

HAVING LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLANS TAKE INTO ACCOUNT THE QUALITY OF SCHOOLS AT PROPOSED FAMILY HOUSING SITES: A PARTIAL ANSWER TO THE RESIDENTIAL SEGREGATION DILEMMA?

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INTRODUCTION

Is it possible that the largest federal subsidy program in the nation is being administered in such a way as to perpetuate racial and ethnic segregation in urban and suburban America? State housing agencies that administer the Low Income Housing Tax Credit (“LIHTC”) program, the largest federal subsidy program for constructing and rehabilitating affordable housing, are currently under attack for promoting such segregation.¹ Recently, in New Jersey, public interest organizations brought to light the reality that the allocation of tax credits for low-income housing is promoting segregation.² The public interest groups asserted that the state agency is bound by the “affirmatively to further” requirement under the Federal Fair Housing Act, which has a dual purpose—to prevent discrimination *and* to promote integration.³ Armed with statistics highlighting the impact of the state agency’s subsidized housing plan on segregation, the groups were rightfully concerned that the second obligation was far from being met.⁴ It was a case of first impression; no court had declared that the Fair Housing Act “affirmatively to further” duty should be imposed upon a state housing credit agency. The court declared that the state agency *was* bound by that duty and that all of its housing development activities, including the construction of its Qualified Allocation Plan (“QAP”)—the means by which the state agency decides to award tax credits—also were subject to the obligation.⁵

A victory for the public interest groups? Unfortunately, no. The public interest groups also had demanded that the state agency take race into account when determining to which development sites to award tax credits, which would allow the state agency to fulfill its mandate to promote integration.⁶ The court stated that the state agency did not have to take race into account in order to promote integration. In fact, the court declared that the state agency was doing

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1. See *infra* note 8 and accompanying text.

2. *In re* Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re* 2003 QAP), 848 A.2d 1 (N.J. Super. Ct. App. Div.), *cert. denied*, 861 A.2d 846 (N.J. 2004).

3. *Id.* at 12; see also 42 U.S.C. § 3601-3631 (2000).

4. *In re* 2003 QAP, 848 A.2d at 5.

5. *Id.* at 11.

6. *Id.* at 15.

all that it could to promote integration in light of its other statutory duties and that utilizing racial classifications within the QAP would only subject the state agency to possible court challenges.⁷

The court's decision frustrates desegregation activists and leaves many unanswered questions. Did the court render the "affirmatively to further" duty effectively futile? Does the court's decision declare that the duty to promote integration is subordinate to the other statutory obligations of the state agency? How can racial classifications be utilized in QAPs without being invalidated? If the state agency is hesitant to make a racial classification within its QAP due to possible court challenges, is there any other kind of classification which can shield a state agency from such challenges and yet effectively achieve integration?

Part I of this Note describes the LIHTC program as a whole and the role of QAPs within the program. Part II focuses on the impact of the Federal Fair Housing Act on QAPs. Part III addresses the issue of race-based classifications within QAPs, focusing on proper construction of race-based classifications and possible challenges to race-based classifications. Finally, Part IV proposes that because there is a correlation between the quality of schools and racial segregation in neighborhoods, state agencies should take into account the quality of schools when developing their QAPs in order to effectively promote integration.

I. QUALIFIED ALLOCATION PLANS WITHIN THE LOW INCOME HOUSING TAX CREDIT PROGRAM

Created by the 1986 Tax Reform Act and administered by the Department of the Treasury ("Treasury"), the LIHTC program is the largest federal subsidy program for affordable housing production and rehabilitation.⁸ In fact, "[t]he LIHTC program produced more than a million units between 1987 and 2001 and has added about 90,000 units in each succeeding year, resulting in a probable total of 1.3 million."⁹ The LIHTC program achieves this not by granting direct

7. *Id.*

8. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189-208 (codified as amended at 26 U.S.C. § 42 (2000)); see also Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1011-12 (1998) ("With the withdrawal of federal support for most other subsidized housing development programs, the LIHTC program stands as essentially 'the only game in town.'").

9. Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L.J. 913, 927 (2005); see also Ted M. Handel & David C. Nahas, *Leveraging the Low-Income Housing Tax Credit Program*, 26 L.A. LAW. 23, 23 (2004) ("Seventeen years after it was enacted into law . . . the program is generating \$6 billion in housing investments and creating more than 115,000 affordable rental housing units nationwide each year for low-income families, seniors, the homeless, and persons with special needs.").

subsidies for construction or rehabilitation of low income housing but by granting tax credits to investors involved in the production or rehabilitation of affordable housing; thus, the investors benefit from a direct reduction in their taxes.¹⁰

In order to be eligible for tax credits, individual projects must either set aside twenty percent or more of the housing units to renters with incomes of fifty percent or less of the area's median gross income *or* set aside forty percent or more of the housing units to renters with incomes no greater than sixty percent of the area's median gross income.¹¹ Additionally, the housing development must remain affordable to low-income renters for a period of at least thirty years.¹²

The Internal Revenue Service ("IRS") is responsible for allocating tax credits to individual states according to their populations.¹³ Because the applications for individual housing projects exceed the number of tax credits, there is much competition to obtain available tax credits.¹⁴ Although the tax credits are generated at the federal level, there is significant state involvement with the program;¹⁵ thus, it is critical to examine the LIHTC program on both the federal and state levels.

State housing finance agencies carry out the LIHTC program by allocating

10. See U.S. Dep't of Hous. & Urban Dev., *How Do Housing Tax Credits Work?*, <http://www.hud.gov/offices/cpd/affordablehousing/training/web/lihtc/basics/work.cfm> (last visited May 18, 2006) ("Federal housing tax credits are awarded to developers of qualified projects. Developers then sell these credits to investors to raise capital . . . for their projects, which reduces the debt that the developer would otherwise have to borrow."); Robert Neuwirth, *Renovation or Ruin: Is the LIHTC Program Promoting Segregation?*, SHELTERFORCE ONLINE ¶ 21 (Sept./Oct. 2004), <http://www.nhi.org/online/issues/137/LIHTC.html> (last visited May 18, 2006) ("The government earmarks approximately \$3 billion to low-income housing tax credits every year . . ."); see also Roisman, *supra* note 8, at 1014-15 ("The investors' incentive is the expectation that for ten years they will receive tax credits and other tax benefits, such as business loss deductions, that they can use to offset the taxes they owe on other income." (internal quotation marks omitted) (citing U.S. GEN. ACCOUNTING OFFICE, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW-INCOME HOUSING PROGRAM 27-28 (1997))).

11. 26 U.S.C. § 42(g)(1) (2000); see also Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 217 (2003).

12. 26 U.S.C. § 42(h)(6)(D); *id.* § 42(i)(1); see also Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1777 (2005).

13. 26 U.S.C. § 42(h)(3)(C); see also Neuwirth, *supra* note 10, ¶ 22.

14. Ballard, *supra* note 11, at 212-13; see also U.S. Dep't of Hous. & Urban Dev., *Allocating Housing Tax Credits*, <http://www.hud.gov/offices/cpd/affordablehousing/training/web/lihtc/basics/allocating.cfm> (last visited May 18, 2006).

15. U.S. Dep't of Hous. & Urban Dev., *supra* note 14 ("[T]he IRS allocates housing tax credits to designated state agencies—typically state housing finance agencies—which in turn award the credits to developers of qualified projects.").

these tax credits to individual projects in accordance with Qualified Allocation Plans, which each agency must develop and adopt.¹⁶ “A QAP is the means by which a state housing credit agency administers the . . . program”¹⁷ Thus, the criteria within QAPs determine whether or not an individual project will be funded.

Congress has set forth certain criteria and preferences which agencies must include within their QAPs. A QAP refers to any plan:

- (i) which sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions,
- (ii) which also gives preference in allocating housing credit dollar amounts among selected projects to—
 - (I) projects serving the lowest income tenants,
 - (II) projects obligated to serve qualified tenants for the longest periods, and
 - (III) projects which are located in qualified census tracts¹⁸ (as defined in subsection (d)(5)(C)) and the development of which contributes to a concerted community revitalization plan, and
- (iii) which provides a procedure that the agency (or an agent or other private contractor of such agency) will follow in monitoring for noncompliance with the provisions of this section and in notifying the Internal Revenue Service of such noncompliance which such agency becomes aware of and in monitoring for noncompliance with habitability standards through regular site visits.
- (C) Certain selection criteria must be used.—The selection criteria set forth in a qualified allocation plan must include—
 - (i) project location,
 - (ii) housing needs characteristics,
 - (iii) project characteristics, including whether the project includes the use of existing housing as part of a community revitalization plan,
 - (iv) sponsor characteristics,
 - (v) tenant populations with special housing needs,

16. 26 U.S.C. § 42(m)(1)(A)(i); *see also* Roisman, *supra* note 8, at 1012; Neuwirth, *supra* note 10, ¶ 22.

