Opportunity and Location in Federally Subsidized Housing Programs

A New Look at HUD's Site & Neighborhood Standards As Applied to the Low Income Housing Tax Credit

Philip Tegeler
Henry Korman
Jason Reece
Megan Haberle

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PRRAC
Poverty & Race Research Action Council
The Ohio State University Kirwan Institute
Many Differences One Destiny
The Opportunity Agenda

Introduction

This paper is intended to present a civil rights perspective on the federal policy discussion currently underway seeking to harmonize various subsidized housing development rules across the three agencies that sponsor low income housing (HUD, the Treasury Department, and the Department of Agriculture). This "compliance harmonization" initiative has so far avoided taking on the difficult question of site selection rules in our largest low income housing development program, the Low Income Housing Tax Credit (LIHTC), administered by the IRS and the Treasury Department. In the discussion that follows we will suggest alternative approaches to civil rights site selection in the LIHTC program that are consistent with the statutory guidance for the program, and that also can integrate successfully with other important goals such as sustainability and transit access.

1. The current HUD standards

HUD's "site and neighborhood standards" set out the agency's basic approach to compliance with the Fair Housing Act's integration mandate – a prohibition on siting additional low income housing in a racially concentrated neighborhood. Civil rights and fair housing advocates have criticized these rules for being too weak, with waivers and exceptions that swallow the rule, while some housing industry representatives complain that the rules are too rigid. Is it possible to design a flexible rule that is more effective in promoting low income housing development in high opportunity areas (and avoiding neighborhoods that are already highly concentrated)? Are there aspects of the LIHTC program that suggest a variation on the approach used by HUD?

Regulations governing the development of public housing are an example of HUD's basic approach, in those areas where siting is regulated[1]:

> 24 CFR § 941.202: Site and neighborhood standards.
>
> Proposed sites for public housing projects to be newly constructed or rehabilitated must be approved by the field office as meeting the following standards:
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> * * * * * * *
>
> (c)(1)The site for new construction projects must not be located in:
>
> (i) An area of minority concentration unless (A) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (B) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area. An "overriding need" may not serve as the basis for determining that a site is

[1] It is important to note that, as discussed in the next section below, site and neighborhood standards are not universal in HUD programs – and some program areas are unregulated.

> acceptable if the only reason the need cannot otherwise feasibly be met is that discrimination on the basis of race, color, religion, creed, sex, or national origin renders sites outside areas of minority concentration unavailable; or
>
> (ii) A racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area.
>
> * * * * * * *
>
> (d) The site must promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

These site selection rules, amended most recently in 1996,[2] also include thoughtful guidance on avoiding negative environmental factors:

> (e) The site must be free from adverse environmental conditions, natural or manmade, such as instability, flooding, septic tank back-ups, sewage hazards or mudslides; harmful air pollution, smoke or dust; excessive noise vibration, vehicular traffic, rodent or vermin infestation; or fire hazards. The neighborhood must not be one which is seriously detrimental to family life or in which substandard dwellings or other undesirable elements predominate, unless there is actively in progress a concerted program to remedy the undesirable conditions.

Most importantly, from an opportunity-based perspective, the rule requires a site to provide access to services and amenities (including education) that are "at least equivalent" to communities without subsidized housing:

> (g) The housing must be accessible to social, recreational, educational, commercial, and health facilities and services, and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing.
>
> (h) Travel time and cost via public transportation or private automobile, from the neighborhood to places of employment providing a range of jobs for low-income workers, must not be excessive….

There are also provisions that govern the special case of public housing demolition and replacement, and which permit building of at least 50% of public housing units back on site.[3] A full copy of the HUD Site and Neighborhood Standards for public housing are set out in the Appendix to this report (along with siting rules for project-based Section 8 housing, and acquisition).

The limits of the current site & neighborhood standards

From a civil rights perspective, the current site and neighborhood standards are a positive *statement* of the agency's affirmative fair housing duty, that have the *potential* to be applied effectively by HUD in specific cases. But the standards have become

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[2] 61 FR 38017, July 22, 1996

[3] 24 CFR § 941.202 (c)(2)

increasingly difficult to enforce: a growing number of waivers and exceptions to the general prohibition on siting in areas of minority concentration are easy for HUD officials to invoke, and it is increasingly difficult to enforce HUD regulatory standards in court.[4]

Site and neighborhood standards are not uniform across HUD programs in crucial areas, (such as acquisition of existing housing, discussed below) and there are no standards at all in important programs such as HUD's multifamily preservation activities. Likewise, the structure of the CDBG program funnel housing activities toward low-income and distressed areas without meaningful oversight.[5] Similarly, while Project-Based Voucher (PBV) rules include standards for acquisition of existing housing, the regulations lack any reference to conditions of segregation.[6]

HUD permits its 32 "Moving to Work" jurisdictions to avoid the site and neighborhood requirements altogether,[7] HUD also replaces existing regulatory standards with criteria that preserve existing patterns of segregation and concentration of poverty in crucial programs that provide substantial financial resources for the development of assisted housing, such as the Choice Neighborhoods and HOPE VI programs.[8] Another issue for fair housing advocates is the difficulty in applying the standards in neighborhoods that are facing clear gentrification pressure – where additional low income units need to be sited to protect existing families in the neighborhood from displacement.

