H.O.P.E., Inc.
Housing Opportunities Project for Excellence, Inc.
18441 N.W. 2nd Ave. Suite 218, Miami Gardens, FL 33169
Phone: 305-651-HOPE, Fax: 305-493-0108

Testimony of Keenya J. Robertson, Esq., President & CEO
Housing Opportunities Project for Excellence, Inc. (HOPE, Inc.)
Before the National Commission on Fair Housing & Equal Opportunity
October 17, 2008, Atlanta, GA

The issues discussed herein stem from a class action lawsuit filed in the United States District Court for the Southern District of Florida. The issues highlight missed opportunities to address discrimination systemically through 1) examining housing providers receiving Low Income Housing Tax Credit and other forms of public subsidy for compliance with the Fair Housing Act and 2) appropriate monitoring of agencies granted substantial equivalency certifications. Appropriate action should be taken following the identification of failure to meet the requirements for substantial equivalency certification and violations of fair housing laws to enhance the effectiveness of a federal, state and local enforcement system.

Background on Milsap, et al. vs. Cornerstone, et al.[1]

The Cornerstone case involves a class action lawsuit filed in 2005 against Cornerstone, an affordable housing developer and property manager, alleging violations of the Fair Housing Act for denial of rental opportunities, discrimination in the terms, conditions and privileges of a housing opportunity, and disparate impact based on familial status, as well as racial discrimination. Cornerstone has established occupancy restrictions for all of its properties. Most of the restrictions limit occupancy to less than two persons per bedroom. For example, in some two bedroom units occupancy is limited to three and some three bedroom units the number of occupants is limited to four or five. One of Cornerstone's properties enforced a written one child per bedroom policy made available at the front desk and given to potential renters prior to being provided an application. As a result of the occupancy restrictions established by Cornerstone, families who exceeded them were denied housing or paid more for their housing because they were forced to live in a larger unit.

Receipt of Low Income Tax Credit and Other Public Subsidies

Cornerstone Group, founded in 1993, has developed fifty-two affordable apartment communities in the State of Florida consisting of more than fifteen thousand multifamily rental and condominium units. They are ranked by the National Association of Home Builders as the 10th largest multifamily developer in the United States and the 5th largest

[1] United States District Court, Southern District of Florida, Case No. 05-60033-CIV-MARRA/SELZER

in Florida. To construct their developments, Cornerstone received financing from local and state funding sources for affordable housing. A majority of such funds were derived from housing assistance plans from the Florida Housing Finance Corp. Since the developments were intended for affordable housing, they were able to receive HUD-guaranteed loans, as well. In exchange for receipt of this funding, the developer had to agree to be in compliance with federal and state laws and regulations, including those pertaining to fair housing.

All properties subject to the lawsuit are tax-credit properties, and as such, each tenant must be income certified on a yearly basis. This tenant income certification form for each household has the names and ages of each resident, as well as the race or national origin of each tenant. All tax credit properties in the state of Florida, including those of Cornerstone Group, provide this information to Florida Housing Finance Corporation. As tax-credit properties, the populations served by these entities are similar, as well as the configuration and type of housing is similar.

The University of Florida's Shimberg Center for Affordable Housing was engaged to conduct an analysis of the disparate impact of occupancy standards more restrictive than two persons per bedroom owned and managed by Cornerstone in Miami-Dade and Broward Counties, Florida, with regard to families with children and African Americans. ***(The complete study is attached hereto.)***

Based upon an analysis of similar tax-credit properties in Broward County:

- An occupancy limitation that limits a two bedroom household to three persons per unit excludes 29.33 times the number of families with children than households without children.

- An occupancy limitation that limits a three bedroom household to four persons per unit excludes 13.88 times the number of families with children than households without children.

- An occupancy limitation that limits a three bedroom household to five persons per unit **only** affects families with children.

Based upon an analysis of similar tax-credit properties in Miami-Dade County:

- An occupancy limitation that limits a two bedroom household to three persons per unit excludes 62 times the number of families with children than households without children.

- An occupancy limitation that limits a three bedroom household to four persons per unit excludes 29.17 times the number of families with children than households without children.

- An occupancy limitation that limits a three bedroom household to five persons per

unit excludes 49.97 times the number of families with children than households without children.

Prior to obtaining financing for each development constructed by the Defendant, the defendants were required to provide a market study for the need for each development in the financing packages required by the finding agencies. An integral part of all funding packages are statistics obtained from United States Census data. Census data for Miami-Dade Counties and Broward Counties clearly demonstrates that African American families have more children than similarly situated White families. Since 2001, the Defendants have implemented more restrictive occupancy standards in neighborhoods that are significantly African American, or neighborhoods that are within the same rental market as these African-American neighborhoods.

Based upon an analysis of similar tax-credit properties in Broward County:

- African-Americans who would qualify for residency are 5.83 times more likely to be excluded than Whites and 2.14 times more likely to be excluded than Hispanics where an occupancy restriction limits a two bedroom unit to three persons.

- African-Americans who would qualify for residency are 41.67 times more likely to be excluded that Whites and 9.6 times more likely to be excluded than Hispanics where an occupancy restriction limits a three bedroom unit to four persons.

- African-Americans who would qualify for residency are 35.5 times more likely to be excluded that Whites and 23 times more likely to be excluded than Hispanics where an occupancy restriction limits a three bedroom unit to five persons.

- African-Americans who would qualify for residency are 48.67 times more likely to be excluded that Whites where an occupancy restriction limits a three bedroom unit to four persons.

