



**Lawyers' Committee for
Civil Rights Under Law**

1401 New York Avenue, NW
Suite 400
Washington, DC 20005-2124

Tel: 202/662-8600
888/299-5227
Fax: 202/783-0857
Web: <http://www.lawyerscommittee.org>

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September 7, 2004

Attn: Matthew Rangel
Multifamily Finance Department
Illinois Housing Development Authority
401 N. Michigan Ave., Suite 900
Chicago, Illinois 60611

VIA FACSIMILE (312) 832-2175

Dear Officials of the Illinois Housing Development Authority:

Re: Public Comments On 2005 Illinois Qualified Allocation Plan (QAP)

The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy. The Committee's major objective is to obtain equal opportunity for and fight discrimination against minorities by addressing the many facets of our society that affect racial justice and economic opportunity. Given our nation's history of racial discrimination, de jure segregation, and the de facto inequities that persist, the Lawyers' Committee actively participates as attorneys in numerous cases to enforce compliance with civil rights laws and the desegregation of our communities.

We submit the following comments on the Illinois Housing Development Authority ("IHDA")'s draft 2005 Illinois Qualified Allocation Plan ("QAP") because we are concerned that the 2005 QAP, following the pattern of previous years, will exacerbate housing segregation by disproportionately siting affordable housing projects in low-income minority neighborhoods. As noted below, seeking desegregative sites in affordable housing programs is not merely a question of good policy, but is required by the affirmative obligations of the federal Fair Housing Act. Accordingly, we urge that the draft QAP be changed so that IHDA's Low-Income Housing Tax Credit ("LIHTC") program actively promotes racial integration by siting affordable housing in integrated communities.

Racial Segregation and the LIHTC Program

Racial segregation continues to pervade the communities of Illinois and across the nation, and poses a continuing and serious problem to race relations, education achievement, and economic disparities between white and black Americans. As the largest source of federal funding currently available for affordable housing development, the LIHTC program provides Illinois in general – and IHDA in particular – with a strong opportunity to address such segregation by siting affordable family housing in areas that will promote integration. Indeed, since 1987, the LIHTC program has been the de facto federal production program for low and moderate income family housing nationwide. *See, e.g.,* Jean Cummings & Denise DiPasquale, *The Low-Income Housing Tax Credit: An Analysis of the First Ten Years*, 10 Housing Policy Debate 251, 303 (1999).

However, recent history indicates that IHDA's implementation of the program has done the opposite – increased segregation. For example, fifty percent (50%) of IHDA's LIHTC projects are sited in census tracts that are majority-minority. In addition, thirty-one percent (31%) of IHDA's LIHTC projects are in census tracts with more than a third of their population in poverty. (By contrast, non-whites are 26% of the Illinois population and families in poverty comprise only 7.8% of Illinois residents.) This reflects an ongoing pattern of siting the affordable family housing disproportionately needed by African Americans primarily within minority (and, often, poor) neighborhoods. Further, these figures likely mask the degree of racial concentration subsidized by the LIHTC program because the total figures include both multi-family (predominantly black) and elderly (predominantly white) development. Thus, the share of predominantly black multi-family LIHTC developments in minority areas and high-poverty areas is even higher than the overall figures for the program.

IHDA's Affirmative Obligation to Promote Integration

Increasing segregation in Illinois under the LIHTC program is not merely poor policy – it is also illegal. At least since the passage of the federal Fair Housing Act in 1968, federal law has been clear: federal and state entities implementing federally-subsidized affordable housing programs have an affirmative obligation to consider impacts of those programs on racial segregation, and to promote integration. Specifically, the Fair Housing Act requires:

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner *affirmatively to further* the purposes of [the Fair Housing Act].

42 U.S.C. § 3608(d) (emphasis added). This provision of the Fair Housing Act thus imposes “a substantive obligation to promote racial and economic integration” in administering federal housing programs. *Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982). In sum, an agency's affirmative duty is not merely to refrain from discrimination, but also to use federal programs to actively assist in ending discrimination and segregation.¹

¹ Numerous courts have upheld this clear pronouncement. *See NAACP, Boston Chapter v. Sec'y of HUD*, 817 F.2d 149, 154 (1st Cir. 1987) (stating there is an affirmative duty for federal

Time and again, courts and agencies implementing federally-subsidized housing programs have recognized these affirmative obligations. For example, compliance with the affirmative obligation is required throughout the U.S. Department of Housing and Urban Development ("HUD")'s programs, whether the Community Development Block Grant program (24 C.F.R. § 570.487(b)), Section 8 program (24 C.F.R. § 982.53(b)), Empowerment Zone program (24 C.F.R. § 598.210(h)), or other state housing programs (24 C.F.R. § 91.325)).

