality, affordable housing opportunities outside high-poverty areas reinforces racial and economic segregation. Numerous social scientists have documented how families in these neighborhoods are cut off from good jobs and schools and other opportunities.¹

¹ See Wilson, William Julius, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy*, Chicago: The University of Chicago Press, 1987. See also Turner Margery Austin & Dolores Acevedo-Garcia, “The Benefits of Housing Mobility: A Review of the Research Evidence,” in “Keeping the Promise: Preserving and Enhancing Housing Mobility in the Section 8 Housing Choice Voucher Program, Conference Report of the Third National Conference on Housing Mobility,” edited by Philip Tegeler, Mary Cunningham & Margery Austin Turner, Washington, DC: Poverty & Race Research Action Council (2005): 9-23 and Nancy Denton & Douglas Massey, *American Apartheid: Segregation and the Making of the Underclass*, Cambridge: Harvard University Press, 1998.

In the face of these problems, and the continuing need to create affordable opportunities outside neglected neighborhoods, we have largely failed to enlist our largest low income housing production program, the Low Income Housing Tax Credit, to become part of the solution.

Our failure collectively to use the LIHTC to reverse segregated housing patterns and open up new opportunities for low income families of color is even more disappointing in light of the strong legal requirement that both the IRS and state Housing Finance Agencies (HFAs) must “affirmatively further fair housing” in the LIHTC program.² As advocates, we have previously documented our concerns about the legal shortcomings of state LIHTC programs, most notably in our 2004 advocates’ guide,³ and these observations have been echoed by legal scholars⁴ and advocates⁵ around the country. Our purpose here, however, is to focus attention on the positive steps taken by some HFAs to incorporate pro-civil rights elements into their state allocation plans. These small steps, taken alone, may not have a large impact, but we think they collectively represent a growing trend among state HFAs to accept responsibility under the Fair Housing Act and to begin focusing on the segregative consequences of their program rules and decisions. In short, this report seeks not to articulate basic legal requirements to which state LIHTC programs must adhere, but to highlight on a policy level some approaches currently being adopted by state agencies that could help families move to new areas of opportunity.

In 2006, PRRAC and the National Fair Housing Alliance commissioned a 50 state study to assess the degree to which states were using the LIHTC to open opportunities for families outside of racially segregated and high poverty neighborhoods.⁶ The results of this research were hopeful – although many developments are still being sited in predominantly poor or minority areas, a growing number of states have located a

² 42 U.S.C. § 3608. Virtually all state HFAs require developers in the program to “certify,” as a condition of initial receipt of the tax credits, that they will build and operate all units in compliance with the Fair Housing Act, prohibiting housing discrimination. *See, e.g.,* NY 2005 QAP (“All low income units in the project are for use by the general public (as defined in 26 CFR part 1 '1.42-9), including the requirement that no finding of discrimination under the Fair Housing Act, 42 U.S.C. 3601-3619, occurred for the project.”). However, most states’ HFAs are not themselves in compliance with the federal requirements.

³ “Civil Rights Mandates in the Low Income Housing Tax Credit Program” (December 2004, PRRAC and Lawyers Committee for Civil Rights) - www.prrac.org/pdf/crmandates.pdf

⁴ See Myron Orfield, “Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit,” 58 *Vand. L. Rev.* 1747 (Nov. 2005) and Florence Roisman, “Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws,” 52 *Miami L. Rev.* 1011 (1998).

⁵ At least three states have seen litigation on these issues: *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan*, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004); *Asylum Hill Problem Solving Revitalization Ass'n v. King*, 890 A.2d 522 (Conn. 2006); and *Inclusive Communities Project, Inc. v. Tex. Dept. of Hous. and Cmty. Affairs*, 08-CV-546 (N.D. Tex.). Administrative and legislative reform have also been pursued in a number of additional states.

⁶ Khadduri, Jill, Larry Buron & Carissa Climaco, “Are States Using the Low Income Housing Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods?” prepared by Abt Associates (2006) and available at: http://www.prrac.org/pdf/LIHTC_report_2006.pdf.

substantial portion of LIHTC units with two or more bedrooms in low poverty, high opportunity areas. However, what we do not yet know – and what is crucial in understanding the civil rights record of this program – is precisely who is being invited to live in these developments. Are suburban LIHTC developments making room and actively marketing to very low income families and Black and Latino families from higher poverty city neighborhoods? Or are LIHTC developments merely passively mirroring the demographics of the local communities where they are built?

*These questions – about **who** is living in LIHTC developments and **where** they are located – go to the heart of state administration of this important program, and are crucial in understanding the “best practices” reported in this guide. For example, a state plan with a strong mandate to site developments in low poverty areas, but with no affirmative marketing requirements, may not be having any desegregative impact at all. Similarly, exemplary siting standards may be irrelevant if a state plan requires local government “permission” for a development to be sited in a particular town, since this all too often allows localities to “veto” LIHTC developments. Congress, in the 2008 Housing Bill HR 3211, has finally required the IRS and state HFAs to report racial and ethnic occupancy data in all LIHTC developments.⁷ It is crucial that this data be collected and distributed by HUD as soon as possible.*

The analysis in this report is the result of a 50-state survey of the “Qualified Allocation Plans” (QAPs) that are adopted annually or semiannually by HFAs to distribute tax credits among qualified developers in each state. We generally used the most recent available QAP, and in several states we also examined the immediate prior QAP. The categories and provisions we looked at included siting requirements to locate family housing outside traditional “low income” and racially segregated neighborhoods; plans that allow suburban development without requiring “local support” for LIHTC developments; rules encouraging access to developments by families using Section 8 vouchers; affirmative marketing requirements to reach out to racial minorities, non-English speakers, and those with disabilities; incentives to house those with disabilities, very low income families, and large families; and racial and demographic reporting. We

⁷ The text of Sec. 2835(d) of HR 3211 states: “(a) In General- Each State agency administering tax credits under section 42 of the Internal Revenue Code of 1986 (26 U.S.C. 42) shall furnish to the Secretary of Housing and Urban Development, not less than annually, information concerning the race, ethnicity, family composition, age, income, use of rental assistance under section 8(o) of the United States Housing Act of 1937 or other similar assistance, disability status, and monthly rental payments of households residing in each property receiving such credits through such agency. Such State agencies shall, to the extent feasible, collect such information through existing reporting processes and in a manner that minimizes burdens on property owners. In the case of any household that continues to reside in the same dwelling unit, information provided by the household in a previous year may be used if the information is of a category that is not subject to change or if information for the current year is not readily available to the owner of the property. (b) Standards- The Secretary shall establish standards and definitions for the information collected under subsection (a), provide States with technical assistance in establishing systems to compile and submit such information, and, in coordination with other Federal agencies administering housing programs, establish procedures to minimize duplicative reporting requirements for properties assisted under multiple housing programs.”

found that a fair number of states had one or more of these provisions; but few, if any, had a sense of comprehensive fair housing planning in their QAP. If there are exemplary provisions that we failed to spot or report, we hope that readers of this guide will contact us so that a later edition can be updated to reflect the full range of these “best practices.”

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WHERE ARE AFFORDABLE HOUSING OPPORTUNITIES LOCATED?