From a fair housing perspective, then, the HUD siting standards need to be stronger and more routinely enforced, rather than further watered down, and in designing a civil rights siting standard for the LIHTC program, the Treasury Department should consider a set of rules and incentives that will better achieve the goal of affirmatively furthering fair housing.

Our suggestion for redesigning site and neighborhood standards in the LIHTC program builds on the underlying assumption of the HUD standards, that *balanced development across a region* should be a policy goal, but recognizes that this kind of distribution is not furthered by a case-by-case siting standard. An alternative allocation model that distributes tax credits equitably across a metropolitan area, using an opportunity-based profile of the region, will have the best chance to achieve civil rights goals and maximize

[4] For example, site and neighborhood standards have the potential to be wholly or partially waived in the HOPE VI, Choice Neighborhoods, and Moving to Work (MTW) programs.
[5] The operation of the CDBG program frequently conflicts with some of the program's other key statutory objectives, which include "the reduction of the isolation of income groups within communities and geographical areas"; the "promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income, and the "revitalization of deteriorating or deteriorated neighborhoods." 42 USC sec. 5301(c)(6).
[6] A complicating factor is that a large component of LIHTC development involves acquisition of existing property using bond financing and 4% tax credits, and also may involve PBVs.
[7] See "Guidance on non-discrimination an equal opportunity requirements for PHAs," PIH Notice, PIH-2011-31 (6/13/11), at pp. 12-13. http://portal.hud.gov/hudportal/documents/huddoc?id=pih2011-31.pdf. We do not yet have a listing of which PHAs have sought such waivers.
[8] *See, e.g., FY 2010 Choice Neighborhoods Notice of Funding Availability,* page 23 (June 6, 2011) and *FY 2010 HOPE VI Notice of Funding Availability,* page 28 (August 25, 2010).

housing choice in the LIHTC program. In the next section, we will review the available metrics for mapping opportunity, before turning to a proposed allocation model.

2. The benefits of opportunity metrics

An important goal of the Fair Housing Act's AFFH mandate is equal access to opportunity in education, employment, public and private services, and other attributes of upward economic mobility that have traditionally been less equally available in communities of color. This insight is reflected in the 1968 Kerner Commission report, the legislative history of the Fair Housing Act, and in scores of school and housing desegregation lawsuits that proceed from the understanding that separate communities are inherently unequal (or will inexorably become unequal again over time, even as they receive generous equalization subsidies in the short term).

The current use of "opportunity mapping" moves directly to this position without necessarily using race as the single metric. It offers several advantages, in that it is *conscious of race,* but removes the most controversial issue from the policy debate by avoiding the stigmatization of neighborhoods, and permits more real time neighborhood assessment than the decennial census. Most importantly, it provides increased flexibility to allow housing investments in "high" or "emerging" opportunity areas that may not yet be racially integrated, and potentially can be used to avoid placing more low income families in transitional neighborhoods that are on a downward economic spiral but appear (currently) racially integrated.

Existing regional opportunity grids

Opportunity mapping was pioneered by Professor john powell in the late 1990s, working first out of the Institute on Race & Poverty at the University of Minnesota and later at the Kirwan Institute at Ohio State University, where the Institute's opportunity communities program further refined and expanded the analysis, and has conducted mapping analysis in more than two dozen states and dozens of metropolitan areas..[9] The opportunity mapping approach has been further modified and developed by a variety of groups,

[9] Opportunity maps have been utilized in policy advocacy, litigation, applied research, community organizing, coalition building and to inform service delivery. Recent organizations partnering with the Institute to create opportunity maps include: Maryland ACLU, NAACP Legal Defense Fund, Poverty & Race & Research Action Council, The Miami Workers Center, The Greater New Orleans Fair Housing Center, Green Doors (formerly the Austin Coalition for the Homeless), The Presidents' Council of Cleveland, The Michigan Roundtable for Diversity & Inclusion, ISAIAH (MN Gamaliel affiliate), The Connecticut Fair Housing Center, Massachusetts Law Reform Institute, Washington County Oregon Department of Community Development, Gulf Coast Regional Planning Commission, The Columbus Community Development Collaborative and the Northwest Justice Project. For more information and background on opportunity mapping please see: Maya Roy and Jason Reece. Poverty's Place Revisited: Mapping for Justice & Democratizing Data to Combat Poverty. Clearinghouse Review Journal of Poverty Law and Policy. July/August 2010 and Jason Reece and Eric Schultheis. *Poverty's Place: The Use of Geographic Information Systems in Poverty Advocacy.* Clearinghouse Review Journal of Poverty Law and Policy. 430-447. January-February 2009.

including the Opportunity Agenda,[10] the Institute on Race & Poverty,[11] DiversityData.org,[12] the Furman Center,[13] and a number of private companies. Some of these versions of opportunity mapping have placed greater emphasis on specific aspects of opportunity, such as health outcomes, educational performance, and transportation access.

