Omissions in the Interim Rule

The interim rule fails to address several areas that are crucial to meaningful implementation of VAWA. For example, the interim rule does not include any amendments to 24 C.F.R. Part 966, which sets forth the requirements for public housing leases and the grievance procedure. VAWA requires that public housing leases include the statute's eviction and confidentiality protections,[28] yet this requirement is absent from the interim rule. Further, the interim rule fails to address what effect, if any, VAWA has on 24 C.F.R. § 966.51, which presently states that a PHA may exclude from the grievance procedure a termination of tenancy that involves violent criminal activity. Accordingly, 24 .C.F.R § 966.51 currently could be interpreted to exclude from the grievance procedure terminations of victims that are related to acts of domestic violence committed against them.

The interim rule replicates VAWA's provisions permitting a PHA or owner to bifurcate a lease to evict a tenant who engages in criminal acts of violence without evicting the victim of the violence. However, it does not incorporate VAWA's language stating that a PHA may terminate assistance to a household member who commits criminal acts of violence without terminating the victim's assistance.[29] In fact, there are several places in the interim rule that fail to incorporate VAWA's protections against voucher terminations.[30] In the preamble to the interim rule, HUD states that PHAs may be able to use their existing authority under 24 C.F.R. § 982.552(c)(2)(ii) to terminate voucher assistance for certain family members for criminal activity while permitting other family members to continue receiving assistance. However, even if it would be redundant to include VAWA's language regarding bifurcation of vouchers in the final rule, this would seem to be an important reminder for PHAs that they have this authority in cases involving domestic violence, dating violence, or stalking.

Conclusion

Housing and domestic violence advocates across the country submitted comments identifying the VAWA interim rule's deficiencies. Hopefully HUD will consider these comments and amend the interim rule accordingly before it issues the final rule. Even if the final rule does little more than reiterate VAWA's language, advocates can still work locally with PHAs to amend their Section 8 Administrative Plans and public housing Admissions and Continued Occupancy Policies to address the needs of survivors of domestic violence, dating violence, and stalking.[31] ■

[28] § 1437d(l)(5)-(6).
[29] § 1437f(o)(7)(D).
[30] *See, e.g.*, §§ 5.2005(b), 5.2007.
[31] For sample PHA plan language and domestic violence policies, please contact Meliah Schultzman, attorney and Equal Justice Works fellow, at mschultzman@nhlp.org.

Fair Housing Tax Credit Case Survives Motion to Dismiss

The United States District Court for the Northern District of Texas recently denied a Motion to Dismiss by the Texas Department of Housing and Community Affairs (TDHCA) in a fair housing case brought by the Inclusive Communities Project (ICP),[1] which sought to increase the number of affordable housing units in more racially and economically integrated neighborhoods. TDHCA argued that ICP had no standing to bring the suit and that the case could not go forward because of ICP's failure to join the IRS and the City of Dallas. However, the court found in favor of ICP on all issues presented, permitting the case to proceed.

Background

Federal law imposes on the Department of Treasury and state housing finance agencies (HFAs) an obligation to promote racial and ethnic desegregation.[2] Both the Treasury and state HFAs are required "affirmatively to further" fair housing.[3] In the context of other programs, several courts of appeal have held that the "affirmatively to further" duty prohibits an agency from funding housing developments that will exacerbate racial concentration.[4] Pursuant to these holdings, Treasury and state HFAs arguably should be obligated to reject tax credit applications that would worsen racial concentration.[5]

The ICP filed an initial complaint on March 28, 2008, alleging that TDHCA had violated the Fair Housing Act (FHA), the Equal Protection Clause of the Fourteenth Amendment, and 42 U.S.C. § 1982 by (1) using race as a consideration in siting Low-Income Housing Tax Credit (LIHTC) properties and (2) disproportionately allocating tax credits in areas primarily comprised of people of color while denying credits in predominantly white