A. SITING RESTRICTIONS/INCENTIVES

One of the primary civil rights considerations for state HFAs is ensuring that tax credit-subsidized developments do not perpetuate or exacerbate racial segregation. In particular, state HFAs should avoid practices which concentrate affordable housing opportunities (disproportionately needed by lower-income minority families) only in higher poverty or racially segregated neighborhoods. Instead, tax credit programs should discourage or prohibit developments likely to do so, and incentivize affordable housing developments in neighborhoods with rich economic and educational opportunities – often in suburban areas. In short, state agencies should be using their tax credit dollars to promote quality, affordable housing opportunities in neighborhoods with better educational and job choices. Such program design would not only contribute to desegregation, but also offer lower-income, minority families a choice to move to neighborhoods that, studies show, can measurably improve their lives.⁸

1. Mandatory Restrictions to Prohibit Increases in Racial and Economic

Concentration. *To promote the objectives of racial and economic integration, some state HFAs already incorporate terms into their QAPs to discourage or prohibit developments that would exacerbate segregation. For example, using a geographic focus to avoid areas where projects will increase concentration, states may prohibit (subject to exceptions) developments in designated census tracts:*

The North Carolina plan requires that “projects cannot be in areas of minority and low-income concentration (measured by comparing the percentage of minority and low-income households in the site’s census tract with the community overall),” but notes that exceptions may be made for projects in community revitalization plan (CRP) areas.
(NC 2008 QAP, p. 23)

Another approach limits the concentration of developments not by restricting sites in specific areas, but by prohibiting the concentrated siting of tax credit developments themselves. This approach, however, has the drawback of unnecessarily limiting developments in high-opportunity areas if more than one site is identified (or if one development is for the elderly and one is for families).

“Staff will only recommend, and the Board may only allocate, Housing Tax Credits . . . to more than one Development . . . in the same calendar year if the Developments are, or will be, located more than one linear mile apart as determined by the Department.” Therefore, an elderly development cannot be awarded within one mile of a family development in the same calendar year. “For purposes of this rule, any two sites not more than one linear mile apart are deemed to be ‘in a single community.’”

⁸ See Turner and Acevedo-Garcia (2005).

(TX 2008 QAP, p. 18)

Alternatively, prohibiting the number of concentrated tax credit developments based on the particular needs and circumstances of a market allows for the maximum number of developments to be built in high-opportunity areas while controlling for possible racial/economic segregation.

“The proposed rental project must meet AHFA’s market feasibility requirements... The market study must demonstrate an adequate market for the proposed units and that the proposed project would not adversely impact any existing AHFA projects or create excessive concentration of multi-family units.”
(AL 2008 QAP, p. 7-8) (italics omitted)

In addition, the limitation could be avoided by making the rule inapplicable to sites located in a census tract with greater economic opportunity, e.g., a poverty rate at least five percent below the metropolitan average or an average household income more than 120% of the Area Median Income.

The flip side of promoting development in high opportunity suburban areas is protecting low income housing opportunities in rapidly gentrifying urban neighborhoods.⁹ We did not find specific models for such protections in the state QAPs, although a few states have important general anti-displacement provisions in their QAPs:

“Permanent displacement of tenants is strongly discouraged. The Authority reserves the right to reject any applications that fail to minimize permanent displacement of tenants.”
(NH QAP 2008, p. 9)

2. Using Scoring to Discourage Racial and Economic Concentration. *While mandatory restrictions have obvious advantages in terms of controlling the excessive concentration of sites, states can also use the scoring component of their QAPs to affect site selection. For example, bonus points can be awarded to proposals which will offer affordable housing in high-opportunity areas to ensure that the agency prioritizes selecting these developments. Different state QAPs have identified various criteria to measure the suitability and quality of the neighborhoods selected.¹⁰ Note, however, that to assess the “strength” of a point system’s incentives, it is essential to know the total number of points on the QAP scale.*

Site evaluation and scores include consideration of neighborhood characteristics which include, “Trend and direction of real estate development and area economic health,” and the “concentration of affordable housing.” (NC 2008 QAP, p. 10)

⁹ See Audrey McFarlane, “The New Inner City Class Transformation, Concentrated Affluence and the Obligations of the Police Power,” 8 *U. Pa. J. Const. L.* 1 (January 2006).

¹⁰ See Rodda and Khadduri (2004) (recommending that states use other indicators of places where the private market is not responsive to increases in rents, such as places where rents are rising without an accompanying rise in construction permits).

Points are awarded for a “[p]roject...located in census tract in which the median income of the census tract exceeds the area median income.”
(LA 2007-2008 QAP, p. 63)

“DHCD will award 6 points to projects located in a census tract where the poverty rate is below 15% and the sponsor provides a detailed affirmative fair marketing plan for attracting those tenants least likely to apply based on the location of the units.”
(MA 2008 QAP, p. 37)¹¹

Points awarded for projects sited in non-CDBG eligible census tracts.
(NV 2008 QAP, p. 40)

West Virginia provides a graded scale of points awarded for a property located in a county where that county’s LIHTC program unit production as a percentage of the 2000 census renter-occupied housing units is included and falls between certain percentages. A maximum of 40 points is awarded for property located in a county where the percentages are included in or fall between 0.00% and 1.86%.
(WV 2007-2008 QAP, p. 19)

Additionally, the use of a state’s scoring component to incentivize anti-displacement measures can also be beneficial in combating racial/economic segregation.

“A Project involving rehabilitation of existing multi-family rental housing stock containing 5 or more units that also provides protection against displacement and substantial increases in housing costs attributable to the rehabilitation will receive 3 points.” (ME 2008-2009 QAP, p. 14)

Naturally, to avoid this incentive covering inappropriate areas (such as lower-income neighborhoods not facing significant gentrification), it is critical that states using it include in their QAPs a clear definition of what constitutes an area facing displacement or a housing cost increase.

Other Quality of Site Issues

3. Mandatory Requirements to Encourage Sustainable Development in High Opportunity Areas. *In addition to policies that minimize racial/economic segregation, states can also use threshold requirements to ensure that projects are built in a sustainable, environmentally-friendly way, and in choice locations. This is critical given*

¹¹ A 15% standard for the poverty rate in an area, however, is not recommended. Much social science research on low-poverty areas uses a standard of less than 10% poverty, including the companion report documenting the track record of states’ tax credit programs. As that report notes, using a standard of 10% and below to designate low-poverty census tracts still means 58% of metro-area populations live in low-poverty areas. See Khadduri, *supra* at note 6, at 6.

the disproportionate risk of health problems due to heightened exposure to pollution and stress in higher poverty neighborhoods:

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Threshold #2: Quality of Site - All projects must be located on sites that are acceptable by the Department of Housing and Community Development (DHCD). “Sponsors should review their sites in light of the sustainable development principles outlined in . . . this QAP.” These principles include: redeveloping community centers and neighborhoods, concentrating development to create walkable communities, promoting equitable sharing of the benefits and burdens of development, restoring and enhancing the environment, conserving natural resources, building housing to meet the needs of people of all abilities and incomes, increasing access to transportation, supporting the growth of new and existing local businesses, fostering sustainable businesses, and supporting local plans that have broad public support.
(MA 2008 QAP, p. 21)

“DHCD will award six points to any family housing project located in a municipality which has less than 10% subsidized housing. DHCD will make this determination based on a municipality’s percentage of low and moderate income housing as identified in DHCD’s most recent subsidized housing inventory. The Department wishes to encourage development in such communities, as long as the proposed projects are consistent with . . . sustainable development principles . . .”
(MA 2008 QAP, p. 34)

4. Using Scoring to Discourage Development in Environmentally Distressed Neighborhoods. *State HFAs should discourage or prohibit the placement of low-income, minority housing in high pollution areas. Some states have chosen to incentivize the location of their tax credit developments in environmentally clean areas by reducing the number of points awarded to a plan in which the units are to be located near waste sites.*

“INAPPROPRIATE LOCATIONS - Inappropriate locations such as locations in flood areas, noise areas, near hazardous site areas (above ground storage tanks of hazardous materials), airport clear zones, and those sites listed in the EPA CERCLIS data base, etc., may receive up to a negative 200 points.”
(WY 2008 QAP, p. 21)

“Adverse utility location, such as a highline going through the site . . . will score low. If these factors are absent the score will be high.” (KS 2008 QAP, p. 27)

Projects located within one mile of a landfill, garbage dump, trash incinerator, nuclear power plant, oil/chemical refinery, or unremediated Superfund or toxic waste site will have two points deducted from their score.
(NJ 2008 QAP, p. 41)

5. Using Scoring to Encourage Development in High Opportunity Areas. *Policies that incentivize racial and economic integration are likely to be intertwined with other*

amenities associated with high opportunity areas, such as a large supply of entry level jobs and efficient, easily accessible public transportation. A number of states use scoring to directly reward development plans that include these additional amenities -- tools that will increase access to opportunities and improve the quality of life for the targeted population.