17. *In re* Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re* 2003 QAP), 848 A.2d 1, 5 (N.J. Super. Ct. App. Div.), *cert. denied*, 861 A.2d 846 (N.J. 2004); *see also* JEREMY GUSTAFSON & J. CHRISTOPHER WALKER, THE URBAN INSTITUTE, ANALYSIS OF STATE QUALIFIED ALLOCATION PLANS FOR THE LOW-INCOME HOUSING TAX CREDIT PROGRAM (2002), *available at* <http://www.huduser.org/publications/pdf/AnalysisQAP.pdf>.

18. “The term ‘qualified census tract’ means any census tract which is designated by the Secretary of Housing and Urban Development and . . . 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.” 26 U.S.C. § 42(d)(5)(C)(ii)(I).

- (vi) public housing waiting lists,
- (vii) tenant populations of individuals with children, and
- (viii) projects intended for eventual tenant ownership.¹⁹

Although Congress has provided some criteria to state and local finance agencies as how to develop QAPs, the criteria set forth are neither specific nor defined.²⁰ Thus, because the statutory criteria are vague, QAPs can differ greatly from state to state. The state and local finance agencies have considerable leeway when developing their QAPs, thereby giving the agencies considerable leeway in determining how to allocate the distribution of tax credits. Basically, state and local finance agencies can determine for which project characteristics they will award more “points” and for which project characteristics they award fewer “points.” Naturally, proposed project developments with more points have a greater chance of being funded than a proposed plan that is awarded fewer points. Thus, state and local finance agencies make clear what they consider the most important development priorities, what they consider the least important development priorities, and what is not a development priority at all.

II. THE IMPACT OF TITLE VIII ON QAPs

Although state agencies do have great flexibility in constructing their individual QAPs, each agency should be aware that the LIHTC program must operate with “regard to civil rights laws.”²¹ “The fundamental source of civil rights obligations imposed on the . . . administration of the LIHTC program is Title VIII of the 1968 Civil Rights Act.”²²

Title VIII makes it unlawful, among many other things, “to refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”²³ Furthermore, according to Title VIII, the Secretary of Housing and Urban Development (“HUD”) is required to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this

19. *Id.* § 42(m)(1)(B) and (C) (bold omitted).

20. U.S. GEN. ACCOUNTING OFFICE, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW-INCOME HOUSING PROGRAM 2 (1997); see Roisman, *supra* note 8, at 1018. Professor Roisman explains that “while the Code specifically directs the agencies to include seven ‘selection criteria’ in their allocation plans[,] the Code does not define these criteria or provide any guidance for their use.” *Id.* (brackets in original) (internal quotation marks omitted) (citing U.S. GEN. ACCOUNTING OFFICE, *supra*). Professor Roisman further explains, “For example, the Code requires that each QAP’s selection criteria include ‘project location’ and ‘tenant populations with special housing needs,’ but does not tell an allocating agency what to do about these subjects.” *Id.* (internal citation omitted).

21. Roisman, *supra* note 8, at 1012.

22. *Id.* at 1025.

23. 42 U.S.C. § 3604(a) (2000).

subchapter.”²⁴ Additionally, Title VIII mandates as follows:

[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.²⁵

Title VIII plainly states that all federal agencies involved in housing are subject to the statute. “The statute imposes on the Treasury the obligation to administer the LIHTC program ‘in a manner affirmatively to further the purposes of’ Title VIII.”²⁶ Thus, it is important to examine (1) what exactly is meant by “affirmatively to further” and (2) whether the obligations imposed on the Treasury are passed on to state and local finance agencies allocating the LIHTC program tax credits.

The purposes of Title VIII are twofold—to prohibit discrimination and to promote integration.²⁷ The legislative history of Title VIII demonstrates that proponents of enacting Title VIII not only wanted to end discrimination but also to promote residential integration. “Proponents of Title VIII in both the Senate and House repeatedly argued that the new law was intended not only to expand housing choices for individual blacks, but also to foster racial integration for the benefit of all Americans.”²⁸ There is no question that integration was a prime consideration when enacting Title VIII. “Aware . . . that the nation was dividing into two racially separate societies, Congress *clearly* intended Title VIII to remedy segregated housing patterns and the problems associated with them—segregated schools, lost suburban job opportunities for minorities, and the alienation of whites and blacks”²⁹

Furthermore, caselaw addressing the nature of Title VIII relied heavily on the legislative history to determine that the purpose of the statute was twofold.³⁰

24. 42 U.S.C. § 3608(e)(5).