Opportunity mapping provides an analytical framework to measure opportunity comprehensively and determine who has access to opportunity rich areas. In general, opportunity mapping is an effective strategy for making a range of information visually accessible, facilitating comparisons within and among regions. Such maps can provide policymakers with a clearer understanding of spatial inequalities, by illustrating patterns in racial and socioeconomic distribution as well as social and financial resources. Mapping opportunity requires selecting variables that are indicative of high and low opportunity. For example, high opportunity indicators include the availability of sustainable employment, high performing schools, a safe environment, access to high quality health care, adequate transportation, quality childcare and safe neighborhoods. These multiple indicators of opportunity are assessed in a comprehensive manner at the same geographic scale, thus enabling the production of a comprehensive "opportunity map" for the region and/or state.

Because these dimensions of opportunity are often interrelated, this method of mapping can be used to evaluate neighborhoods' relative strength in providing residents with access to fuller, healthier, more productive lives; or conversely, their likelihood of perpetuating the effects of segregation and poverty.

To map opportunity in a region, we use variables that are indicative of high and low opportunity. High-opportunity indicators include the availability of sustainable employment, high-performing schools, a safe environment, and safe neighborhoods. A central requirement of indicator selection is a clear connection between the indicator and opportunity. What is opportunity? For this analysis, opportunity is defined as environmental conditions or resources that are conducive to healthier, vibrant communities and are more likely to be conducive to helping residents in a community succeed. Indicators could either be impediments to opportunity (which are analyzed as negative neighborhood factors, e.g., high neighborhood poverty) or conduits to opportunity (which are analyzed as positive factors, e.g., an abundance of jobs). These multiple indicators of opportunity are assessed at the same geographic scale, thus enabling the production of a comprehensive opportunity map for the region.

For example, the Kirwan Institute's recent Massachusetts analysis utilized nineteen indicators of opportunity, assessed separately in three different opportunity areas. The analysis was conducted using Census Tracts as geographic representations of neighborhoods. Data for education was disaggregated from the school district level to

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[10] *A User's Guide: Using Maps to Promote Health Equity*, The Opportunity Agenda and the Health Policy Institute at the Joint Center for Political and Economic Studies (2009), available at http://opportunityagenda.org/mapping.
[11] www.irpumn.org
[12] www.diversitydata.org
[13] http://furmancenter.org

census tracts for the analysis. The comprehensive opportunity map represents the combined score based on these primary opportunity areas for each state. The following tables and regional map represent the indicators utilized in the analysis for the Massachusetts mapping assessments (the maps can be zoomed in to the neighborhood level):

Educational Opportunity	Economic Opportunity	Neighborhood/Housing Quality
Student Expenditures	Unemployment Rates	Home Values
Student Poverty	Population on Public Assistance	Neighborhood Vacancy Rate
Students Passing Math Tests	Proximity to Employment	Crime Index or Crime Rate
Students Passing Reading Tests	Economic Climate (Job Trends)	Neighborhood Poverty Rate
Dropout Rate	Mean Commute Time	Home Ownership Rate
Graduation Rate		Proximity to Toxic Waste Release Sites
Number of Certified teachers		Proximity to Superfund Sites