Developments demonstrating linkages with public transportation will receive 20 points.
(WI 2007-08 QAP, p. 6)

Projects that are within half a mile of a primary/elementary school, day care center, food store, community center or faith-based organization, public transportation, or a park shall receive one point for each positive land use.
(NJ 2008 QAP, p. 41)

Points are awarded for different components of “responsible growth,” such as five points for a site located that is defined as a “transit oriented development” by the Connecticut General Assembly, one point for a site located within one-half mile from a grocery store, and one point for a site located within one-quarter mile of a public park or recreation center.
(CT 2008 QAP, p. 21)

In awarding bonus points for such facilities and services, states should also specify that the points are available so long as the developer can document that amenities are being developed and will be available at the time of the placed-in-service date of the tax credit property. Requiring that the amenities be currently operating can function to exclude proposals in new growth areas or those that complement existing community development plans where such amenities are coming on-line with new housing.

B. MINIMIZING BARRIERS CREATED BY LOCAL PARTICIPATION IN SITE SELECTION

*The applicable federal statute covering local involvement in the siting of tax credit properties, 26 U.S.C. § 42(m)(1)(A)(ii), requires only that the agency do no more than notify “the chief executive officer (or the equivalent) of the local jurisdiction within which the building is located of such project and provides such individual a reasonable opportunity to comment on the project.” However, many state plans instead require actual or de facto **approval** of LIHTC projects by local governments, and the central barriers housing developers face in proposing affordable family developments outside of economically or racially concentrated areas are those raised by local governments which often withhold approval or financial support for sites within their boundaries. Unfortunately, this local involvement in the selection of tax credit sites is above and beyond the control localities already have over development through zoning and land use regulations. These regulations themselves already allow municipalities to limit much affordable housing development to pre-selected areas. State HFAs which require local*

*approval or contribution **beyond** notification and comment thus grant even further control specific to affordable tax credit developments – precisely the housing most often blocked by NIMBY-driven local politics.*

The result is a metropolitan dynamic where too many municipalities attempt to “opt out” of LIHTC housing, leading to concentration in areas of central cities or older suburbs with higher poverty or concentrated minority populations. State HFAs can address this dynamic by minimizing local approval and contribution requirements or incentives. Such rules not only eliminate the developments most likely to offer integrated housing opportunities, but also discourage developers from even seeking appropriate sites or submitting proposals for them. (If the fate of a project rests on local approval, developers are unlikely to approach the state HFA – or even a municipality – with an affordable housing proposal not desired by the locality, particularly where the locality has acted to block or discourage such developments in the past.¹²)

1. Limiting Local Participation to the Statutory Minimum. *The best practice in this area is to limit local approval to the statutory minimum of notification.¹³ Allowing more than this ensures local governments have greater leeway to steer tax credit developments into high poverty areas. Those states that appear to subscribe only to the statutory minimum include California, Connecticut, Maine, Michigan, Nebraska, Nevada, New Jersey, Tennessee, Washington DC, and West Virginia.*

Additional points are given to projects where the local government adopts a formal affordable housing initiative and the project application is consistent with the initiative. (CA 2008 QAP, p. 26)

“The Code requires that the chief executive officer of the municipality in which the project is to be located be given the opportunity to comment on the project. The application may include a letter from the chief executive officer of the municipality or NJHMFA staff shall notify the chief executive officer of the municipality and allow him or her a reasonable opportunity to comment on the project.” (NJ 2008 QAP, p. 46)

“The Authority, at the time it issues the Reservation, shall notify the chief executive officer of the locality in which the project is to be located of the

¹² The broad “chilling effect” of these local approval or contribution requirements can be so strong that it wholly discourages developers from even considering sites in certain areas with reputations for opposition to affordable housing. Because of the costs of seeking appropriate sites and acquiring site control pending submission and approval of a tax credit proposal, or because of their desire to maintain friendly relationships for other projects in those localities, developers will only rarely seek to develop in sites where they anticipate community or local government opposition. As a result, state HFAs are unlikely to see many applicants in areas hostile to affordable housing.

¹³ Another approach to addressing local land use barriers would involve liberating developers participating in the state tax credit and other state affordable housing programs from zoning barriers in jurisdictions that do not have a “fair share” of affordable housing. A developer’s ability to override local zoning barriers has been created by statutes in states such as Illinois, Connecticut, Massachusetts, and California. While such an approach may not be within the state HFA’s ability to implement in itself, agencies should support such legislation as is helpful to their goal of diversifying the sites of affordable housing in a state.

proposal, and shall give reasonable opportunity for comment by that chief executive officer.” (MI 2008-09 QAP draft, p. 16)

We notice that some states simultaneously incentivize and de-incentivize the reduction of community barriers. For example, Wyoming awards 20 points for the reduction of community barriers and lists the ways in which this can be achieved. (WY 2008 QAP p. 22-23) On the other hand, it also gives significant points (65) to those projects that have support or contributions from local sources. (WY 2008 QAP, p. 24) Such internal conflicts are reflective of a lack of comprehensive fair housing planning.¹⁴

Several states have no local approval process, but gave points for local government contribution.

Many of the current state QAPs provide insight into practices that should be avoided. Mandatory requirements for local approval are found in: Arkansas, Maryland, Kansas, New Mexico, and Oklahoma. Maryland requires both a local contribution and a resolution supporting the project from the governing body and highest elected official in that jurisdiction. While not a mandatory requirement, South Dakota specifies that it can reserve and allocate or not reserve tax credits for any project it does not believe furthers the goals and purposes set forth in Section 42 or in its plan. As articulated in the plan, this unfettered discretion can be based on such information as the comments of officials of local governmental jurisdictions, and serves as a significant impediment to fair housing.

*Almost as bad are states that use the scoring component of their QAPs to incentivize community approval. See, for example: Indiana, Louisiana, Massachusetts, Montana, New Hampshire, Ohio, Oklahoma, Pennsylvania, South Dakota, and Wisconsin. In Massachusetts, for instance, in addition to extra points being given for community support, the HFA also has the discretion to reject a tax credit application if unconvinced that the sponsor/owner has made every reasonable effort to obtain support. In Pennsylvania, developers are awarded up to thirty points for demonstrated local support through a publicly approved community plan or significant funding commitment. Like scoring which prioritizes approval, QAPs which award extra points for local **contribution** in the form of subsidies for the development also create a barrier for developments in some municipalities – particularly those smaller or suburban jurisdictions which, unlike larger cities, do not have formal housing subsidy programs of their own.*

Additionally, some states give preference in lieu of actual points to projects with substantial local approval. See, for example, Rhode Island and Montana.

¹⁴ See also Rodda and Khadduri (2004)(recommending that states make LIHTC allocations part of a state housing strategy that also reduces regulatory barriers to affordable housing. in order to reduce barriers, states can establish mandatory, preemptive building codes and standards; establish one-stop permitting to reduce delays that add to development costs; and mandate the conditions under which local governments may establish impact fees).

WHO HAS ACCESS TO LIHTC HOUSING?