25. *Id.* § 3608(d).

26. Roisman, *supra* note 8, at 1025.

27. *Id.* at 1026-29 (discussing in depth the purposes of Title VIII as explained through the caselaw).

28. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 2.3, at 2-6 to 2-7 (West 2001) [hereinafter SCHWEMM, HOUSING DISCRIMINATION]. “Senator Mondale, the FHA’s principal sponsor, decried the prospect that ‘we are going to live separately in white ghettos and Negro ghettos.’” Robert G. Schwemm, *Discrimination Housing Statements and § 3604(C): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 212 (2001). Furthermore, “Congressman Cellar, the Chairman of the House Judiciary Committee, spoke of the need to eliminate the ‘blight of segregated housing and the pale of the ghetto’” *Id.* (citing 114 CONG. REC. 9559 (1968)).

29. SCHWEMM, HOUSING DISCRIMINATION, *supra* note 28, at 2-6 to 2-7 (emphasis added).

30. *See* *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting Senator Mondale in his assertion that “the reach of the proposed law was to replace the ghettos with ‘truly

Specifically, in *Shannon v. HUD*,³¹ residents and organizations challenged a decision by HUD to finance a low-income housing project. The residents and organizations claimed that the housing development would exacerbate the high concentration of low-income black residents in the area. They further alleged that this would adversely affect the quality of life and property values in the neighborhood.³² The Third Circuit noted that one of the goals of Title VIII was to prevent racial and economic concentration which could lead ultimately to urban blight.³³ The court held that HUD was prohibited from making funding decisions without “some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the . . . 1968 Civil Rights Act[.]”³⁴ Thus, before making any funding decisions, HUD was required to carefully analyze the racial and economic effect a proposed housing development would have on a neighborhood.³⁵ The court further suggested the following criteria that could appropriately be included in the “institutionalized method” required by Title VIII:

1. What procedures were used by the LPA [local public agency] in considering the effects on racial concentration when it made a choice of site or of type of housing?
2. What tenant selection methods will be employed with respect to the proposed project?
3. How has the LPA or the local governing body historically reacted to proposals for low income housing outside areas of racial concentration?
4. Where is low income housing, both public and publicly assisted, now located in the geographic area of the LPA?
5. Where is middle income and luxury housing, in particular middle income and luxury housing with federal mortgage insurance guarantees,

integrated and balancing living patterns” (citing 114 CONG. REC. 2706)); *id.* at 209 (referring to the “broad and inclusive” language of Title VIII); *see also* *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir. 1988), *aff’d in part*, 488 U.S. 15 (1988) (per curiam) (stating that Title VIII should be broadly interpreted in order to fulfill the “congressional mandate” of promoting integration); *NAACP, Boston Chapter v. HUD*, 817 F.2d 149, 155 (1st Cir. 1987) (stating that “every court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating”); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134-35 (2d Cir. 1973) (referring to the fact that “Congress’ desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing”). *See generally* Roisman, *supra* note 8, at 1026 (noting that the caselaw demonstrates the dual purpose nature of Title VII: “to eschew discrimination and to promote integration”).

31. 436 F.2d 809, 811 (3d Cir. 1970).

32. *Id.* at 818.

33. *Id.*

34. *Id.* at 821.

35. *Id.*

located in the geographic area of the LPA?

6. Are some low income housing projects in the geographic area of the LPA occupied primarily by tenants of one race, and if so, where are they located?

7. What is the projected racial composition of tenants of the proposed project?

8. Will the project house school age children and if so what schools will they attend and what is the racial balance in those schools?

9. Have the zoning and other land use regulations of the local governing body in the geographic area of the LPA had the effect of confining low income housing to certain areas, and if so how has this effected racial concentration?

10. Are there alternative available sites?

11. At the site selected by the LPA how severe is the need for restoration, and are other alternative means of restoration available which would have preferable effects on racial concentration in that area?³⁶

The court further explained that “the agency’s judgment must be an informed one; one which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration.”³⁷ Thus, an informed decision promoting racial integration must be a priority when determining site selection for low-income housing developments.

Although *Shannon* and most other cases involved HUD, Title VIII does

36. *Id.* at 821-22.

37. *Id.* at 822. Other cases also have addressed the importance of racial integration and informed decision-making on the agency’s part. For example, in *Otero v. New York City Housing Authority*, 484 F.2d 122 (2d Cir. 1993), the Second Circuit stated

[t]o allow housing officials to make decisions having the long range effect of increasing or maintaining racially segregated housing patterns merely because minority groups will gain an immediate benefit would render such persons willing, and perhaps unwitting, partners in the trend toward ghettoization of our urban centers.