Indicators utilized in the MA opportunity mapping analysis

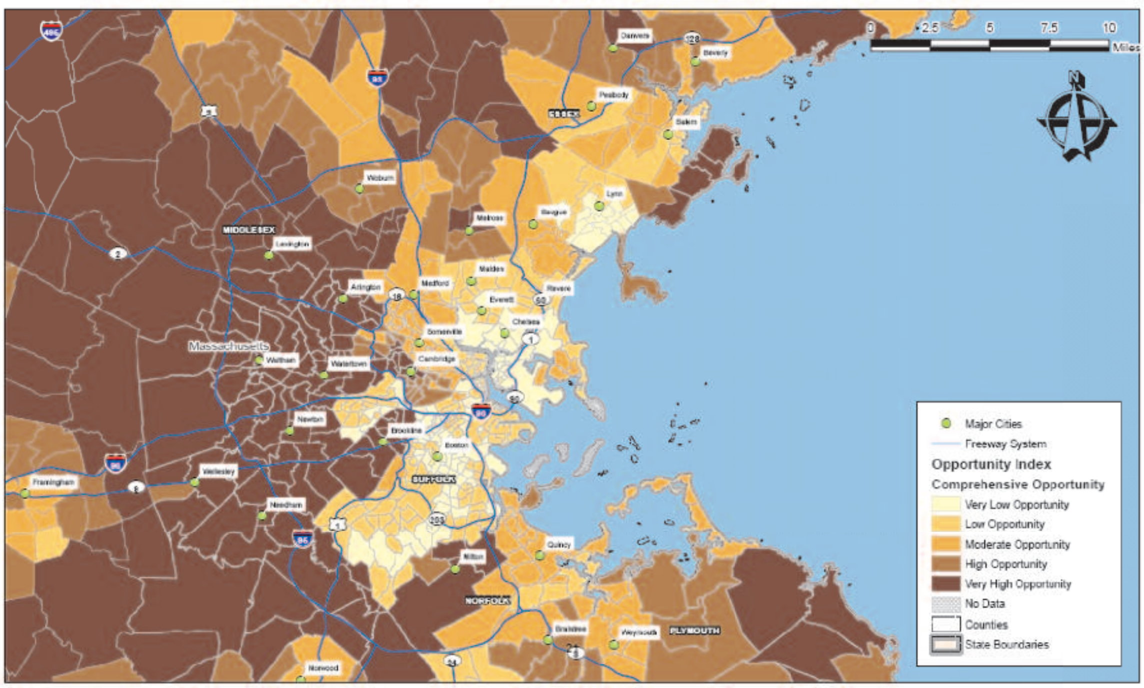
Map 1A: Comprehensive Opportunity Map

GREATER BOSTON

KIRWAN INSTITUTE for the Study of Race and Ethnicity

This map displays the spatial pattern of distribution of opportunity based on Education,Economic & Mobility, and Housing & Neighborhood indicators

Source: US Census 2000; County Business Pattern; ESRI; EPA; Massachusetts Department of Education; MA State Police **Date:** July 17, 2008



The HUD Office of Policy Development and Research (PD&R) is now deeply engaged in the process of measuring and mapping opportunity, as part of the Sustainable Communities Initiative (SCI), and in preparation for new rules on implementing the

AFFH requirement for HUD grantees.[14] The agency's new Fair Housing Equity Assessment for the SCI program is the most articulated expression of this approach to date, with a database and maps for grantees on school proficiency rates, poverty concentration, labor market indicators, housing stability, and job access.[15] These new standards (and the metrics released as part of the anticipated Affirmatively Furthering Fair Housing rule) should be incorporated into the performance standards for LIHTC siting.

Producing a National Opportunity Mapping Methodology

To successfully utilize opportunity metrics for LIHTC nationally, both nationally calculated metrics (identifying areas which do not meet a national baseline for neighborhood conditions, for example, neighborhoods with failing schools and poverty rates exceeding 40%) should be calculated, additionally, regional metrics (calculating regional opportunity analysis – comparing neighborhoods across the region, as illustrated in the Massachusetts map above) should be used to create a local opportunity maps to guide location requirements.

Additionally, national metrics should be a baseline starting point for more in-depth locally led opportunity mapping analysis, which would provide a more comprehensive opportunity map (including local data not available at a national scale), analysis which could be sharper in geographic precision (analyzing areas smaller than census tracts) and would stimulate local engagement among stakeholders in embracing opportunity based housing and opportunity metrics. Local state housing finance agencies could conduct their own opportunity analysis for the LIHTC program, utilizing a base methodology provided by HUD but also mandated to follow a process to expand this baseline analysis to produce robust regional or state opportunity maps which achieve the goals listed above.

In embracing an opportunity frame for location of assisted housing, we should not lose sight of continuing patterns of racial segregation. One of the key rationales for desegregation, whether in schools or in housing, has been to provide equal access to opportunity, but even when a community's opportunity profile is positive, it may not be appropriate for siting of assisted housing where the community is undergoing racial transition (where, for example, the school population has become predominantly African American or Latino, with increasing school poverty concentrations), or even where the community is already racially segregated.

[14] See Kirk McClure, "Housing Choice Voucher Marketing Opportunity Index: Analysis of Data at the Tract and Block Group Level." United States Department of Housing and Urban Development (2011). http://www.huduser.org/publications/pdf/Housing_Choice_Voucher_Report.pdf

[15] See archived HUD webinar on the Fair Housing Equity Assessment at www.prrac.org/pdf/Regional_FH_Equity_Assessment_HUD_Aug_2011.pdf

3. A regional allocation model for subsidized family housing

The existing site and neighborhood standards represent a pragmatic compromise between the strict legal demands of the Fair Housing Act (to stop promoting segregation) and the realities of local politics, which suggest a more flexible standard. The resulting exceptions to the rule essentially permit (except in the most opportunity deprived neighborhoods) up to half of subsidized housing resources to be placed in higher poverty, racially concentrated neighborhoods. However, this "50/50" approach has never been implemented in any program or metro area, in part because of resistance to low income housing in predominantly white, higher opportunity communities, and in part because of the demands for additional housing funds from urban areas, in locations where opposition is low and where any improvements to the neighborhood and subsidies to neighborhood stakeholders are viewed as positive. Thus, in almost every American metropolitan area, and in spite of these siting rules, the vast majority of assisted housing units are located in neighborhoods that exceed the combined average Black and Latino population averages for the region, and in neighborhoods that are substantially poorer than the average neighborhood in the region.