C. AFFIRMATIVE MARKETING

Promoting the development of tax credit units throughout metropolitan areas, however, is but one component needed to ensure they provide racially- and economically-integrated housing opportunities for families. For, all too often, even when laudable state programs create affordable housing choices in high-opportunity areas, their full potential to provide desegregated housing goes unrealized when the residents are drawn from families mirroring the predominantly-white racial composition of the neighborhood.¹⁵

Fully realizing the potential of the program, then, requires planning in the state HFA's QAP. In addition to siting affordable units in high-opportunity areas, some state HFAs have also sought to promote and increase access to tax credit units by families in higher-poverty and segregated neighborhoods by requiring affirmative marketing which targets marketing to groups least likely to apply for the units, specifically those outside the immediate geographic area of the development. Without such affirmative outreach efforts, segregated housing patterns can all too easily be recreated in the tax credit program as eligible families seeking to leave high-poverty areas are unaware of the chance to move to higher-opportunity neighborhoods. This can result in affordable housing units in high opportunity areas that are not being used by those who need them most.¹⁶

The industry standard in terms of affirmative marketing (as outlined by HUD in its HOME PJ (participating jurisdiction) policy) is to require the adoption of affirmative marketing procedures that must include:

- (1) methods to inform the public, potential tenants, and owners about fair housing laws and the affirmative marketing policy;*
- (2) descriptions of what a project owner must do to market housing assisted with the subject funds (e.g. use the equal opportunity logotype or slogan);*
- (3) statement of procedures for how project owners (and developers) will inform persons who are not likely to apply without special outreach efforts about the housing;*
- (4) description of how the records that document actions taken to affirmatively market will be maintained;*

¹⁵ Of course, affirmative marketing is also a critical component of promoting desegregation wherever units are located. So, for example, in racially diverse and/or predominantly minority areas, affirmative marketing should include marketing to socioeconomic groups least represented in the community (also those least likely to apply).

¹⁶ Gordon, Adam, "Making Exclusionary Zoning Remedies Work: How Courts Applying Title VII Standards to Fair Housing Cases Have Misunderstood the Housing Market," *24 Yale L. & Pol'y Rev.* 437 (Spring 2006).

(5) description of how the developer will assess the effectiveness of these actions; and

(6) a description of corrective action(s) to be taken when requirements are not met.¹⁷

Affirmative marketing may take a wide variety of forms, including: “governmental subsidies to private housing referral agencies in order to ‘counsel’ homeseekers, promotional campaigns aimed toward selected audiences, priority to one group for occupancy in new housing, site selection for new housing, increased monitoring of realtor steering activity through the use of “testers,” prosecuting infractions wherever possible, and promoting high quality education, public facilities, and police security...”¹⁸

While all QAPs should require a threshold level of affirmative marketing, state HFAs may also award bonus points for conducting specific types of additional marketing and outreach beyond this threshold level. Further, it is critical that actual numerical goals be set and the affirmative marketing practices of the subject tax credit developments be monitored to ensure compliance. State HFAs should engage in post-development review to ensure that these affirmative marketing techniques are actually being implemented.

1. Mandatory Requirements to Ensure Affirmative Marketing. *A solid pre-development method of ensuring that principles of fair housing are actually being incorporated into the construction of these tax credit developments is to make mandatory an affirmative marketing plan before such developments are approved. The following states detail in their QAPs the required submission of an affirmative marketing plan:*

Threshold #13: Fair Housing Narrative requires every sponsor to detail how the marketing “will incorporate the Department’s Fair Housing principles provided in Appendix J. The narrative also should clearly describe the efforts that will be made to ensure affirmative outreach to those households and individuals least likely to apply for the affordable units within a project.”
(MA 2008 QAP, p. 25)

“The sponsors of the project must be committed to undertake strong affirmative measures to ensure that the activity funded promotes regional economic, social and racial integration and the integration of persons with disabilities... The sponsors must agree to comply with all affirmative marketing...”
(CT 2008 QAP, p. 6)

¹⁷ “Affirmative Marketing,” published by the U.S. Department of Housing and Urban Development, and available at <http://www.hud.gov/offices/cpd/affordablehousing/training/web/crosscutting/equalaccess/marketing.cfm>.

¹⁸ Bishop, Dorn, “Fair Housing and the Constitutionality of Governmental Measures Affecting Community Ethnicity,” 55 *U. Chi. L. Rev.* 1229, 1237-38 (Fall 1988).

“At the time of submission of the documentation, the Development Owner must also submit a Management Plan and an Affirmative Marketing Plan (as further described in the Carryover Allocation Procedures Manual).”
(TX 2008 QAP , p. 64-5)

“The applicant must complete an Affirmative Fair Housing Marketing Plan (Form AFHM-98). All items on the form must be completed correctly including all attachments. The applicant must include on the form a description of the outreach, marketing, and advertising methods used in order to affirmatively market the project.”
(OH 2008 QAP, p. 32)

“Affirmative Marketing Plan: Describe how you will market your project to minorities or hard-to-reach very low-income households. Explain in detail.”
(WY 2008 Current Year Summary, p. 74)

It is also good policy for the state QAPs to outline potential ways in which a tax credit developer can engage in effective affirmative marketing. This will ensure that a developer knows how to comply with the requirement and can put into effect the best practices as determined by the applicable housing authority. Connecticut’s affirmative marketing regulations for affordable housing developments are a good example of basic affirmative marketing principles. They include the following types of requirements:

- (1) Making Announcements to social service agencies and other community contacts serving low-income minority families in the region (including churches,¹⁹ civil rights organizations, housing authorities, and legal services organizations);*
- (2) Offering Assistance to minority applicants in processing applications;*
- (3) Marketing efforts in geographic areas of high minority concentrations within the housing market area;²⁰*
- (4) Beginning marketing efforts prior to the general marketing of units, and repeating again during initial marketing, at fifty percent (50%) completion, and thereafter at reasonable period intervals with respect to resales or rentals; and,*
- (5) Collecting basic racial and ethnic information for all residents and persons on the wait list for the development.*
- (6) In an affordability plan or affirmative fair housing marketing plan for an affordable housing development, preferences in application procedures or*

¹⁹ The reference to “churches” should be expanded to all religious organizations and denominations.

²⁰ This provision assumes the units being marketed are outside high minority concentrations. More generally, the provision should require units to be marketed to those least likely to apply and/or socioeconomic groups who are under-represented in the immediate area of the development.

*occupancy for existing residents of the subject municipality shall not be utilized unless members of racial and ethnic groups identified as least likely to apply receive equally-weighted preferences.*²¹

While most states do not provide this information in their QAPs, some do require that the affirmative marketing plan explain in detail the tactics to be used. An HFA's review of this aspect of the plan for potential effectiveness is a good practice.

The New Jersey Mortgage and Housing Finance Agency encourages developers to “affirmatively market their projects ... [Developers] shall submit an Affirmative Fair Housing Marketing Plan, which, in short, documents how the project will be marketed to those people who are least likely to apply. For instance, if the proposed development is located in an area predominantly populated by Caucasians, outreach should be directed to non-Caucasians.” (NJ 2008 QAP, p. 33-34)

Preference is given for applications that include plans to market the development to persons on public housing waiting lists. “To receive [this preference], the Applicant must include in their marketing plan a description of outreach, marketing and advertising methods used to attract individuals on public housing waiting lists as well as evidence that the public housing agencies have been contacted.” (SC 2008 QAP, p. 6)

“For special needs housing projects, describe in detail the services that will be provided or coordinated for the property's residents and how client outreach will occur. Describe how the housing units and/or services proposed will be marketed to eligible participants and what kind of screening procedure, if any will be used.” (WY 2008 Current Year Summary, p. 72)

“DHCD will award six points to projects located in a census tract where the poverty rate is below 15% and the sponsor provides a detailed affirmative fair marketing plan for attracting those tenants least likely to apply based on the location of the units.” (MA 2008 QAP, p. 37)

2. Using Scoring to Incentivize Affirmative Marketing. *While the best practice is to make affirmative marketing a mandatory requirement, a second-best alternative is to incentivize specific affirmative marketing techniques through the scoring component of the QAP.*

²¹ CT ADC § 8-30g-7 (a) (3). See also CT ADC §§.8-37ee-302 (“Affirmative fair housing marketing process”), 303 (“Application process”), 304 (“Selection process”), 305 (“Selection methodology”), 306 (“Insufficient number of least likely to apply applicants”), and 307 (“Post occupancy requirements”). The best practice is to avoid residency preferences altogether since, by their nature, they reinforce the pattern of segregation in the locality. However, if the state does wish to permit a residency preference, we recommend that the applicant be required to show that the preference will not create or maintain segregated housing patterns or have an adverse impact on residents due to race or ethnicity.