[1] Inclusive Communities Project v. Texas Dep't. of Hous. and Cmty. Affairs, No. 3:08-CV-0546-D, 2008 WL 5191935 (N.D. Tex.) (hereafter *ICP v. TDHCA*). For background, *see* NHLP, *Texas Group Files Suit Alleging LIHTC Program Perpetuates Segregation*, 38 Hous. L. Bull. 146 (July 2008).
[2] *See* 42 U.S.C.A. § 3608(d) (West, WESTLAW through P.L. 110-231 approved 5-18-08); 42 U.S.C.A. § 5304(b)(2) (West, WESTLAW through P.L. 110-231 approved 5-18-08); *see also* Poverty & Race Research Action Council, *Civil Rights Mandates in the Low Income Housing Tax Credit (LIHTC) Program* 2 (2004), http://www.prrac.org/pdf/crmandates.pdf; Florence Wagman Roisman, *Poverty, Discrimination, and the Low Income Housing Tax Credit Program* 20 (2000), http://www.nhlp.org/lalshac/roisman.pdf.
[3] 42 U.S.C.A. § 3608(d) (West, WESTLAW through P.L. 110-231 approved 5-18-08); 42 U.S.C.A. § 5304(b)(2) (West, WESTLAW through P.L. 110-231 approved 5-18-08); Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994).
[4] Roisman, *supra* note 2, at 22 (citing Shannon v. HUD, 436 F.2d 809, 814 (3d Cir. 1970); Alschuler v. HUD, 686 F.2d 472, 482 (7th Cir. 1982); Otero v. N.Y. Hous. Auth., 484 F.2d 1122, 1333-34 (2d Cir. 1973); Anderson v. City of Alpharetta, 737 F.2d 1530, 1535 (11th Cir. 1984)).
[5] *Id.*

neighborhoods, thus making housing unavailable based on race, color and national origin.[6] Because LIHTC properties are required by law not to discriminate against Section 8 voucher holders, they provide essential housing for low-income families. However, in a survey of 383 apartment complexes in predominantly white Dallas suburbs, ICP had found that only seventy were willing to accept Section 8 vouchers.[7] Twenty-six of those properties accepting vouchers were tax credit properties, which are subject to the nondiscrimination requirement.[8] The complaint alleges that over 60% of LIHTC units in Texas are located in U.S. Census tracts with a majority minority population.[9] Furthermore, the LIHTC projects that are located in predominantly white neighborhoods tend to be where the eligible population is also predominantly white.[10] Because of this inequitable distribution of LIHTC properties, ICP faces increased difficulty in helping its clients find affordable housing in integrated communities.

The claim requested a number of forms of equitable relief aimed at addressing the racial disparities resulting from the siting of LIHTC housing. First, the requested relief would require TDHCA to allocate as many tax credits in predominantly non-minority census tracts as in predominantly minority census tracts.[11] Second, ICP requested that the court prohibit TDHCA from using race and ethnicity of the proposed project location and probable residents into account during decision-making regarding allocations.[12] The third request for relief seeks to enjoin defendants from approving tax credits to applications in Dallas unless certain fair housing, health and safety requirements are met.[13] The fourth request for relief aims to prohibit TDHCA from perpetuating racial and ethnic segregation through its tax credit allocations.[14] Finally, ICP asks the court to require defendants to comply with and implement reporting and monitoring requirements to demonstrate compliance with fair housing obligations.[15] The complaint also requests attorney fees, court costs and litigation expenses.[16]

[6]Complaint, Inclusive Communities Project v. Texas Dep't. of Hous. and Cmty. Affairs, No. 3:08-CV-0546-D (N.D. Tex. Mar. 8, 2008).
[7]Kim Horner, *Group Sues, Says Housing Program Perpetuates Segregation*, Dallas Morning News, Apr. 24, 2008, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/042508dnmethousingsuit.1336daa.html.
[8]*Id.*
[9]Compl. at 6, Inclusive Communities Project v. Texas Dep't. of Hous. and Cmty. Affairs, No. 3:08-CV-0546-D (N.D. Tex. Mar. 8, 2008).
[10]*Id.*
[11]*Id.* at 16-7.
[12]*Id.*
[13]*Id.*
[14]*Id.*
[15]*Id.*
[16]*Id.*

Defendant's Motion to Dismiss

In response to ICP's complaint, the defendant TDHCA filed a motion to dismiss. TDHCA contended that ICP does not have standing to bring this suit, for lack of a cognizable injury in fact, and that it failed to join two necessary parties—the City of Dallas and the IRS—as defendants. The court denied the motion, for the reasons explained below.