Notably, courts have repeatedly required agencies to consider the racial impacts of site selection procedures for affordable housing as part of compliance with their affirmative obligations. The *Shannon* decision, handed down just two years after the Fair Housing Act's passage, upheld a challenge to the site selection process for a subsidized housing project on the basis that "the site chosen will have the effect of increasing the already high concentration of low income black residents." *Shannon v. HUD*, 436 F.2d 809, 812 (3d Cir. 1970). Noting that the agency failed to consider the discriminatory effects of site locations which aggravated segregation, the Third Circuit ruled that "such color blindness is impermissible," *id.* at 820, because

the choice of location of a given project could have the "effect of subjecting persons to discrimination because of their race" 24 C.F.R. § 1.4(b)(2)(i). That effect could arise by virtue of the undue concentration of persons of a given race, or socio-economic group, in a given neighborhood.

Id. The Seventh Circuit reiterated that "[a]s part of HUD's duty under the Fair Housing Act, an approved housing project must not be located in an area of undue minority concentration, which would have the effect of perpetuating racial segregation." *Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982).

programs to actively assist in ending discrimination and segregation); *id.* at 155 (noting a statutory "intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases"); *Anderson v. Alpharetta*, 737 F.2d 1530, 1535 (11th Cir. 1984) (the "affirmatively to further" provision is intended to allow race-conscious decision-making); *Alschuler v. HUD*, 686 F.2d 472, 482-484 (7th Cir. 1982) (Fair Housing Act imposes "a substantive obligation to promote racial and economic integration" and prohibits the siting of housing projects in areas of undue minority concentration that would have the effect of perpetuating racial segregation); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (the "affirmatively to further" requirement seeks to prevent the increase of segregation of racial groups whose lack of opportunities the Act was designed to combat); *Shannon v. HUD*, 436 F.2d 809, 820 (3d Cir. 1970) (color blindness in the administration of federal housing programs is impermissible).

For a recent example, see *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 33, 72 (D. Mass. 2002) (Fair Housing Act intended for HUD to end discrimination and segregation through its programs).

Thus, as required by the Fair Housing Act's affirmative obligation and such case law, HUD programs have been careful to implement regulations which require careful consideration of racial segregation in site selection – whether in public housing or Section 8 subsidized housing.² Notably, the state agency's obligation to consider the racial impact of sites selected for housing subsidies applies regardless of whether the agency itself selects the sites (as in public housing) or whether it chooses among sites proposed by private developers (as in subsidized housing programs). *See, e.g., Project B.A.S.I.C. v. Kemp*, 776 F. Supp. 637, 640 (D.R.I. 1991).

Of particular importance in fulfilling such obligations is the collection of data by the agency regarding the demographics of tenants and sites selected. As numerous courts have concluded, an agency cannot fulfill its obligation to affirmatively further fair housing unless it gathers and considers the site selection data necessary to fully understand the effects of its housing programs on racial segregation. *See Shannon*, 436 F.2d at 821 (“[T]he Agency must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts.”).³

² *See, e.g.,* 24 C.F.R. § 941.202(c)(1)(i) (public housing site selection regulations requiring that “[t]he site for new construction projects must not be located in [a]n area of minority concentration” unless specified exceptions are met, including the existence of “sufficient, comparable opportunities [] for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration”); 24 C.F.R. § 983.6(b)(3)(i), (ii) (Section 8 site selection regulations requiring that “[t]he site must not be located in an area of minority concentration,” subject to the same exceptions).

³ *See also, e.g., Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982) (to meet its obligation not to build housing “which would have the effect of perpetuating racial segregation,” HUD must ensure it has the proper data “necessary to make an informed decision on the effects of site selection on the area”); *Jones v. Tully*, 378 F. Supp. 286, 292 (E.D.N.Y. 1974) (“[i]t is incumbent upon the reviewing court to be assured that the Secretary of HUD, in administering the programs and activities relating to housing and urban development, did so ‘in a manner affirmatively to further the policies’ of the Civil Rights Act, which means that HUD in choosing site locations for funding must avoid racial discrimination”); *Blackshear Residents Org. v. Housing Auth. of the City of Austin*, 347 F. Supp. 1138, 1147 (W.D. Tex. 1971) (quoting *Shannon*'s requirement that the agency “utilize some institutionalized method” of considering the necessary racial and socioeconomic data).