Points are awarded to projects that market units to households listed on public or Indian housing agency waiting lists.
(NM 2008 QAP, p. 18)

However, we caution that merely utilizing the immediate locality's public or subsidized housing waiting list may not constitute affirmative marketing unless the composition of that list differs from the racial/ethnic composition of the area proposed for the development. In the subsequent section, we discuss the need for preferences targeted to subsidized voucher holders and waiting lists to include all area housing authorities, not merely the immediate jurisdiction.

3. Language Access and Marketing to Non-English Speaking Applicants. *Without question, tax credit housing has to be accessible to all people. Nevertheless, a few state HFAs go even further and request affirmative marketing to those in hard to access communities. While our primary emphasis in this report has been on race and ethnicity, furthering fair housing for language minorities is also an important fair housing goal.*

OKansas has placed under the “Information and Education” section of its list of potential fair housing activities the following: “[p]ublish bilingual fair housing information for non-English speaking residents in the community.”
(KS 2008 QAP, p. 54)

D. PREFERENCES FOR SECTION 8 VOUCHER HOLDERS AND FAMILIES ON SUBSIDIZED HOUSING WAITING LISTS

1. Promoting Section 8 Voucher Access in High-Opportunity Areas. *State HFAs committed to using tax credit housing to promote racial and economic integration should also seek to ensure that those units are accessible to very low income families, the population most in need of access to good jobs and schools. State HFAs should work to ensure that tax credit developments affirmatively include families participating in all area Section 8 Housing Choice Voucher programs, as well as those on waiting lists for subsidized housing of all types. Looking at metropolitan regions as a whole, families in the Section 8 program (and on waiting lists) are at the lowest income levels, often overwhelmingly minority, and confined to lower opportunity areas of the region.*

Some state HFA policies award bonus points to developments which proactively solicit voucher tenants by, for example, giving them preference on housing unit waiting lists. In the case where the state agency or a locality has project-based Section 8 subsidies (or other subsidies) available, the state HFA can also reward developments which reserve a specified number of units for project-based housing subsidies. It is important to remember that LIHTC managers are prohibited from discriminating against Section 8 voucher holders. (26 USCS § 42 (h)(6)(B)(vi)). State HFAs should also make clear that the QAP preferences for households on subsidized housing waiting lists must be extended

to existing Section 8 voucher holders. While we are not aware of any state HFAs that currently do so, QAPs could be written to also award points for developments which set-aside a certain percentage of units for such families.

A crucial component of any preference for voucher holders, however, is ensuring that the preference is available to all voucher holders, not merely those from the municipality where the development is located. Unless this preference is affirmatively extended to all voucher holders – or at least all voucher holders in a single metropolitan area – the preference will only serve voucher families in the immediate area, reinforcing existing patterns of metropolitan segregation (e.g., making a suburban tax credit development open to voucher holders in that locality but not available to predominantly minority voucher holders from the central city).²²

“A maximum of ten points will be awarded for a firm commitment of federal project-based rental subsidies for at least 20% of total project units. Applicants proposing to convert tenant-based Housing Choice Vouchers (Section 8) to a project-based subsidy (pursuant to 24 CRF Part 983) must submit a letter from the issuing authority in a form approved by the Agency.”
(NC 2008 QAP, p. 11)

Five points will be awarded to plans that give preference in the selection of tenants to persons from public housing waiting lists or other existing waiting lists for subsidized housing.
(NY 2008 QAP 10)

Awarding one or two points for prioritizing public housing tenants in new developments or using Section 8 waiting lists are weaker incentives. Like the stronger point incentives, they do not require the developers to accept vouchers from a large geographical area. Below are examples of smaller point awards:

“Public Housing Waiting Lists Projects that can demonstrably provide housing to persons on waiting lists for public housing will be eligible for points in this category. To meet this requirement the local public housing authority must be a general or co-general partner. 3 point”
(NH 2008 QAP, p. 15)

“Two (2) points may be earned by applicants who enter into a written agreement with the local public housing representative to give priority to households on waiting lists for subsidized or public housing.”
(CO 2008 QAP, p. 30)

²² See Korman, Henry, “Underwriting for Fair Housing? Achieving Civil Rights Goals in Affordable Housing Programs,” *Journal of Affordable Housing* 14(4): 292-331 (Summer 2005). Available at: www.prrac.org/pdf/Korman.pdf.

“Maximum Number of Points - 1...Applicant executes and provides to the Authority a written agreement signed by all parties (the Applicant and the appropriate official for the local or regional public housing representative) with the local or regional public housing representative agreeing to give priority to households on waiting lists for subsidized or public housing.”
(IN 2007-2008 QAP, p. 30)

“One (1) point will be awarded for developments that are utilizing local public housing waiting lists and/or Section 8 existing waiting lists. The application must contain a letter from the appropriate agency in order to receive this point.”
(DE 2008 QAP, p. 40)

Few HFAs use access to housing by Section 8 Housing Choice Voucher holders as a general criterion for awarding tax credits to developers. Without a definite set-aside, threshold requirement or point valuation it is unclear how much weight these criteria will have on the state’s tax credit allocation. In general, we found that state HFAs need to offer a stronger point incentive for giving preference to families on Section 8 and subsidized housing waiting lists. Otherwise, the emphasis on providing housing for people with Section 8 vouchers could be undermined by other criteria during the selection process. Missouri provides an example of a weak Section 8 incentive:

Among the selection criteria for a development is whether the proposal makes units available for people who have Section 8 Housing Choice Vouchers.
(MO 2008 QAP, p. 9)

There are, however, some HFA’s that provide stronger incentives to creating tax credit unit set asides for public housing recipients. Wyoming is one such state; it requires as a general criterion that a development plan receive two of its points from its commitment to giving preference to individuals and families on public housing waiting lists.

“PUBLIC HOUSING WAITING LISTS - (Maximum 2 pts. Must score a minimum of 2 pts.) Proposals that commit to giving preference to individuals and families on the public housing waiting lists, and commit to limiting the gross rent accepted from all sources to not exceed the maximum percentage as presented in the application, will receive 2 points.”
(WY 2008 QAP, p. 24)

2. Monitoring of Voucher Access. *As recipients of federal subsidies, owners and operators of tax credit subsidies are prohibited from discriminating against participants in the Section 8 Housing Choice Voucher program. 26 U.S.C.A. § 42(h)(6)(B)(iv) (West 2006). The previous section addressed practices state HFAs can adopt to promote access to tax credit developments. This section describes practices state HFAs can adopt to better ensure that owners throughout the state’s portfolio of tax credit properties are not illegally discriminating against Section 8 voucher holders. Monitoring and preventing such discrimination is important because it makes these housing opportunities available to a population that, in many metropolitan areas, is lower income and more*

disproportionately minority than the population normally reached by tax credit developments.

Creating a certification requirement that owners have not refused to rent to Section 8 voucher holders is one way to ensure owners do not discriminate against low-income minorities in their rental practices. QAPs that require annual proof of compliance offer even stronger enforcement mechanisms since the owner must continuously provide certification or risk perjury and forfeit the credit. The following are examples of certification requirements:

“[A]t least annually, for the entire 15-year compliance period and the extended use period, the owner of a low-income housing project shall certify under penalty of perjury that...an owner cannot refuse to lease a unit in the project to an applicant because the applicant holds a voucher or certificate of eligibility under Section 8.”

(CT 2008 QAP, p. 34 & 36)

“Applicants must not use minimum income criteria to reject Section 8 Housing Choice Voucher Participants when their income reflects that they can pay their portion of the rent.”

(SC 2008 QAP, p. 6)

“As a part of the site inspection, a review will be conducted of the owner’s marketing efforts to attract special needs populations and Section 8 applicants as outlined in the extended low-income housing commitment.”