Standing

The court analyzed standing for the claims under the FHA separately from the claims under 42 U.S.C. § 1982 and the Fourteenth Amendment. Any "aggrieved person" may pursue a cause of action under the FHA. An "aggrieved person" is one who "claims to have been injured by a discriminatory housing practice" or "believes that such a person will be injured by a discriminatory housing practice that is about to occur."[17] Because of these specific provisions, a plaintiff need only show Article III standing under the FHA, without regard to addressing additional prudential standing concerns that might otherwise impede suit. Thus, ICP only had to establish injury in fact, causation, and redressability.

The court analogized ICP's standing to the situation in the Supreme Court case, *Havens Realty*, where the Court found standing when a fair housing organization had to use more resources to identify discriminatory steering practices.[18] Similarly, ICP argued, and the court agreed that it had to spend more resources to help African-American Section 8 voucher holders find housing in predominantly non-minority neighborhoods because of the lack of LIHTC units.[19] The court also dismissed TDHCA's argument that ICP was not directly affected because under Article III standing principles, the court need not distinguish between first- and third-party standing.[20]

The second element for standing requires that the defendant's actions caused the injury to be redressed. The court found that if not for TDHCA's denial of tax credit applications in predominantly white neighborhoods, an equal number of LIHTC units would be available in the predominantly minority neighborhoods as in the predominantly non-minority neighborhoods.[21] If an equal number of LIHTC units were available in minority and non-minority neighborhoods, ICP would have an easier time finding housing for its clients.[22] Assuming that TDHCA did not use race as a factor in allocations, the prevalence of LIHTC units would also equalize in all neighborhoods. Based on those two assumptions, the court found that ICP had "sufficiently alleged the causation element of standing."[23]

[17]42 U.S.C. § 3602(i); *See also ICP v. TDHCA* at *3.
[18]*ICP v. TDHCA* at *4, *citing* Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982).
[19]*Id.*
[20]*Id.*
[21]*Id.* at *5.
[22]*Id.*
[23]*Id.*

Finally, the court easily found that the injury alleged by ICP could be redressed by the equitable relief requested.[24] Thus, ICP met the elements for standing under the Fair Housing Act.

The court similarly found that ICP has standing under the slightly different analysis required for 42 U.S.C. § 1982 and the Fourteenth Amendment. In addition to the analysis required for the FHA, broader prudential standing rules apply to these causes of action.[25] Therefore, the court considered whether or not ICP had standing as a third party to enforce the rights being violated. The prudential rule against recognizing third-party standing has two purposes—to avoid unnecessary litigation and to ensure the "most effective advocate for the rights is before the court."[26] The district court found that denying ICP standing under such a rule would not serve such purposes.[27] ICP's close relationship with its clients ensures that the litigation will help them exercise their rights and the organization, with its mission of housing desegregation, would be effective in advocating the rights of its clients.[28] Thus, the court held that the prudential rule against third-party standing did not apply to ICP in this case.[29]

The case could provide a strong precedent to push state agencies toward fair allocations of its tax credits to spur development of affordable housing units in a wider variety of neighborhoods with better opportunities for jobs, schools and services.

Failure to Join Parties

After having found that ICP had standing to pursue its three causes of action, the court turned to the final question of whether or not the organization had failed to join two necessary parties—the City of Dallas and the IRS.[30] A party must be joined if it is necessary to afford complete relief. TDHCA argued that the IRS is a necessary party because the Tax Code allegedly provides incentives for developers to select low-cost land and any remedy would require the IRS to amend those incentives.[31] ICP's claim seeks to prohibit discrimination in the form of imbalanced acceptance of proposals in minority and non-minority communities, as well as the use of race as a factor in selection, not where developers select the land. To remedy such discrimination, the IRS would not have to change any policy. Therefore, the court held that the IRS is not a necessary party.[32] TDHCA also claimed that the City of Dallas's zoning laws would block construction of LIHTC units in white neighborhoods, but the court found no evidence supporting such a contention.[33] Thus, the court found that it could afford full relief to ICP without the IRS or the City of Dallas as parties, therefore obviating any need for joinder.[34]

Conclusion

The ICP will now be able to move forward with its substantive fair housing claims against TDHCA. If successful, the case could provide a strong precedent to push state agencies toward fair allocations of its tax credits to spur development of affordable housing units in a wider variety of neighborhoods with better opportunities for jobs, schools and services. ■

[24] *Id* at *6.
[25] *Id.*
[26] *Id*. at *7.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id*. at *8
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at *9.