Our suggestion for redesigning site and neighborhood standards in the LIHTC program builds on the underlying assumption of the HUD standards, that *balanced development across a region* should be a policy goal, and suggests that this goal is best accomplished by allocating a significant proportion of tax credits for family developments in high opportunity areas. An allocation model that distributes tax credits equitably across a region, has the potential to achieve civil rights goals and maximize housing choice. Such a model would have the following features:

¶ Assess current distribution of assisted family housing units in the metropolitan area, in both high and low opportunity areas;

¶ Allocate a sufficient percentage of LIHTC funds over a 5-year period to reach the goal of 50% of total family subsidized units in the metropolitan area in high opportunity areas (depending on the metro area, this goal may require a high opportunity area allocation in excess of 50% in any given year);

¶ Allocate the remainder of LIHTC funds in areas of emerging opportunity (gentrification) or in lower-opportunity areas where there is a bona fide "comprehensive community development plan," consistent with the LIHTC statute;

¶ Strong affirmative marketing requirements should accompany the allocation of funds, to ensure that units in high opportunity communities are substantially occupied by persons residing in very low opportunity areas, including low income African American and Latino families;

¶ Use HUD's Fair Housing Equity Assessment (and any related metrics released as part of the anticipated Affirmatively Furthering Fair Housing rule) to measure outcomes and performance over time;

¶ Important sustainability goals - such as development of new LIHTC units near transit - should be overlaid with opportunity mapping, and should not substitute for such mapping.[16]

¶ Unspent funds should not be reallocated within the region to lower opportunity areas, but are reallocated to other regions or returned to the general fund.

Adapting siting allocation rules to the LIHTC statute: QCTs and DDAs[17]

The LIHTC statute (Section 42 of the Internal Revenue Code) specifies two types of neighborhoods eligible for enhanced tax credits: "Qualified Census Tracts" (QCTs) and "Difficult to Develop Areas" (DDAs) – plus the "Concerted Community Revitalization Plan," which is a condition of eligibility for the QCT. These standards, which defer to HUD and the Department of Treasury for implementation, present an opportunity for civil rights reform in the LIHTC program without the need to return to Congress for statutory changes.

A "Qualified Census Tract" (QCT) is defined in the statute as

> any census tract which is designated by the Secretary of Housing and Urban Development and, for the most recent year for which census data are available on household income in such tract, either in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent. If the Secretary of Housing and Urban Development determines that sufficient data for any period are not available to apply this clause on the basis of census tracts, such Secretary shall apply this clause for such period on the basis of enumeration districts.

A "Difficult to Develop Area" (DDA) is defined in the statute as

> any area designated by the Secretary of Housing and Urban Development as an area which has high construction, land, and utility costs relative to area median gross income.

The "Concerted Community Revitalization Plan" is not defined in the statute, but Section 42 instructs state housing credit agencies to include a preference in qualified allocation plans for developments in QCTs that contribute to such a plan.

[16] For example, it may be sensible to say that, for a competition between different potential sites in high opportunity areas, sites that have good transit access should get extra points; or that "comprehensive community development plans" that are around a transit hub should be viewed more favorably in allocating the remainder of LIHTC funds. However, transit access and other sustainability goals should not be substituted for opportunity - i.e. a site with access to transit in a low-opportunity neighborhood should not substitute for high opportunity sites.

[17] This section relies in part on the excellent recommendations in a 2004 Abt Associates report, *Making the Best Use of Your LIHTC Dollars: A Planning Paper for State Policy Makers* (HUD Office of Policy Development & Research, July 2004).

LIHTC developments in these areas are eligible for tax credits based on a "basis boost" calculated at 130% of qualified basis (supporting significantly more of development costs than in other areas). Although the basis boost is not an entitlement, and is awarded to fewer than 50% of developments in eligible census tracts, it is nonetheless a substantial incentive that helps to drive some siting decisions, and given the fact that HUD has the discretion to set definitions of these neighborhoods within broad statutory parameters, it is an area where significant progress could be made in supporting high opportunity development. The LIHTC statute also allows state housing credit agencies to designate high cost projects as eligible for the basis boost.