(TN 2008 QAP, p. 34)

“Federal statutes prohibit discrimination against Section 8 certificate and voucher holders. DCA will closely monitor whether the tenant application process is structured to avoid such discrimination or whether any actions are taken to discourage Section 8 Rental Assistance certificate or voucher holders from applying. Likewise, all lease provisions must be compatible and not in conflict with Section 8 leases.”

(GA 2008 Draft QAP, p. 7-8)

In addition, to better monitor the success of tax credit developments in placing Section 8 voucher holders in units, state HFAs could add a requirement that all developers participating in the program submit with their other annual reports a listing of the disposition of all inquiries from Section 8 voucher holders. Such reporting would not merely capture the success in placing voucher holders in the property, but also serve to document the success of the development’s marketing in reaching such families.

E. PROMOTING AFFORDABLE HOUSING FOR PEOPLE WITH DISABILITIES²³

²³ See Rodda and Khadduri (2004) (stating that “[w]hile in general people with disabilities are just as successful using vouchers as other voucher-holders, there is suggestive evidence that those with certain

While it is indisputable that the tax credit units must be designed to comply with the Fair Housing Laws and the Americans with Disabilities Act as well as any state and local civil rights legislation, some states go even further to meet the needs of people with disabilities and ensure their success in securing affordable housing. This entails going above and beyond the required supportive services, affirmatively marketing to those with disabilities, and setting aside disability accessible units in an integrated environment.^{24, 25} North Carolina provides a strong example of an expansive policy toward promoting fair housing for people with disabilities.

“At a minimum, Targeting Plans must include:

- (a) A description of how the development will meet the needs of the targeted tenants including access to supportive services, transportation, proximity to community amenities, etc.
- (b) A description of the experience of the local lead agency and their capacity to provide access to supportive services, and to maintain relationships with the management agent and community service providers for the duration of the compliance period.
- (c) A Memorandum of Understanding (MOU) between the developer(s), management agent and the lead local agency. The MOU will include:
 - (i) A commitment from the local lead agency to provide, coordinate and/or act as a referral agent to assure that supportive services will be available to the targeted tenants.
 - (ii) The referral and screening process that will be used to refer tenants to the development, the screening criteria that will be used, and the willingness of all parties to negotiate reasonable accommodations to facilitate the admittance of persons with disabilities into the development.
 - (iii) A communications plan between the development management and the local lead agency that will accommodate staff turnover and assure continuing linkages between the development and the local lead agency for the duration of the compliance period.
- (d) Certification that participation in supportive services will not be a condition of tenancy (not required for projects where all of the units are providing transitional housing for the homeless).

types of disabilities and service needs have a more difficult time finding housing that meets their needs and has willing owners”) (citations omitted). This statement by Rodda and Khadduri suggests the need for affirmative marketing and required set asides of tax credit units that are disability accessible and/or provide the necessary supportive services.

²⁴ As defined in the Iowa 2006 QAP, an integrated setting means: “mixed population housing that is integrated “in a community” rather than in certain buildings. The property may not limit occupancy based on the type of disability or election of services offered.” (p. 33).

²⁵ See Rodda and Khadduri (2004) (stating that “[i]n recent years people with disabilities and their advocates—supported by the U.S. Supreme Court’s Olmstead decision—have focused on the right of those with disabilities to live as independently as possible”).

- (e) Agreement that for a period of ninety (90) days after the initial rent-up period begins, the number of units specified in the application for persons with disabilities will be held vacant other than for such population(s).
- (f) Agreement to maintain a separate waiting list for persons with disabilities and prioritizing these individuals for any units that may become vacant after the initial rent-up period, based upon the minimum number of units specified in the application.
- (g) Agreement to affirmatively market to persons with disabilities.
- (i) Agreement to accept Section 8 vouchers or certificates (or other rental assistance) as allowable income as part of property management income requirement guidelines for eligible tenants and not require total income beyond that which is reasonably available to persons with disabilities currently receiving SSI and SSDI benefits.”

(NC 2008 QAP, p. 17-18)

Additionally, New Jersey provides a substantive list of some of the supportive services a tax credit unit can offer. An LIHTC best practice is to provide targeted supportive services that will most benefit the subject community. Additionally, these services need to be provided on an on-going and regular basis:

“Supportive services range across a wide continuum of care (such as meals preparation, assistance with housecleaning, etc.) to high level (such as substance abuse and mental health supports) to medically intense (such as skilled nursing) and will vary from person to person depending on their particular physical, psycho-social, and/or mental limitations, and may vary for one person over time. Each special needs tenant does not have to utilize all of the services provided by the project; however, the services must be available. If tenants are not utilizing the services that are available, NJHMFA may call into question whether or not the project is serving a special needs population.”

(NJ 2008 QAP p. 12)

“Developments designed for special needs populations (elderly, handicapped, mentally ill, developmentally disabled) and/or which provide continuing supportive services to assist families in becoming more self-sufficient or which address identified tenant needs as follows” will receive 15 points. (ID 2008 QAP, p. 17) Moreover, “[s]ponsors must provide a definitive Supportive Services Plan, a firm commitment from a supportive services provider, and documentation from the provider as to their background and experience, in providing the proposed services. The services to be provided must be offered on an on-going and regular basis.”

(ID 2008 QAP, p. 18)

Further, in compliance with the principles of fair housing, incentives to promote the full integration of people with disabilities in individualized housing is a best practice:

To qualify for a service enriched set-aside “(1) [t]wenty percent (20%) or approximately \$1,163,000 of the State housing per-capita Tax Credit [must] be set-aside for developments that serve people with disabilities. At least twenty-five percent (25%) of the units must be set-aside and rented to families with a member who has a disability. (IA 2008 QAP, p. 2)

“SDHDA and the Department of Human Services (DHS) have entered into an agreement promoting the full integration of citizens with disabilities into individualized housing settings rather than group homes. All housing designed specifically for people with disabilities must receive prior approval from DHS. Applicants who agree to offer services to these individuals in an integrated housing setting will receive points under this section.”
(SD 2008 QAP, p. 28)

One of Connecticut’s threshold requirements is that “the sponsors of the project must be committed to undertake strong affirmative measures to ensure that the activity funded promotes regional economic, social and racial integration and the integration of persons with disabilities.”
(CT 2008 QAP p. 6)

Additionally, state HFAs should promote the use of tax credit units by people with disabilities through effective affirmative marketing techniques:

All sponsor/owners should include a detailed plan with their respective applications. The plan must indicate in detail how the sponsor intends to market to and attract underserved populations to the project, indicating persons with disabilities and minority households.
(MA 2008 QAP, p. 30)

“[T]he executive director may make a reservation of credits, to any applicant that proposes a non-elderly development that (i) provides rent subsidies or equivalent assistance in order to ensure occupancy by extremely low-income persons; (ii) conforms to HUD regulations interpreting the accessibility requirements of section 504 of the Rehabilitation Act; and (iii) will be actively marketed to people with disabilities in accordance with a plan submitted as part of the application for credits and approved by the executive director.”
(VA 2008 QAP, p. 21)

Lastly, ensuring that there are an adequate number of housing units accessible to people with disabilities is critical in complying with fair housing and civil rights laws. An incentive to create the highest level of accessibility is a best practice, since it expands the affordable rental housing market for those with the severest disabilities:

Points are awarded for applications in which the “Number of units which are equipped in excess of the minimum number required by federal fair housing law, state or local law, or specific program requirements. Applicants must explain

the difference between what is required and what is proposed. (Maximum 10 Points)”
(AK 2008 QAP, pp. 16-17)²⁶

“Eight (8) points may be earned for the set-aside of at least 33 percent of the units for special needs tenant populations.” (CO 2008 QAP, p. 30)

F. FAMILY/LARGE BEDROOM INCENTIVES

Critical to providing real housing options for families in high-poverty, concentrated census tracts is recognizing that the market often does not provide sufficient housing opportunities for larger or extended families residing together as a single household. State HFAs should incentivize the creation of larger family units – 3-bedrooms or more – since such units are often desperately needed by large families who otherwise have very limited options, particularly when trying to find housing outside the lowest-income neighborhoods. When such units are promoted across a wide range of tax credit developments, and these developments are located across a metropolitan region, larger low-income families will have a range of choices to move to higher-opportunity areas, and be less likely to become trapped or resegreated as a result of their family size.