Notably, the Third Circuit in *Shannon* made clear that this requirement does not *prohibit* the construction of all public or subsidized housing in areas of minority concentration. *See Shannon*, 436 F.2d at 822 (“We hold only that the agency’s judgment must be an informed one.”). On the other hand, of course, “the obligation does not end with a mere consideration of the proper factors.” *Project B.A.S.I.C. v. Kemp*, 776 F. Supp. 637, 643 (D.R.I. 1991).

Proposed Amendments to the Draft 2005 QAP

To fulfill its affirmative obligations under the Fair housing Act, we believe that IHDA should amend its draft 2005 QAP in ways that will discourage the concentration of LIHTC projects in areas of minority concentration and promote the siting of projects in outside such areas. An imperative step necessary to meaningfully achieve this goal is to include provisions in the QAP related to site selection that favor projects with positive, rather than negative, effects on racial integration. This factor is reflected in our comments and recommendations below with respect to application requirements and scoring criteria.

In General

- **Data Collection.** Section II.A (Mandatory Site and Market Study) requires that applicants submit, among other things, a population/demographic study, including such characteristics as general population, number of households, population and households by age, households by size, and distribution of households by income. *See* Attachments 1, 2 and 3. In addition to the existing requirements, applicants should be required to report racial demographics – both of the market area/census tract in which the project is located, as well as the projected applicants/tenants of the proposed project.
- **Compliance Monitoring.** Section VI (Compliance Monitoring) should be amended to make clear that applicants have a continuing obligation to report on the demographic characteristics – including racial composition – of their project and the market area/census tract. Further, the section should be amended to require reporting on the steps taken by the owner/applicant to conduct affirmative marketing to encourage groups least likely to apply to utilize the housing. This is a particularly important component of using affordable housing to promote integration, since such affirmative marketing steps are often crucial in encouraging minority families to make integrative moves to housing located outside minority areas. Likewise, owners should promote integrative moves by white families to projects located in minority areas.

Mandatory Elements

- **Utilizing Public Housing/Section 8 Waiting Lists to Promote Integration.** We agree that it is appropriate for LIHTC-subsidized project to give preferential treatment to low income tenants listed on the public housing or Section 8 list maintained by public housing authorities (“PHAs”). *See* Section II.C.1.c (Public Housing Waiting List Preference). However, in many cases, limiting the preference to the waiting list for the PHA “in the area in which the Project is located” will have the effect of promoting segregation. Specifically, for example, the disproportionately black waiting list of an urban PHA should be given the same preference for housing in a suburban LIHTC-funded project. Therefore, we urge IHDA to change this requirement to allow a preference for all regional PHA waiting lists. In addition, we urge IHDA to work with local PHAs to use this preference to promote integrative moves, such as through programs to encourage and educate those on the waiting list as to the benefits of such moves.

- **Flexibility with Respect to Zoning Obstacles Faced by Developers.** Section II.C.1.g (Zoning), establishing a mandatory requirement that the *current* zoning permit a project, can serve as an additional obstacle to multifamily suburban development.

Application Scoring

Given the highly competitive nature of the LIHTC program, we understand that every scoring factor in the 2005 QAP can be critical to whether an applicant is awarded tax credits by IHDA. We are particularly concerned that factors which limit the points available to multifamily projects in suburban areas outside of minority concentrations undermine the ability of the program to promote integrated housing. We urge IHDA to re-evaluate the following scoring criteria which can deprive such projects of points – or discourage developers from creating and submitting applications for such housing outside areas of minority concentration.

