Future Steps in Other Cases

While a circuit split on the enforceability of § 1437p under § 1983 would create the possibility of an appeal to the Supreme Court, it is doubtful that such claims would have a receptive audience at the nation’s highest court. In the past, Justice Kennedy has never voted to uphold court access under § 1983 for safety net statutes, and Chief Justice Roberts was the attorney representing Gonzaga University in Gonzaga v. Doe and arguing for the result adopted by the Court.

In cases involving a state statute or regulation in conflict with federal law, preemption under the Supremacy Clause provides an alternative route to judicial review. Jurisdiction arises under federal question jurisdiction, 28 U.S.C. § 1331, and authorizes injunctive and declaratory relief, though not damages or attorneys’ fees. However, a preemption claim is less likely to succeed in the event of inaction by the state, such as failure to provide a notice or delays in compliance.

The problem of unenforceability of specific provisions of the United States Housing Act could readily be resolved through legislative action, such as the addition of a private right of action to the statute. Advocates should explore the possibility of positive legislative changes that would overturn the court’s denial of judicial enforcement of rights clearly delineated in the housing statute. It is noteworthy that the legislative fix enacted after Edwards was phrased in terms of the obligations of federal and state government actors, with only the legislative history referencing the rights of individuals. In order to be certain to withstand challenge following Gonzaga, a legislative fix should clearly enumerate the rights of individuals in the text of the statute and not merely the legislative history.

Section 504 Protections Apply to ARRA-funded LIHTC Projects

The Low-Income Housing Tax Credit (LIHTC) program is one of the federal government’s primary methods for creating and maintaining affordable housing. However, the program has escaped compliance with Section 504 of the Rehabilitation Act, which only applies to programs receiving federal financial assistance. Section 504 provides disabled individuals with important protections by prohibiting discrimination and creating accessibility requirements. The LIHTC program has been exempted from compliance with Section 504 because the program provides tax credits and not direct financial assistance. However, the market for tax credits has declined with the economy, leading the federal government to offer direct funds to developers in exchange for unused credits through an LIHTC Exchange Program. Additionally, a Tax Credit Assistance Program (TCAP) will provide further financial assistance to help projects meet gaps in financing. Because TCAP and the Exchange Program will provide direct funding, any projects receiving funds through these programs must fully comply with the requirements of Section 504. This should spur development of affordable housing that will meet increased accessibility requirements for disabled persons.

Background

Low-Income Housing Tax Credit

By any measure, the Low-Income Housing Tax Credit program is among the federal government’s largest programs for creating and rehabilitating affordable housing for low-income people. In 2007, over $790 million in program credits produced nearly 75,000 units of affordable housing. As of 2005, the program had produced a total of 1.382 million units of affordable housing. The program works by providing tax credits to developers and investors, on a one-for-one basis, for every dollar spent on affordable housing development. These credits are usually sold to investors in return for equity, which provides upfront capital for developers. This initial infusion of equity reduces the level of capital required through long-term loans, which reduces debt obligations and permits developers to charge rents within levels that are restricted by the LIHTC program.
The LIHTC program provides states with tax credits based on a per-capita formula. Each state is then responsible for allocating the funds, which usually involves a competitive process where developers apply for credits with a state tax finance agency. The credits are awarded both for new developments and rehabilitation projects. Because the program utilizes tax credits, the program’s subsidies persist every year and do not require annual appropriations. Despite its status as the largest federal housing program, the program is administered by the Internal Revenue Service (IRS), not the Department of Housing and Urban Development (HUD), because it operates through the tax code.

Section 504 of the Rehabilitation Act

Because LIHTC provides tax credits as opposed to direct subsidies, there has been some historical debate as to whether certain federal laws apply to the program, namely those laws that apply only to programs receiving any “federal financial assistance.” One such law is Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against disabled individuals and imposes accessibility standards on housing providers. The IRS has maintained that “federal financial assistance” does not include tax credits, rendering Section 504 inapplicable to the LIHTC program. Courts have shown sympathy to this argument, reasoning that favorable tax treatments are not the same as subsidies and that Congressional intent to provide more than preferential tax treatment should be considered when defining the term. This view has its critics, however, since the economic benefits of tax credits and exemptions are indistinguishable from the economic benefits produced by actual expenditures. Nonetheless, the IRS view has persisted, leaving Section 504 provisions inapplicable to the LIHTC program.