“A Development consisting entirely of Single-Family homes and/or duplexes will receive 1 point.”
(IN 2007-2008 QAP, p. 22)

Many states reward developers for reserving a minimum percentage of their units for large families. Most of these incentives require these units to have at least three bedrooms. The following are examples of good point incentives for targeting housing for large families:

Developments that serve large families by having a minimum of 10% of the units with three or more bedrooms will receive 12 points.
(WI 2007-08 QAP, p. 7)

“Up to 10 points may be awarded for those developments providing units with three or more bedrooms for large families...Points will be considered for developments that include the following percentages of units with three or more bedrooms: 15-20% - 6 points, 20-25% - 8 points, 25% or more – 10 points”
(PA 2008 QAP, p. 25)

“Low-density buildings where at least 30 percent of the units are large family units shall receive seven points. Points are based on the percentage of large family units with respect to the total number of units...”
(NJ 2008 QAP, p. 37)

²⁶ A better approach makes clear specifically the standards that applicants must meet. Specifically, the best practice is for the QAP to specify not just compliance with fair housing laws on minimal accessibility and adaptive features, but also to condition the award of points on specifically meeting Section 504 of the Rehabilitation Act and the duty to create 5% of the units in UFAS compliance or “fully accessible.”

“(5 points) - Scored on the ratio of bedrooms to units in a project serving households with children.”
(NY 2008 QAP 12)

Some states opt for smaller point awards for developing housing for large families. Below are examples of somewhat weaker incentives:

A Development that has 20% or more of the RHTC units with three (3) bedrooms will receive 3 points. **Or** “A Development that has 10% or more of the RHTC units with four (4) bedrooms will receive 3 points. (IN 2007-2008 QAP, p. 21-22)

Points awarded for large family developments, such as units with three bedrooms or more.
(MS 2007-2008 QAP, p. 29).

“Housing Targeted for Large Families, Points will be awarded based on the percentage of units with 3 or more bedrooms...Housing Targeted to and Suitable for Families with Children. Points will be awarded based on the percentage of total units with two or more bedrooms.
(CT 2008 QAP, p. 20)

Point incentives for developers that target Individuals with Children are not as strong as those specifically aimed at large families, because these populations are not completely mutually inclusive. Targeting Individuals with Children includes small families. Thus, developers who provide units for Individuals with Children might not relieve the problem that large, low-income families face finding adequate housing. New Mexico has this weaker point incentive.

Projects with provisions of housing for elderly and special needs households, or tenant populations of Individuals with Children receive priority. Projects with at least 25% of all units reserved for Individuals with Children will be awarded five points. Projects that get points for Special Needs or Elderly Households cannot get points for reserving units for Individuals with children.
(NM 2008 QAP, pp. 10, 15)

1. Supporting Family Moves to Low Poverty Neighborhoods. *Housing mobility research shows that support services can help families stabilize their housing situations and better access opportunities in their new community.²⁷ For example, post-move assistance with transportation, mental health and employment/career services have been shown to help families overcome the barriers they face in transitioning to a new neighborhood.²⁸*

²⁷ Tegeler, Phil, Mary Cunningham and Margery Austin Turner, “Keeping the Promise: Preserving and Enhancing Housing Mobility in the Section 8 Housing Choice Voucher Program : Final Report of the Third National Conference on Housing Mobility,” published by PRRAC, December 2005.

“Permanent Supportive Housing 1 – A minimum of 20% of the tenants selected for occupancy must be families who are identified as needing the services to maintain permanent housing. The services provided must include, at a minimum: case management and counseling/coaching, job search assistance and support, financial management training and children/youth programs. Operational and financial support must be provided by the owner. 7 points”
(NH QAP 2008, p. 14)

Developments that are linked to public transportation will receive 20 points. (WI 2007-08 QAP, p. 6)

“The provision of social and support services is an integral part of any development to improve the quality of life of the residents of the development. Services must be affordable, appropriate, available and accessible to the development's tenants. One (1) point will be awarded for each service up to a maximum of three (3) points. Services should be actively linked to the residents and not simply provided to the community at large and must be provided on-site.”
(DE 2008 QAP, p.41)

“All family projects must include at least one (1) basic ongoing service from the following categories”: social and recreation programs overseen by a project manager (semi-monthly birthdays, holiday parties, etc.), semi-monthly classes conducted on site (arts and crafts, computer tutoring, etc.), after school or adult day care located on site.
(GA 2008 QAP Draft, p. 5)

“Maximum Number of Points...2...Services...Service should be tailored to the needs of the targeted clients and preference will be given to those Applicants offering the services on-site and at no cost to tenants. Consideration will also be given to Applicants that provide a majority of services off-site due to special circumstances.”
(IN 2007-2008 QAP p. 32)

“(III) Seven points will be awarded for providing six of the services.
(ii) Service options include child care; transportation; basic adult education; legal assistance; counseling services; GED preparation; English as a second language classes; vocational training; home buyer education; credit counseling; financial planning assistance or courses; health screening services; health and nutritional courses; organized team sports programs or youth programs; scholastic tutoring; . . .” (TX 2008 QAP, p. 52)

²⁸ See *id.*; see also Waller, Margy, “Auto-Mobility: Subsidizing America’s Commute?” *Washington Monthly*, October/November 2005. Available at: <http://www.washingtonmonthly.com/features/2005/0510.waller.html> .

“[S]ervice enriched housing which incorporate substantive social services which are appropriate to the tenant population, on an ongoing basis,” is available for a maximum of ten points. (AK 2008 QAP, p. 19)

“Up to 10 points may be awarded to an applicant committing to operate a job-training program, targeting low- and moderate-income families, during the construction of the project. The trainees must be prepared for meaningful employment opportunities after the program is completed.” (AK 2008 QAP, p. 19-20)

G. INCOME TARGETING

State HFAs should also consider the civil rights implications of QAP provisions governing the income mix at subsidized properties, since these decisions directly affect the economic and racial composition of developments. It is crucial for policy makers to recognize, moreover, that resident income policies should not follow a one-size-fits-all approach for all LIHTC developments. Rather, incentives for different types of developments – whether mixed-income or targeted to the lowest-income groups – must be used selectively in relation to the location of each development. In other words, policies which incentivize units for the lowest-income families are appropriate in areas outside of high-poverty concentrations, while in high-poverty areas those same incentives will only reinforce socioeconomic segregation.

1. Promoting Units for the Lowest-Income Households Outside High-Poverty Neighborhoods

Many state HFAs have included provisions in their QAP requirements or scoring to promote income-targeting to ensure that tax credit developments serve the lowest-income households – families at or below 30% of Area Median Income (AMI). These provisions ensure that at least a share of the units, if not whole developments, go beyond the normal tax credit requirement that units serve families at or below 60% of AMI, which too often leaves behind those groups most in need of housing in a metropolitan area.

However, state HFAs should be careful in encouraging income-targeting that they are not also promoting the concentration of the lowest-income families in units in high-poverty census tracts. This economic reconcentration (which usually also involves racial concentration) is one of the very civil rights problems state HFAs should strive to avoid. While it is laudatory to encourage income-targeting, such provisions must be accompanied by provisions to ensure that the units targeted to the lowest-income families provide opportunities to move out of these high-poverty census tracts. In particular, if targeted units are limited to higher-income tracts, the developments themselves become “mixed income” since the neighborhood itself supplies the middle and/or upper-income households.