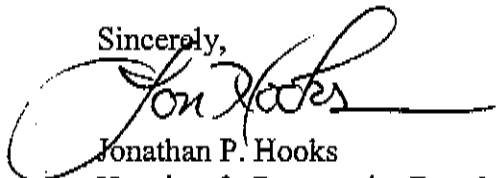
- **Project Site and Market Evaluation.** We are concerned that Section II.C.2.g.1 (Project Site and Market Evaluation) may limit the prospects of applicants seeking to develop integrative multifamily housing outside areas of minority concentration through the use of subjective concerns about the “appropriateness” of such projects and narrow definitions of market demand. Specifically, that section awards up to 15 points using at least two variables that, because of their vagueness, could easily be construed in a way that discourages integrative multifamily sites: “the appropriateness and marketability of the Project location” and “local demand and need for the type of Project proposed.” Clear interpretive guidelines for “appropriateness” should be included to ensure that, in scoring applications, projects promoting integration are rewarded, not discouraged. Further, we believe that guidelines should make clear that “local demand” shall not be construed narrowly to exclude projects that serve regional needs for affordable housing.
- **Promoting Mixed Income Development.** One way IHDA can reduce the concentration of low-income minority families in neighborhoods that are already disproportionately minority and poor is to promote the development of mixed-income LIHTC developments in such neighborhoods, rather than projects which serve only the lowest income groups. Unfortunately, the draft QAP awards a significant number of points to projects serving exclusively low-income tenants – those projects which are most likely to contribute to this concentration. Specifically, in Sections II.C.2.g.3 (Lowest Income Tenants/Lowest Rents) and II.C.2.g.5.a (Project-Based Assistance), the QAP awards a significant number of points where projects are almost exclusively low-income. (For example, QAP Section II.C.2.g.5 encourages leveraging of resources by awarding proposals five points if 80% of the tenants are Housing Choice voucher recipients and another five under this same section if this support is combined with LIHTC.) By contrast, Section II.C.2.g.4 (Mixed Populations) awards only five points for mixed income developments. We believe that the maximum points awarded for mixed income project should be increased to promote the development of such projects in areas of concentrated poverty. Conversely, IHDA should reduce the number of points awarded to projects serving the lowest-income tenants when such projects are sited in areas that already have high percentages in poverty.

- **Promoting Integrated Locations.** We believe the QAP should be explicit in promoting projects that will reduce racial segregation and should take substantial steps to promote this goal. Specifically, the QAP should set aside a significant portion of the tax credits (50% or more) exclusively for the development of multi-family housing in low-poverty areas accessible to inner city residents. Targeting such locations would both promote integration and deconcentrate poverty-stricken neighborhoods. In the alternative, Section II.C.2.g.6 (Project Location) should award a substantial number of points (in the range of 20 or more points) for multi-family projects located in suburban areas – *i.e.*, those most likely to promote integration.
- **De Facto Veto By Chief Elected Official.** We believe that Section II.C.2.g.8 (Community Support), which awards three points to applications that includes a letter of support from the municipal chief elected official, results in *de facto* veto power by such officials over the development of any LIHTC-funded project within their municipality. (The *de facto* veto stems from the competitiveness of the scoring process and the need for applicants to obtain every available point in order to obtain the LIHTC subsidy.) Given the history of opposition by officials to affordable housing in general – and initiatives which promote integration in particular – we believe offering such points undermines the ability of developers to site projects that promote integration in predominantly white areas that resist such development. We encourage IHDA to eliminate this scoring area *entirely*, as such opposition indicates nothing about the merits of LIHTC that is not already captured by the QAP's scoring process. In the alternative, if IHDA declines to eliminate this scoring area, it should reduce the number of points available under this category to one (1). Further, if IHDA retains this category, the burden of establishing community support should be reversed. If a chief elected official wishes to deny an applicant the benefit of such support, the QAP should require that the official provide specific reasons in writing for opposing the application. Such a requirement would place some limit on the current standardless discretion under which chief elected official can currently withhold support – even for projects that can demonstrate local demand, meet local zoning, etc.

Thank you for your attention to this critical matter. We believe that these comments propose changes that are feasible and consistent with the larger policy goals of IHDA. Indeed, our proposals are, as stated above, an effort to harmonize the LIHTC subsidized housing program with the IHDA's obligations under the Fair Housing Act.

If you have questions regarding our comments, please do not hesitate to contact me directly at (202) 662-8326. We appreciate your consideration of our comments and we look forward to your response.

Sincerely,



Jonathan P. Hooks
Housing & Community Development Project
Lawyers' Committee for Civil Rights Under Law



**LAWYERS' COMMITTEE FOR CIVIL RIGHTS
UNDER LAW
1401 New York Avenue, NW
Suite 400
Washington, DC 20005**

FAX COVER SHEET

September 7, 2004

To: Matthew Rangel
Multifamily Finance Department
Illinois Housing Development Authority
401 N. Michigan Ave., Suite 900
Chicago, Illinois 60611

Telephone Number: (312) 836-5366

Telecopier Number: (312) 832-2175

From: Jon Hooks

Telephone Number: (202) 662-8326

Telecopier Number: (202) 783-5113

NOTE: IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CONTACT:

Name: Jon Hooks

Telephone Number: (202) 662-8326

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