



PUBLISHED IN ASSOCIATION WITH THE NATIONAL HOUSING & REHABILITATION ASSOCIATION

TaxCreditAdvisor News, Ideas and Information for Tax Credit Developers and Investors

Issue Theme: Mixed-Income Development

State Agencies Far Along in Awarding Stimulus Dollars to Projects, Survey Finds

STATE AGENCIES HAVE awarded more than \$3.6 billion in federal stimulus act funds so far to jumpstart stalled low-income housing tax credit (LIHTC) projects, according to data collected by a *Tax Credit Advisor* survey that shows the enormous housing production from the new Tax Credit Assistance Program (TCAP) and Section 1602 credit exchange program.

A federal official also reported new figures showing growth in state commitments of TCAP funds.

ARRA,
continued on page 32

California New Markets Transactions to Help Renters, Struggling Homeowners

TWO NEW INITIATIVES in California illustrate the flexibility and evolutionary nature of the federal new markets tax credit (NMTC) program. One project is a new energy company that is installing solar power equipment at 11 affordable rental housing communities, while the second will implement a model to use the NMTC to help struggling low-income homeowners avoid foreclosure and stay in their homes.

Solar Energy Business

Sunwheel Energy Partners and US Bancorp Community Development Corporation, both based in St. Louis, recently announced the closing of a \$16 million investment in solar photovoltaic panels that will be

Projects,
continued on page 26

In This Issue

- TCAP, 1601 Funds Getting Out the Door** 1
New survey finds states busy awarding dollars
- Innovative California NMTC Deals** 1
Renters, struggling homeowners to be aided
- Legislative Campaign Down to the Wire** 2
Extenders bill eyed for LIHTC, bond proposals
- Stimulus Dollars Save Pair of Deals** 3
Two developers describe their zigs and zags
- HUD Guidance on Master Leases** 3
- GAO Studying TCAP, Exchange Programs** ... 5
- Fannie Mae Rebuffed in Proposed Sale** 6
Fate of GSEs' LIHTC investments still pending
- Choice Neighborhoods & Mixed-Income Development** 10
HUD official outlines proposed new program
- Q & A With Kevin J. McCormack** 12
McCormack Baron president discusses development
- Transit-Oriented Development** 14
- NH&RA News, Events** 16
- Historic Rehab Project Award Winners** 19
- Tax Court Decision on Easements** 21
Ruling has potential far-reaching significance
- Green Building** 23
Enterprise makes new \$4 billion commitment
- CDFI Fund Makes NMTC Awards** 25
- Update on Fair Housing Act Litigation** 27
Attorney Michael Allen describes recent progress
- HUD and the Future of Rental Assistance** ... 30
Official discusses plans for improvements
- Capital, State Briefs** 31
- State-by-State Survey Results** 34-39
TCAP, 1602 awards, 2010 LIHTC programs

Fair Housing Act Litigation Yields Progress for Affordable Housing and Integration

By Michael Allen, Esq., Relman & Dane, PLLC

EVEN AS THE MARKET for low-income housing tax credit (LIHTC) remains slack, the zoning and land use environments for affordable housing are improving in areas throughout the country, thanks to a series of lawsuits brought under the federal Fair Housing Act (FHA) and related laws. These cases suggest that the FHA is an indispensable tool in the affordable housing toolbox, and that syndicators, investors and developers ignore this tool at their peril.

I don't mean to suggest that all opposition to affordable housing is discriminatory. Rather, as I outlined in a previous article,¹ when municipal zoning, land use and building rules are used to delay or prevent such development, it is appropriate to consider whether municipal officials are motivated, even in part, by the race, national origin, disability or familial status of the prospective residents. Because folks in these FHA "protected classes" often have a greater need for affordable housing, opposition to such housing may amount to discrimination on a prohibited basis, even if there was no conscious decision to discriminate.

Recent developments in federal court cases in New York, Louisiana and Texas – and new legislation in North Carolina – have given some encouragement to affordable housing developers and advocates, and may provide a road map for overcoming municipal and community opposition.

Westchester County Case

The first of these is *United States ex rel. Anti-Discrimination Center v. Westchester County*,² a ground-breaking case under the federal False Claims Act handled by my firm and described in my earlier article (*see Tax Credit Advisor, May 2009, p. 1*).

After the Anti-Discrimination Center convinced a judge that Westchester had falsely certified, on as many as 1,000 occasions, that it was addressing race-based impediments to fair housing choice, the U.S. government intervened in the case for purposes of brokering a settlement. An agreement was reached in principle on August 10, 2009, which requires Westchester County to devote at least \$51.6 million in funding for affordable housing over seven years, to ensure the development of 750 units in the County's whitest neighborhoods and to affirmatively market those units to people of color throughout the New York City metropolitan area. The County's Board of Legislators approved the settlement on September 23, 2009, and a monitor appointed by the federal court will oversee compliance. One of the most remarkable parts of the settlement was an agreement by the County to litigate, in appropriate circumstances, against towns and villages that resisted affordable housing development.