Some states offer points for allocating a share of units for the lowest income families:

“Consideration will be given to developments in which at least 20 percent of the units will be affordable to and rented to residents whose incomes do not exceed 40 percent of the area median income, adjusted for family size...A total of 15 points may be given for this category.”
(PA 2006 QAP, p. 24)²⁹

Points will be given to projects that “commit to renting at least 10% of the tax credit eligible units to individuals or families with incomes at or below 30% of median income.”
(MA 2008 QAP, p. 25)

Applicants will receive 10 points for choosing one of the following:

- a. 5% of the units are occupied and affordable to households with incomes at or below 35% of the Area Median Gross Income (AMGI) in non-participating jurisdictions; or
- b. 10% of the units are occupied and affordable to households with incomes at or below 35% of the AMGI in participating jurisdictions. (OH 2008 QAP, p. 37)³⁰

As noted above, the best practice is to limit the availability of such point incentives for income targeting to sites outside high-poverty, racially-segregated areas. This is especially important where the points awarded increase for higher percentages of the lowest-income units, since such schemes too easily reward properties likely to reinforce socioeconomic segregation. The best civil rights practice is to limit bonus points for low-income units to properties in high-income/low-poverty census tracts – or at least to limit the increased awards of bonus points for higher percentages to those high-opportunity areas.

²⁹

This provision has been changed to state the following, “Consideration will be given to developments which evidence a financing plan ensuring that accessible units in the development will be affordable to persons at or below 20 percent of the area median income, adjusted for family size. (PA 2008 QAP, p. 25). The QAP also states, “the applicant may be awarded up to 20 points for developments that are designed to be substantially occupied by and affordable to residents with incomes that are at or below 50 percent of the area median income.” 4 points are awarded for residents whose incomes are 10-20% of the AMI; 8 points are awarded for 20-30%; 12 points for 30-40%; 16 points for 40-50%; and 20 points for 50% or greater. (PA 2008 QAP, p. 23).

³⁰ Ohio’s QAP does reflect some geographic tailoring of the points used to incentivize income-targeting: “Applicants who select one of the following elections, will receive 25 points:
a. 60% of the units affordable to households with incomes at or below 50% AMGI (projects located in Geographic Pool A [urban] or B [suburban/mid-sized counties]); or
b. 40% of the units affordable to households with incomes at or below 50% AMGI (projects located Geographic Pool C [rural], except for counties listed below); or
c. 30% of the units affordable to households with incomes at or below 50% AMGI (projects located Belmont, Lawrence, or Washington counties).”
(OH 2008 QAP, p. 36)

However, state HFAs should use this geographic tailoring not merely to differentiate amongst income-targeting levels between different metropolitan areas, but also *within* metropolitan jurisdictions, offering the point incentives in the metro-area jurisdictions with the lowest poverty rates.

“Income Targeting points will be awarded based on percentage of total AHTC units targeted to persons at or below 50% AMI to the total number of AHTC units in the development. Points will be awarded as follows: 10% - 1 point, 20% - 2 points, 30% - 3 points, 40% - 4 points, 50% - 5 points, 60% - 6 points, 70% - 7 points, 80% - 8 points, 90% - 9 points, 100% - 10 points.”
(OK 2008 QAP/Tax Credit Application Instructions, p. 27)

“A maximum of ten (10) preference points will be awarded based on the overall rent targeting in the project. A project’s overall rent level is determined by multiplying the percentage of the total units within each rent level(s) by the rent level in percentages.” The point scale rewards greater degrees of targeting the lowest income populations. (NV 2006 QAP, p. 51)

States can ensure that all developments – particularly those in high-opportunity areas – will offer at least a modest percentage of units to the lowest-income families.

“Threshold #11: Inclusion of Units for Very Low Income Persons or Families ... requires sponsors of 2005 tax credit applications to reserve ten percent of the total number of units in their projects for persons or families earning less than 30% of area median income.” This is a good preference that encourages development across a broad array of communities.
(MA 2008 QAP, p. 25)

While blanket requirements can accomplish this purpose, a superior approach would apply this threshold obligation only to developments in low-poverty census tracts.

HOW SHOULD WE MEASURE CIVIL RIGHTS COMPLIANCE?

H. RACIAL/DEMOGRAPHIC REPORTING

Gathering demographic and racial data on tenants of tax credit developments is a basic first step in fair housing guidance³¹, but remarkably, only a handful of states now require this. This will now be changing as the 2008 Housing Bill HR 3211 requires a racial component for the distribution of LIHTC. We expect that the Department of the Treasury will soon be issuing guidance on how state agencies should comply.³² Such data permit

³¹ See Korman (2005).

³² The text of Sec. 2835(d) of HR 3211 states: “(a) In General- Each State agency administering tax credits under section 42 of the Internal Revenue Code of 1986 (26 U.S.C. 42) shall furnish to the Secretary of Housing and Urban Development, not less than annually, information concerning the race, ethnicity, family composition, age, income, use of rental assistance under section 8(o) of the United States Housing Act of 1937 or other similar assistance, disability status, and monthly rental payments of households residing in each property receiving such credits through such agency. Such State agencies shall, to the extent feasible, collect such information through existing reporting processes and in a manner that minimizes burdens on property owners. In the case of any household that continues to reside in the same dwelling unit, information provided by the household in a previous year may be used if the information is of a category that is not subject to change or if information for the current year is not readily available to the owner of the

officials to understand the civil rights impact of the program and to assess whether the siting and occupancy practices of tax credit developments have contributed to or eased metropolitan segregation. Best practices by state HFAs include requiring owners to report, both at initial lease-up and on a periodic ongoing basis, demographic data about tenants. Since all state HFAs require some ongoing reporting at least to confirm compliance with the income eligibility requirements, an additional layer of ethnic/racial response would add little to no burden for participating developers.

In order to assess the impacts of local preference on affirmative marketing goals and compliance with civil rights laws, all project owners will be required to report household characteristics of all tax credit units. The report will include but may not be limited to the following: size of tenant household, income level of household, race and ethnicity of the head of household (to the extent available), number of children under the age of six, number of children under the age of 18, and type of rental assistance, if any.

(MA 2008 QAP, p. 49)³³

“Owner’s Responsibilities...Recordkeeping and Retention Requirements...Each owner of a low-income rental housing project must keep records for each qualified low-income building in the project that show for each year in the compliance period...10) The Ethnicity of Head of Household for each restricted unit;11)...”

(WY 2008, p. 42)

“The owner of a low-income housing project must keep records for each qualified low income building (in the project) showing each year...2. The number of occupants in each low-income unit and the number of minors. Housing information concerning ethnicity, elderly or family household and student resident status, and type and amount of rental assistance;”

(MN 2008 QAP, p. 16)

“The record must include...evidence supporting that the project complies with the Fair Housing Act and does not discriminate in the provision of housing”

(AK 2008 QAP, p. 27)

property. (b) Standards- The Secretary shall establish standards and definitions for the information collected under subsection (a), provide States with technical assistance in establishing systems to compile and submit such information, and, in coordination with other Federal agencies administering housing programs, establish procedures to minimize duplicative reporting requirements for properties assisted under multiple housing programs.”

³³ Note that this reporting requirement applies only to units awarded tax credits in 2006 and going forward. It does not apply to tax credit units developed before 2006.

CONCLUSION

The “best practices” highlighted in this report are meant as a starting point for a discussion about how to move the Low Income Housing Tax Credit Program towards improved compliance with the Fair Housing Act. Of course, state Housing Finance Agencies will ultimately be judged not on what their plans say on paper, but on how well their programs do in promoting integrated housing choices in a variety of communities – especially communities with safe streets, high quality schools, and ample employment opportunities – and to ensure that this housing is truly open and accessible to low income families of color and persons with disabilities. To achieve this, we believe that state HFAs will need to play a more assertive role in demanding fair housing performance within the development and housing management communities, especially on issues of siting and tenant selection. The Department of Treasury, which oversees the program, will also be called upon to play a stronger role. It is our hope that the examples described in this report will help move us towards these goals.

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