Based upon an analysis of similar tax-credit properties in Miami-Dade County:

- African-Americans who would qualify for residency are 31 times more likely to be excluded that Whites and 1.27 times more likely to be excluded than Hispanics where an occupancy restriction limits a three bedroom unit to four persons.

- African-Americans who would qualify for residency are 30 times more likely to be excluded that Whites and 2 times more likely to be excluded than Hispanics where an occupancy restriction limits a three bedroom unit to five persons.

The disparate impact on African Americans is much more severe in Miami-Dade and Broward counties than they would be if Cornerstone chose to enact occupancy limitations

elsewhere in the State of Florida. Even following the filing of this action in 2005, Cornerstone altered many of their occupancy standards; however, most properties continued to refuse to permit two persons per bedroom, and left the occupancy rate at five persons for a three bedroom – a policy which has the largest exclusive effect on African-American families.

In 2000, the United States Departments of the Treasury, Housing and Urban Development, and Justice entered into a memorandum of understanding (MOU)[2] in a cooperative effort to promote enhanced compliance with the Fair Housing Act for the benefit of residents of low-income housing tax credit properties and the general public. According to the provisions of the MOU, HUD and Treasury will cooperate in research sponsored by either Department concerning low-income housing tax credit properties. Further, the MOU states that HUD, Justice, and the IRS will cooperate, in consultation with the state housing finance agencies, in the identification and removal of unlawful barriers to occupancy of low-income housing tax credit properties by individuals holding section 8 vouchers.

Recommendation: In accordance with the MOU between HUD, Justice and the IRS, research should be conducted that examines the occupancy restrictions of properties receiving the Low Income Tax Credit and other public subsidies, in addition to an analysis of tenant income certification and relevant Census data to identify discriminatory practices and disparate impact on families with children, minorities, and other classes of persons protected in the Fair Housing Act, as amended. The research should be followed by enforcement where violations of the Act are indicated.

Substantial Equivalency

The Fair Housing Act authorizes the United States Department of Housing and Urban Development (HUD) to certify local enforcement agencies as "substantially equivalent" if the local law meets the requirements set forth in the Fair Housing Act and HUD's implementing regulations.[3] The Florida Fair Housing Act[4] is enforced by the Florida Commission on Human Relations (FCHR), a Fair Housing Assistance Program (FHAP) certified by HUD as substantially equivalent agency. HUD has a two-phase procedure for the determination of substantial equivalency certification. In the first phase, the Assistant Secretary for Fair Housing and Equal Opportunity determines whether, "on its face," the State or local law provides rights, procedures, remedies and judicial review provisions that are substantially equivalent to the federal Fair Housing Act. In the second phase, the determination as to whether, "in operation," the State or local law provides rights, procedures, remedies and the availability of judicial review that are substantially equivalent to the federal Fair Housing Act is made. An affirmative conclusion that the State or local law is substantially equivalent both on its face and in operation will result

[2] http://www.hud.gov/offices/fheo/lihtcmou.cfm
[3] 42 U.S.C. § 3610(f); 42 U.S.C. § 3616; 24 C.F.R. part 115
[4] State of Florida, Civil Rights Statutes, Title XLIX, Chapter760.2

in HUD offering the agency certification, renewable after five years, if the Assistant Secretary determines that the agency still qualifies for certification.

The Plaintiffs in Cornerstone alleged violations of the Federal Fair Housing Act and Florida's "substantially equivalent" Fair Housing Act. The court dismissed the Plaintiff's claims under the Florida Fair Housing Act for failure to exhaust administrative remedies. The court adopted the opinion in Belletete v. Halford[5], where a Florida intermediate appellate state court found that the Florida Fair Housing Act requires exhaustion of administrative preconditions. The Belletete v. Halford relies upon a Florida employment discrimination statute, which mirrors federal employment discrimination law that requires exhaustion. Housing law, federal and state, is distinguishable from employment law.

The decision in Belletete was directly contrary to the decision of the United States Supreme Court in Gladstone v. Village of Bellwood[6], where the court found that the "Fair Housing Act section providing for enforcement, by a 'person aggrieved' in federal district court, of rights granted is not structured to keep complaints brought under it from reaching federal courts, or even to assure that administrative process runs its full course. The Court states further that "Congress intended to provide all victims of Title VIII violations two alternative mechanisms by which to seek redress: immediate suit in federal court, or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail."

The Plaintiffs in Cornerstone are entirely foreclosed on their state remedies. "In operation", the Florida Fair Housing Act does not provide rights, procedures, remedies and the availability of judicial review substantially equivalent to the federal Fair Housing Act. While a law need not be identical to be substantially equivalent, the Belletete interpretation actually removes a substantive right for victims of housing discrimination, if victims must exhaust first and then are unable to seek immediate judicial relief for discriminatory housing practices. The Cornerstone case involved a situation demanding relief that was immediate, specifically a "one child per bedroom" occupancy restriction enforced at a Cornerstone property. As such, an unlawful housing action justifiably received a preliminary injunction. To require exhaustion of administrative remedies would clearly diminish, if not entirely eliminate, the "substantial equivalency" of the Florida law to its federal counterpart.

Recommendation: State and local laws certified as substantially equivalent by HUD should be examined closely, during the recertification phase or in the presence of any indication to the contrary, to determine whether "in operation" the state or local law provides rights, procedures, remedies and the availability of judicial review that are substantially equivalent to the federal Fair Housing Act.

[5] 886 So.2d 308 (Fla. Dist Ct. App. 2004)
[6] 441 U.S. 91 (1979)