November 1, 2004

Attn: James M. Chandler
Director of Low Income Housing Tax Credit Programs
Virginia Housing Development Authority
601 S. Belvidere St.
Richmond, VA 23220.

VIA FACSIMILE: (804-343-8356)

Dear Mr. Chandler:

On behalf of Housing Opportunities Made Equal, Inc. (HOME) and the Lawyers' Committee for Civil Rights Under Law, we submit the following comments on the Virginia Housing Development Authority's draft 2005 Virginia Qualified Allocation Plan. We are concerned that the 2005 QAP will continue to exacerbate housing segregation by disproportionately encouraging the siting of affordable housing projects in low-income minority neighborhoods. 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 amended so that VHDA's Low-Income Housing Tax Credit program will actively promote racial and ethnic integration as well as the creation of healthy mixed income communities.

Neighborhoods in Virginia and across the nation continue to be segregated, creating a barrier to improving race relations, limiting the educational achievement of minorities, intensifying economic disparities, and interfering with the creating of economically viable communities. Since 1987 the LIHTC program has been the largest source of funding for the development of low and moderate income family housing.[1] As such, it provides Virginia – and VHDA – with a strong opportunity to address such segregation by siting affordable family housing in areas that will promote integration.

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[1] *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).

Increasing segregation in Virginia under the LIHTC program is not merely poor policy – it is also illegal. Federal law has been clear since the passage of the federal Fair Housing Act in 1968: 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 that:

> 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.[2] VHDA is clearly covered by this requirement that an agency has an affirmative duty not merely to refrain from discrimination, but also to use federal programs to actively assist in ending discrimination and segregation.[3]

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

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[2] *Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982).

[3] 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 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 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).

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.

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). As a result of this clear mandate, HUD has implemented regulations for its programs which require careful consideration of racial segregation in site selection – whether in public housing or Section 8 subsidized housing.[4] 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. 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.").[5]

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[4] *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).

[5] *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

Recommendations

There are many possible actions that VHDA could take to ensure that the LIHTC program in Virginia does not continue to reinforce segregated communities. [6] We suggest some of them below.

- **Data Collection.** To effectively track the impact of Virginia's LIHTC program, data should be collected about the racial/ethnic demographics of the area around project sites. Otherwise, it is impossible for VHDA to evaluate the impact of its housing subsidy decisions on housing segregation within the state. VHDA should require a market study of proposed projects under 13 VAC 10-180-50 (Application) that includes racial/ethnic demographics of the market area and the census tract in which the project is located, as well as the projected demographics of the proposed project, in addition to general population demographic data. Beyond collecting and considering such information in the application process, VHDA should continue to monitor the racial demographics of all developments and their surrounding areas. Specifically, under the compliance requirements in 13 VAC 10-180-90 (Monitoring for IRS Compliance), applicants should also have a continuing obligation to report on similar racial composition and demographic data.

- **Require Affirmative Marketing**. As a condition of participation in the program, developers should be required to undertake affirmative marketing efforts to encourage tenant applicants in ways that promote integration – specifically, developers should be required to promote their development to groups least likely to apply (*e.g.*, minorities in predominately white communities). 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. Further, as part of VHDA's ongoing monitoring of compliance with the LIHTC program by participants, VHDA should require documentation of actual offers made by projects to those tenants least likely to apply.

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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).

[6] Under the applicable statutes and regulations, there is no requirement that the VHDA administer its LIHTC program through the point allocation system it uses. In particular, VHDA is not required by any statute or regulation to include the provisions identified in this comment letter.

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 VHDA. We are particularly concerned that the point system is currently set up in such a way that it undermines the ability of the program to promote integrated housing. We urge VHDA to re-evaluate the following scoring criteria which can lower the scores of multi-family projects in areas outside of minority concentrations and thus discourage developers from submitting applications for such housing.