The basis boost provisions of Section 42 were enacted in 1989 to assure that rents in tax credit properties are affordable in two situations. Granting a basis boost to properties in DDAs makes additional capital contributions available to projects facing high development costs. The additional equity provided through the basis boost replaces mortgage debt that would otherwise have to be repaid through higher rents. For similar reasons, a basis boost for a project in a QCT allows a LIHTC owner to reduce rents in neighborhoods with higher proportions of low income households and families in poverty relative to the rest of a metropolitan area who might not otherwise be able to pay even the restricted LIHTC rent.

The selection preference for projects within QCTs that are the subject of a concerted community revitalization plan was enacted in 2002 as part of legislation initially introduced as the Community Renewal Tax Relief Act of 2000. The law established a series of initiatives creating the New Markets Tax Credit program, empowering HUD to designate up to 40 "renewal communities," and extending a variety of tax benefits to address environmental concerns and support small businesses in distressed locations.[18]

Responsibility for administering the DDA and QCT provisions of Section 42 is divided between HUD, which must identify the high cost and low income areas designated as DDAs and QCTs, and the IRS, which must issue standards for qualified allocation plans, including a definition of a concerted community revitalization plan.

To better target – and limit – LIHTC resources to appropriate QCTs, the concerted community revitalization plan requirement in the LIHTC statute should be more clearly defined. Giving real content to this provision of Section 42 can help to prioritize the development of tax credit housing in neighborhoods where there is a sustained financial and programmatic commitment to improving schools, adding to transportation networks that promote access to jobs, adding to neighborhood services and amenities, and removing poor environmental conditions. Given the limited nature of the LIHTC subsidies, in order to promote opportunity the IRS should target QCTs that are in the path of gentrification, and not prioritize placement of additional low income units in high poverty neighborhoods that are not rising out of poverty status.

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[18] Pub. L. 106-554, §1(a)(7), title I, §132(b), 114 Stat. 2763A-612 (December 21, 2000). *See also, Joint Committee on Taxation, Summary of Provisions Contained in H.R. 5662, the "Community Renewal Tax Relief Act of 2000," (JCX-112-00), December 15, 2000.*

Difficult to Develop Areas are an obvious vehicle for HUD to incentivize development in high opportunity communities, but HUD has resisted doing this. Instead, HUD designates DDAs based on the ratio of an area-wide Section 8 fair market rent to an area-wide monthly LIHTC rent limit solely at the metropolitan area level. As a consequence, DDA designation is limited to 42 of the more than 360 metropolitan statistical areas, and only 40 of more than 2,000 non-metropolitan counties have the designation. In contrast to the methodology used for QCTs, where 20% of the poorest census tracts are designated as QCTs in each metropolitan area, for DDAs there is no accounting for variations in development cost within metropolitan areas.[19]

HUD can create incentives for greater volumes of LIHTC development in more expensive opportunity areas by using opportunity metrics linked to development cost and incomes within metropolitan areas. With the additional capital supplied through a basis boost, development in opportunity areas will become more feasible, and the rents in the completed developments will be more affordable to low income families.

Each of these reforms to the LIHTC program can help to drive access to opportunity in the program, and can be accomplished with no statutory changes. Each of these regulatory reforms is also arguably required by the Fair Housing Act.

4. Beyond site selection: incentivizing opportunity-based housing and removing barriers to development in high opportunity communities

A balanced siting and allocation system alone will not address the many additional barriers to development in higher opportunity areas. Some of the barriers most commonly cited by affordable housing developers include:

- High land costs
- Site control requirements
- Financial disincentives for scattered-site and small developments
- Local "contribution and approval" requirements
- Zoning and land use barriers and related delays
- Administrative overhead costs relating to delays
- Lapsing of assigned tax credits relating to delays
- Expert and legal costs

The Treasury Department can encourage or mandate state HFAs to utilize other state powers and funds to level the playing field for developers willing to venture into family LIHTC development in these areas. This is what it means to "affirmatively further fair housing." The Treasury Department can take the following administrative actions – through regulation or guidance – that would significantly expand fair housing choice for future residents of tax credit housing:

[19] 75 Fed. Reg. 57481 (September 21, 2010).

Define Standards for Qualified Allocation Plans

Prohibit local approval requirements and selection priorities: QAP provisions in many states either require local project approval (including evidence of zoning approval) either as a threshold requirement, or render LIHTC applications non-competitive by awarding selection points to projects with local approval.[20] Such provisions tend to exclude LIHTC family developments from the high opportunity communities where they are most needed. The QAP portion of the tax credit statute, Section 42(m), requires only notice to the chief executive officer of a local community and an opportunity for comment on a proposed LIHTC project. The Code does not require local approval of projects, nor does it permit the prioritization of projects with local support. Standards for QAP should forbid such standards.[21]

In project market studies, include information about the extent of segregation and concentration of poverty, and about access to opportunities for likely project occupants; provide for credit agency review of this content in allocation decisions. The obligation to further fair housing includes a duty to assess the civil rights impact of funding decisions and to make funding decisions so that over time patterns of segregation are dismantled and open housing markets are established. The market study required by Section 42(m) is an excellent vehicle for this assessment.