Section 504 prohibits discrimination based on disability in any program, service or activity, and requires certain levels of accessibility. Section 504 applies to a smaller number of units than the Fair Housing Act since it does not apply to private owners but its requirements are stricter. For example, housing providers must not only allow reasonable modifications, as required by the Fair Housing Act, but also pay for them. The statute prohibits providers from offering housing that is unnecessarily different or separate, requiring that housing for disabled individuals be as integrated as appropriate. In order to ensure accessibility, Section 504 also mandates 5% of new building or substantial rehabilitation be accessible to those with mobility impairments, and that an additional 2% be accessible to persons with hearing or vision impairments. Further, the law requires not only accessibility, but also targeting, through affirmative outreach to the public. The law also includes certain planning and evaluation practices, to ensure that these requirements are met.
The Exchange Program and the Tax Credit Assistance Program

Due to the recent financial crisis, the market for tax credits has dried up, reducing the effectiveness of the LIHTC program. In response, the federal government created the Exchange Program as part of the American Recovery and Reinvestment Act (ARRA) signed by President Obama on February 17, 2009.21 The Exchange Program was initially planned to offer direct grants in exchange for unused tax credits.22 On June 1, Sen. Barney Frank (D-MA) sent a letter to Secretary Timothy Geithner, requesting that states be allowed to make sub-awards in the form of loans as well as grants for greater flexibility in using state funds within the confines of current state requirements.23 On July 9, 2008, the Treasury Department released guidance in the form of a “Frequently Asked Questions and Answers” fact sheet indicating that it would allow states to structure award funds as non-interest, non-repayable loans if necessary.24 Because loans are generally considered federal financial assistance,25 this policy change will not affect Section 504 compliance requirements.26

The Exchange Program will provide state housing credit agencies funds equal to 85% of the value of states’ unused low-income housing tax credits.27 The funds will be allocated to housing credit agencies with sub-awards made in the form of grants or loans to qualified low-income housing developments by these agencies.28 Essentially, this means that developers who could not find investors to buy their credits will be able to turn them in for eighty-five cents on the dollar. Any funds not awarded to qualified projects by the end of 2010 will be returned to the federal government.29

The government also appropriated $2.25 billion in HOME funds to TCAP for LIHTC projects under Title XII of ARRA.30 This program will facilitate the development of LIHTC projects by providing gap financing.31 ARRA allocated TCAP funds to state housing credit agencies, and the agencies will distribute the funds through a competitive process pursuant to the states’ qualified allocation plans, which describe eligibility requirements and selection criteria.32 Projects that received or will receive tax credits between October 1, 2006, and September 30, 2009, are eligible to apply for TCAP funds, which must be used within three years of ARRA’s enactment.33 Additionally, ARRA instructs states to give priority to projects that are expected to be completed within three years of the law’s enactment.34

Section 504 Compliance and ARRA-Funded LIHTC Projects

TCAP funds qualify as federal financial assistance, which makes Section 504 applicable to developments that receive any funding through the program. Under Section 504’s governing regulations, “[f]ederal financial assistance means any assistance provided or otherwise made available by the Department through any grant, loan, contract or any other arrangement, in the form of: (a) Funds...”35 Since TCAP grants actual funds, the program clearly qualifies as financial assistance, requiring full compliance with Section 504. Further, the statute’s language specifically prohibits the HUD secretary from waiving requirements related to fair housing and nondiscrimination.36 HUD has confirmed that Section 504 of the Rehabilitation Act applies to all TCAP grants.37