Fair Housing,
continued on page 28

Fair Housing,*continued from page 27*

In the wake of its decision to enter the case, the U.S. Department of Housing and Urban Development (HUD) announced that it would be proposing new regulations strengthening the obligation to “affirmatively further fair housing,” and to impose the Westchester standards on more than 1,200 state and municipal recipients of federal housing and community development funds.

Louisiana Case

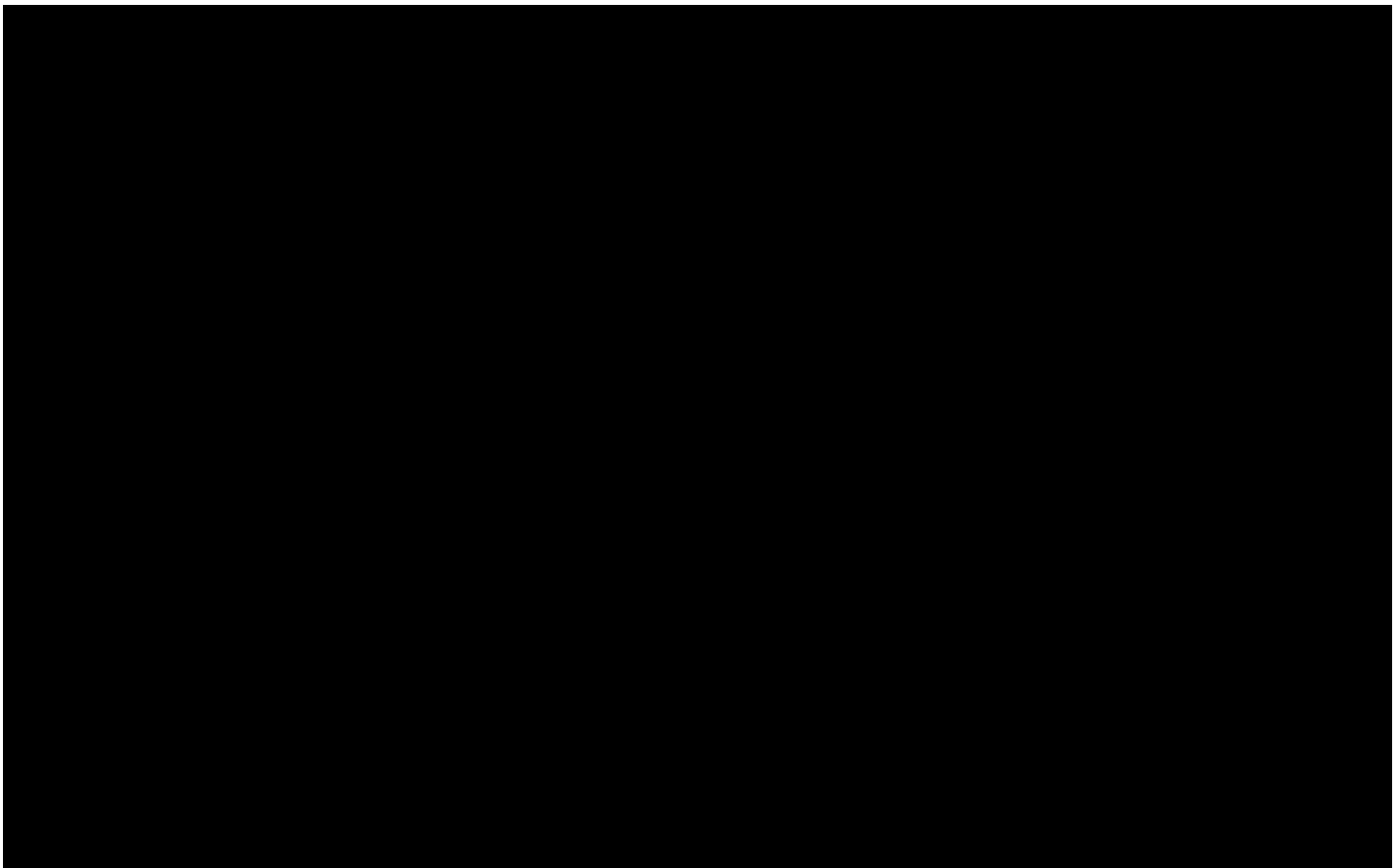
We had similar success in our litigation on behalf of Provident Realty Advisors (PRA) and the Greater New Orleans Fair Housing Action Center against St. Bernard Parish, to eliminate barriers to the

development of four LIHTC apartment developments.³ Despite repeated court rulings declaring a moratorium on multifamily development to be in violation of the FHA, Parish officials refused to issue permits. On September 11, 2009, in response to our motion, U.S. District Court Judge Helen Berrigan found St. Bernard Parish and the St. Bernard Parish Council in contempt of court for a third time this year. The Court also issued specific deadlines for approval of Provident’s building permits, the final step necessary to begin construction, and ordered the imposition of sanctions of up to \$10,000 per day if the Parish did not comply. Concerning the conduct of Parish officials who continued to block PRA’s affordable housing developments, Judge Berrigan wrote:

“Instead of acquiescing in, and even pandering to the exaggerated fears and race and class based prejudice of some of its citizens, these officials could courageously challenge those assumptions, and accurately present to its citizens the advantages this development could bring to the parish ... Leadership is not finding an angry crowd and getting in front of it to goad it on. A leader takes people where they want to go, and a great leader takes people where they do not necessarily want to go, but ought to be.”