Establish site and neighborhood standards for project selection criteria that prioritize developments serving families with children in high opportunity areas and that discourage development in high poverty, racially concentrated neighborhoods. The text of Section 42(m) and its legislative history evidence an intent that LIHTC development expand housing choice for tenant populations with special housing needs, including people of color, households on public housing waiting lists, and families with children.[22]

Utilize new statutory authority to designate high cost projects for the basis boost to create financial incentives for development in high opportunity areas. Development in high opportunity areas typically involves higher land costs, larger construction budgets to address restrictions on density and local design requirements, and the cost of infrastructure. Requiring credit agencies to make the basis boost available to these projects expands housing opportunity.[23]

Limit the use of LIHTC for rehabilitation and preservation projects. Given the historic manner in which federal housing programs have created and reinforced residential segregation, priorities for rehabilitation and preservation projects should be focused on

[20] See *Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program* (PRRAC and Lawyers Committee for Civil Rights, 2008) (www.prrac.org/LIHTC.php)
[21] We view municipal manipulation of local zoning laws, often exercised with either discriminatory purpose or impact, as among the most significant impediments to the development of affordable housing serving people of color and families with children in opportunity locations. Efforts to reform the LIHTC program would be significantly strengthened with a concomitant enforcement presence addressing local land use practices.
[22] 26 U.S.C. §42(m)(1). *See also,* House Rpt. No. 101-247 (September 20, 1989) at 650.
[23] 26 U.S.C. §42(d)(5)(B)(v).

the preservation of family housing in high opportunity areas or activity that is part of a concerted community revitalization plan.

Encourage credit agencies to relax standards for site control and zoning approvals in opportunity locations. Rigorous site control and zoning approval requirements in QAPs can effectively exclude projects in high opportunity locations where land use approvals are more difficult to obtain.

Create Financial Incentives for Opportunity-based Housing

Clarify that the credit agency evaluation of financial feasibility can permit higher costs for land, infrastructure, and design requirements that characterize multifamily development in opportunity locations. Credit agency cost limits often screen out projects in opportunity locations that face higher costs related to the location.

Clarify that off-site infrastructure improvements necessary for development are basis items that are eligible for tax credits. Development in opportunity locations often imposes the obligation to build access roads, utilities, and other features that are related to, but not always directly on the site. There is some IRS guidance that helps in this situation, but further guidance can clarify that such costs are basis eligible items.

Issue guidance regarding developer fees that permits higher fees as compensation for development in areas resistant to affordable rental housing. Tax credit development in suburban locations involves greater risk associated with zoning denials, extended periods for obtaining land use approvals, abutter litigation, and similar circumstances that add delay and cost. Higher developer fees in such situations can create incentives to development.

Encourage credit agencies to use binding forward commitments for projects in high opportunity areas stalled due to local opposition. Local community opposition to a family development is usually indicative of a highly desirable area. Opposition should trigger an extension of time to complete development, which can be achieved through forward commitments. These projects are also candidates for added financial support from non-LIHTC sources.

Modify "stacking" rules that recapture credits from a state credit agency after specified time periods to hold harmless the reservation of credits to projects in opportunity locations stalled due to opposition, or protracted zoning disputes. Section 42 requires the return of tax credits in a state's housing credit dollar amount if "unused" after two years. Stacking procedures can define the reservation of LIHTC to stalled projects in opportunity locations as an allocation that is not subject to return.

Relax cost standards in high opportunity locations. Section 42 requires state credit agencies to evaluate the financial feasibility of a project prior to making a reservation of LIHTC.[24] Many states use a single feasibility standard for all projects without regard to

[24] 26 U.S.C. §42(m)(2).

location. The IRS can encourage state credit agencies to utilize flexible feasibility criteria that take into account the higher costs associated with development in opportunity locations. Commitment of HUD financial resources to LIHTC projects involve a similar feasibility analysis by HUD known as "subsidy layering review." HUD's SLR procedures can also be adjusted to account for variations in development cost in high opportunity locations, to allow for larger commitments of HOME and CDBG funds, project-based Housing Choice Vouchers and similar forms of assistance that serve extremely low-income and very low-income households.

Encourage State Housing Finance Agencies to use bond authority and other program funds to further incentivize development in high opportunity communities. The 4% tax credits associated with multifamily tax exempt bond financing do not count against a state's annual LIHTC allocation limit so long as the 4% credits are awarded in a manner consistent with the housing credit agency's qualified allocation plan.[25]

Enforce the General Public Use Rule

Explicitly require LIHTC projects to comply with civil rights laws applicable to owners of rental housing and recipients of federal financial assistance. Civil rights laws for recipients of federal assistance such as Title VI and Section 504 require the responsible agency to issue rules. Tax credits, the Section 1602 credit exchange program, and the recently created Capital Magnet Fund program, are all forms of federal assistance. The general public use rule should explicitly require owners of LIHTC projects to comply with these laws, as well as Title VIII either in the general public use rule, or in separate rulings and rules. Current rules are ambiguous at best.