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22Id. at 362.
24Dept of Treasury, Section 1602: Grants to States for Low-Income Housing Projects in Lieu of Low-Income Housing Credits for 2009, Frequently Asked Questions and Answers (July 9, 2009), http://www.treas.gov/recovery/docs/FAQs.pdf; See also Joseph P. Poduska, Treasury Department Changes Policy on Credit Exchange Program, Will Allow Funds to Be Provided as Loans, [Current Developments] Hous. & Dev. Rep. (West) Vol. 37, No. CD-12, at 353 (June 15, 2009). However, no official guidance on this position has been issued as of the date of this printing.
25See e.g. 31 U.S.C.A. § 7501 (a)(5); 24 C.F.R. § 8.3 (2009) (“Federal financial assistance means any assistance provided or otherwise made available by the Department through any grant, loan, contract or any other arrangement”) (emphasis added).
26Id.; Dept of Treasury, Section 1602: Grants to States for Low-Income Housing Projects in Lieu of Low-Income Housing Credits for 2009, Frequently Asked Questions and Answers (July 9, 2009), http://www.treas.gov/recovery/docs/FAQs.pdf. However, because “grants” are a specific type of federal assistance that require compliance with Davis-Bacon wage and standards and environmental reviews, project owners receiving funds in the form of loans will not have to comply with such requirements.
27American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. B, tit. I, § 1602, 123 Stat 115, 362-63 (2009). States may also award funds to projects without allocated tax credits if doing so will leverage the state increased funds for affordable housing (“a State housing credit agency may make subawards to finance qualified low-income buildings without an allocation only if it makes a determination that such use will increase the total funds available to the State to build and rehabilitate affordable housing”).
28Essentially, this means that developers who could not find investors to buy their credits will be able to turn them in for eighty-five cents on the dollar. Any funds not awarded to qualified projects by the end of 2010 will be returned to the federal government.
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31Id.
32Id. at 364.
34Id.
35Id. at 220.
36Id. Additionally, 75% of the HOME funds must be committed within one year and 75% spent within two years of the Act’s enactment.
37Id.
38American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. A, tit. XII, § 1201, 123 Stat. 115, 221 (2009). (“the [HUD] Secretary may waive any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary or the use by the recipient of these funds except for ... requirements related to fair housing, nondiscrimination ...”).
39Implementation of the Tax Credit Assistance Program (TCAP), CPD-09-03 (May 4, 2009).
The Exchange Program qualifies as federal financial assistance as well, since the program will award “grants... in lieu of low-income housing credit allocations.” This should make developments receiving funds from the Exchange Program subject to Section 504 requirements. While several state tax credit agencies have issued notices that assume Exchange Program funds do not qualify as federal assistance and are not subject to Section 504, the Treasury Department has acknowledged that Section 504 does in fact apply.

**Housing advocates should work with state agencies to ensure that every project with TCAP or Exchange Program funding is fully compliant with Section 504.**

Since most LIHTC projects were not required to comply with Section 504 at the time architectural plans were developed, these plans may have to be amended in order to comply with the law. Projects under construction at the time the owner applies for TCAP must also comply fully. Modifications which make plans compliant with Section 504 are costs eligible for TCAP funding. However, if compliance with Section 504 is not feasible or practical for any of these projects, they cannot receive assistance from TCAP funds.

**What this Means for Advocates and Agencies**

Housing advocates should work with state agencies to ensure that every project with TCAP or Exchange Program funding is fully compliant with Section 504. This not only means complying with structural accessibility requirements but actually targeting disabled individuals and communicating that affected housing developments will be accessible to them. This is particularly important since TCAP and Exchange Program funds will be sought for many projects that did not originally comply with Section 504 requirements. Because Section 504 requirements will only apply to a limited set of LIHTC projects, state housing finance agencies should flag these projects by providing lists of affected projects that remain accessible to the public for the life of those projects. This is important for two reasons. In the short term, TCAP funds impose commitment and expenditure deadlines. If these deadlines are not met, the federal government recaptures the funds. In the long term, lists of TCAP properties should be publicly available for the life of the project since these projects must remain compliant with Section 504 rules, unlike other LIHTC properties.

**Conclusion**

In the context of previous interpretations of “federal financial assistance,” which exempted LIHTC projects from compliance with Section 504 requirements, acceptance of TCAP or Exchange Program funds clearly requires compliance with the law’s increased disability protections while promoting affordable housing development, in general. This means providing the minimum number of units accessible to those with mobility and hearing or vision impairments, ensuring that accessible units are appropriately integrated, and actually targeting disabled persons, among other requirements. Since the funds must be used promptly, advocates should work with housing finance agencies to ensure that Section 504 requirements are fully met by LIHTC projects receiving any ARRA funds—both now and in the future.

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42Notice, supra note 37, at 9.
43Id.