Remarkably, just days after Judge Berrigan’s order, the Parish Council approved legislation to put

Fair Housing,
continued on page 29



Fair Housing,

continued from page 28

before voters a referendum to permanently ban apartment complexes of more than six units. As we prepared a fourth motion for contempt of the court's orders, HUD opened its own inquiry into whether the Parish was violating its "affirmatively furthering" obligation. Concerned that it would be jeopardizing its eligibility for tens of millions of dollars in hurricane reconstruction funding, the Parish Council abruptly rescinded the ordinance on November 3, taking the measure off the ballot for November 14.

Texas Case

Tax credit advocates in central Texas have taken bold and innovative steps to challenge municipal resistance to tax credit properties. The Inclusive Communities Project (ICP), a civil rights group focused on expanding housing opportunities for people of color, has filed two federal lawsuits under the FHA against municipalities that have historically resisted tax credit properties in high-opportunity neighborhoods.⁴ ICP has resources to assist minority families to move out of minority-concentrated neighborhoods, and has offered to deploy these resources to assist municipalities to establish affordable housing in high-opportunity communities.

Prior to the litigation, ICP had offered to provide grants to the two municipalities for purposes of creating incentives to build LIHTC properties in predominantly white communities offering better access to schools, employment and other

opportunities. Such incentives to developers, in exchange for municipal support on the LIHTC applications, would dramatically increase the odds of tax credits being allocated in such communities. ICP has won initial rulings in both cases, with courts determining that the municipal practices may have harmed ICP's efforts to increase the stock of pro-integrative housing for its constituents.⁵ While the cases will not likely be resolved until late 2010, they represent some reason for hope that the FHA can be used to undo municipal barriers to LIHTC development.

North Carolina Law

Finally, the North Carolina legislature has passed, and Governor Bev Perdue has signed, legislation that expands anti-discrimination protections to affordable housing developments. Senate Bill 810 was signed into law on August 28, 2009, and goes into effect immediately. The provision, to be codified at N.C. General Statutes 41A-4(f), provides that

"It is an unlawful discriminatory housing practice to discriminate in land use decisions or in the permitting of development based on race, color, religion, sex, national origin, handicapping condition, familial status, or, except as otherwise provided by law, the fact that a development or proposed development contains affordable housing units for families or individuals with incomes below eighty percent (80%) of area median income. It is not a violation of this Chapter if land use deci-

sions or permitting of development is based on considerations of limiting high concentrations of affordable housing."

While there are potential loopholes in the enforcement of this newly-minted protection, it makes North Carolina just the third state in the country (after California and Florida) to ban discrimination based on the incomes of prospective residents. It should give LIHTC developers an additional tool to overcome municipal and neighborhood opposition to affordable housing. ■

Michael Allen is Counsel with the civil rights law firm of Relman & Dane, PLLC. The firm specializes in fair housing and fair lending issues, and has extensive experience working with affordable housing developers to overcome community opposition and zoning and land use barriers. He may be reached at 202-728-1888, mallen@relmanlaw.com

¹ Michael Allen, "NIMBYism: Using the Fair Housing Act to Overcome Municipal Opposition," *Tax Credit Advisor*, April 2009, page 1.

² Case No. 06-CV-2860, U.S. District Court for the Southern District of New York. Copy of February 24, 2009, decision and related materials available at www.antibiaslaw.com/wfc.

³ *Greater New Orleans Fair Housing Action Center and Provident Realty Advisors v. St. Bernard Parish* No. 2:06-CV-07185 (E.D. La., opinion dated September 11, 2009).

⁴ *Inclusive Communities Project v. Town of Flower Mound*, No. 4:08-cv-433 (E.D. Texas, complaint filed Nov. 19, 2008); and *Inclusive Communities Project v. City of McKinney and Housing Authority of the City of McKinney*, No. 4:08-cv-434 (E.D. Texas, complaint filed Nov. 19, 2008).

⁵ *Inclusive Communities Project v. Town of Flower Mound*, No. 08-CV-433 (E.D. Tex. July 15, 2009); *Inclusive Communities Project v. City of McKinney and Housing Authority of the City of McKinney*, No. 4:08-cv-434 (E.D. Tex. Aug. 20, 2009).