Require housing credit agencies to comply with civil rights laws applicable to recipients of federal financial assistance to and entities engaged in residential real estate-related transactions. These same principles apply to housing credit agencies. Housing credit agencies need guidance in order to understand that Title VIII, and Title VI rules, prohibit disparate impact, including funding decisions that perpetuate segregation. To the extent that housing credit agencies are engaged in the provision of financial assistance for the acquisition, rehabilitation, and construction of housing, QAP provisions that have the effect of steering family projects to segregated, high poverty locations, and that effectively rule out the provision of assistance in high opportunity areas violate Title VIII's prohibition on discrimination in residential real estate-related transactions.

Adopt civil rights-related standards regulating admissions criteria and selection preferences at LIHTC properties. LIHTC properties should operate under admissions standards similar to HUD-assisted properties that forbid eligibility standards and selection preferences such as local resident selection preferences, the effect of which is to delay, deny, or exclude eligible families with protected characteristics.

Create standards for affirmative fair housing marketing. Affirmative fair housing marketing of tax credit units in opportunity locations involves more than outreach to

[25] 26 U.S.C. §42(m)(1)(D).

households that are not likely to apply for the housing. It includes taking affirmative steps to link admissions to opportunity-based housing to the tenant populations with special housing needs, public housing waiting lists, and families with children that are favored by the statutory project selection criteria in Section 42(m). Integration performance goals/expectations should be set out for family developments in predominantly white communities.

<u>Define the prohibition on Section 8 discrimination</u>**.** Although Section 42's provisions for extended use agreements prohibit a refusal to lease to a family because of the household's status as a Section 8 participant, IRS rules reduce the prohibition to an annual owner self-certification of compliance. IRS policies should explicitly prohibit refusals to rent to Section 8 participants, and should also prohibit practices that have the effect of excluding voucher holders, such as screening standards that require incomes at two or three times the monthly contract rent.

About the authors

Philip Tegeler is the Executive Director of the Poverty & Race Research Action Council, a civil rights policy organization based in Washington, DC (www.prrac.org). Mr. Tegeler is a civil rights lawyer and has also written extensively on federal housing policy, including "The Future of Race Conscious Goals in National Housing Policy," in *Public Housing and the Legacy of Segregation* (The Urban Institute Press, 2009), and "Connecting Families to Opportunity: The Next Generation of Housing Mobility Policy," in *All Things Being Equal: Instigating Opportunity in an Inequitable Time,* (The New Press, 2007).

Henry Korman is an attorney specializing in affordable housing development, civil rights and fair housing, and in the transactional, financing, operational, and compliance requirements associated with local, state and federal affordable housing programs. He is of-counsel at Klein Hornig LLP, a Boston and Washington, DC law firm practicing affordable housing and community development law. He has written extensively about civil rights and fair housing as those issues relate to access to housing and affordable housing development, including *Furthering Fair Housing, the Housing Finance System and the Government Sponsored Enterprises* (Kirwan Institute, 2011) and "Underwriting for Fair Housing? The Obligation to Affirmatively Further Fair Housing and the Challenging Work of Achieving Civil Rights Goals in Affordable Housing Programs," 14 *Journal of Affordable Housing and Community Development Law* 292 (2005)

Jason Reece is a senior researcher at the Kirwan Institute for the Study of Race & Ethnicity, where he directs the Opportunity Communities program. He has managed all of the Institute's opportunity mapping initiatives since 2003. Some of his recent publications include: "Perspectives on Community Economic Development in a Global Economy," from the American Bar Association's *Building Health Communities: A Guide to Community Economic Development for Advocates, Lawyers and Policymakers;* "Poverty's Place: The Use of Geographic Information Systems in Poverty Advocacy," *Clearinghouse Review Journal of Poverty Law and Policy*. Jason also is an adjunct lecturer in The Ohio State University's Department of City & Regional Planning, teaching on issues of social equity in planning and development.

Megan Haberle is Associate Counsel and Economic Opportunity Fellow at The Opportunity Agenda, a communications, research, and policy organization based in New York (www.opportunityagenda.org). She advocates for stronger enforcement of civil rights laws, with a focus on infrastructure policy. Previously, she worked as a commercial litigator at Sonnenschein Nath and Rosenthal, as a paralegal with the ACLU National Legal Department, and as a teacher of English in Daegu, South Korea. She holds a J.D. from Columbia Law School, where she was an Executive Editor of the Columbia Journal of Environmental Law, and a B.A. in Sociology/Anthropology from Swarthmore College.