- **Local Approval.** Historically, one of the greatest causes of segregation in federally-subsidized housing has been the ability of local officials to block proposed affordable housing which might have the effect of desegregating predominantly white areas. Unfortunately, the QAP gives local governments significant and unfettered influence over the affordable housing projects by requiring proposals to include evidence of local approval and support. Under 13 VAC 10-180-50 (Application), local officials are afforded an opportunity to comment on a proposal before *and* after an application is submitted. Under 13 VAC 10-180-60 (Review and Selection of Application), provision 1(a) in the 'Readiness' subsection rewards unconditional approval by local authorities very highly. Similarly, in 'Housing Needs Characteristics,' provision 2(b)(1) awards 50 points and 2(c) awards 25 points for similar statements of approval. While we understand the desire of VHDA to respect the wishes of localities in the development of affordable housing, such emphasis on local approval provides local governments with a de facto veto power over proposed projects. This reliance on local government approval undermines the ability of VHDA to site projects that may be attractive to minorities in predominantly white areas that resist such development. Finally, for the same reasons, VHDA should also minimize the point allocation to projects that receive cost subsidies from local government entities. This has the effect of eliminating affordable housing in those localities that do not choose to fund such projects. *See* provision 2(f) (awarding 40 points). We encourage VHDA to eliminate these criteria *entirely* or greatly reduce the point allocation, as local opposition indicates nothing about the merits of the proposal that is not already captured by the QAP's scoring process.

- **Zoning.** Under 13 VAC 10-180-60 (Review and Selection of Application), provision 1(b) of the 'Readiness' subsection rewards proposals sited in areas that have proper zoning or appropriate special use permits. Such an incentive to site affordable housing in areas that already permit their development ensures that existing housing patterns are perpetuated.

- **Promote Family Housing.** Projects that target disabled or special needs tenants are encouraged by the QAP, but few incentives are given for family housing developments even though minority households with children have a great need for affordable housing. Under 13 VAC 10-180-60 (Review and Selection of Applications) in the 'Development Characteristics' subsection, provisions 3(c), 3(d), and 3(e), up to 60 points are awarded to projects being marketed to tenants with special needs and mobility impairments. By contrast, in provision 4(a), those that cater to families are awarded only 30, and that is awarded if merely 20% of the units have three or more bedrooms. VHDA should not make different groups with legitimate housing needs compete against each other (i.e.,

people with disabilities and low-income minority families). The same number of points should be allocated to each, and VHDA should consider raising the eligibility requirement for family points to a higher percentage of three or more bedroom units.

- **Promote Mixed Income Development.** In areas that are already disproportionately minority and poor, VHDA has an affirmative obligation to reduce the concentration of low-income minority families in such neighborhoods by promoting the development of mixed-income developments, rather than new concentrations of poverty, in those areas. Unfortunately, under 13 VAC 10-180-60 (Review and Selection of Applications) in the 'Bonus Points' subsection, provision 7(a) and 7(b) awards a significant number of points (up to 60) to projects serving a high concentration of low-income tenants – projects which are most likely to exacerbate the segregative effects of affordable housing and that make it difficult, if not impossible, to establish healthy mixed income communities. VHDA should encourage mixed-income developments in low income areas by increasing the number of points for affordable housing developments that include market rental rates. Conversely, VHDA 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.

- **Promote Integrated Locations.** Another means of reducing the concentration of low-income minority families in neighborhoods that are already disproportionately minority and poor is to allocate a substantial number of points for projects in areas that do not have concentrations of poverty. This is the most direct method available for VHDA to fulfill its obligation affirmatively to further integrated housing – and the most likely to succeed. Under 13 VAC 10-180-60 (Review and Selection of Applications) in the 'Efficient Use of Resources' subsection, provision 6(a) and 6(b) provide significant incentives for low-cost developments, benefiting developments in high-poverty areas. A larger incentive must be provided to encourage developments in non-minority areas. In addition, a substantial portion of the annual LIHTC family rental allocation should be set aside for use in low poverty neighborhoods outside areas of minority concentration.

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 VHDA. Indeed, our proposals are, as stated above, an effort to harmonize the LIHTC subsidized housing program with VHDA's affirmative obligations to promote integration under the Fair Housing Act.

If you have questions regarding our comments, please do not hesitate to contact Jon Hooks directly at (202) 662-8326 or Connie Chamberlin at 804-354-0641. We appreciate your consideration of our comments and we look forward to your response.

Sincerely,

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Constance Chamberlin

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

HOME and the Lawyers' Committee for Civil Rights Under Law:

HOME is an award-winning non-profit housing counseling and fair housing organization that has been helping Virginians gain access to housing for more than three decades. It has a long-standing partnership with VHDA in promoting homeownership, preventing mortgage defaults, and helping protect homeowners from becoming victims of predatory lending.

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.