There may be some instances in which a housing decision will permissibly result in greater racial concentration because of the overriding importance of other imperative factors in furtherance of national housing goals. But Congress’ desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing, even though the effect in some instances might be to prevent some members of a racial minority from residing in publicly assisted housing in a particular location. The affirmative duty to consider the impact of publicly assisted housing programs on racial concentration and to act affirmatively to promote the policy of fair, integrated housing is not to be put aside whenever racial minorities are willing to accept segregated housing.

Id. at 1134.

impose the same obligation of utilizing an informed decision-making process to promote integrated living patterns on the Treasury as well. Thus, the Treasury is not limited to prohibiting discrimination within its practices and must also focus on integration. “[W]e are satisfied that the affirmative duty placed on . . . HUD . . . and through [it] on other agencies administering federally-assisted housing programs also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area”³⁸ Furthermore, the Executive Branch of the federal government also instructs executive agencies that are involved in the development of housing to act to end discriminatory policies and practices that “result in segregated patterns of housing and necessarily produce other forms of discrimination and segregation.”³⁹ Because of the plain language of Title VIII, the caselaw, and executive orders, the Treasury must affirmatively further fair housing by promoting integrated living patterns through an informed decisionmaking process.⁴⁰

Although the duty affirmatively to further fair housing is imposed on the Treasury, the question remains whether this duty is passed on to local and state finance agencies that allocate LIHTC tax credits pursuant to their individual QAPs. If the duty affirmatively to further fair housing is passed on to state and local finance agencies, then the agencies cannot lawfully construct their QAPs in a manner that will frustrate the goals of Title VIII. Specifically, the state and local finance agencies must not only prohibit discriminatory practices within their QAPs, but also must promote integration through their QAPs.

There exists a strong argument that a specific Department of Treasury regulation imposes upon state housing agencies the duty affirmatively to further fair housing. The regulation provides in relevant part as follows:

If a residential rental unit in a building is not for use by the general public, the unit is not eligible for a section 42 credit. A residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy governing non-discrimination, as

38. *Otero*, 484 F.2d at 1133-34; *see also* Roisman, *supra* note 8, at 1045 (“To the extent that § 3608(e) requires that HUD take racial and socio-economic data into account, the substantially identical language of § 3608(d) requires that the Treasury provide that racial and socio-economic concentration be taken into account.”).

39. Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963), *reprinted as amended* in 42 U.S.C. § 1982 (1988); Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 8513, 8513 (1994) (“If all of our executive agencies affirmatively further fair housing in the design of their policies and administration of their programs relating to housing and urban development, a truly nondiscriminatory housing market will be closer to achievement.”).

40. *See* Roisman, *supra* note 8, at 1031, for a discussion of the Treasury’s obligations under Title VIII.

evidenced by rules or regulations of the Department of Housing and Urban Development (HUD) (24 CFR subtitle A and chapters I through XX).⁴¹

Although this provision explaining eligibility for tax credits does not explicitly refer to the location of possible housing developments and rather refers to individual tenant unit rental, the provision does require the state or local housing agency to comply with “24 CFR subtitle A and chapters I through XX,” which are regulations that include HUD’s site selection regulation.⁴² Title 24 C.F.R. § 941.202 provides in relevant part as follows:

Proposed sites for public housing projects to be newly constructed or rehabilitated must be approved by the field office as meeting the following standards:⁴³

- ...
- (b) The site and neighborhood must be suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of . . . Title VIII of the Civil Rights Act of 1968 . . .⁴⁴

Thus, a state or local housing agency is required to affirmatively further fair housing, including through its construction of QAPs. This duty is initially imposed on the Treasury through Title VIII, caselaw interpreting the goals of Title VIII, and Executive Order 11,063. The Treasury then arguably imposes this obligation on state and local finance agencies allocating LIHTC credits through 26 C.F.R. § 1.42-9(a), incorporating HUD’s site selection regulation 24 C.F.R. § 941.202.⁴⁵

41. 26 C.F.R. § 1.42-9(a) (2006).

42. Appellants’ Brief on Appeal at 37-39, *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003 QAP)*, 848 A.2d 1 (N.J. Super. Ct. App. Div.) (No. A-10-02T2), *cert. denied*, 861 A.2d (N.J. 2004) [hereinafter Appellants’ Brief on Appeal]. Although *In re 2003 QAP*—the first case to confront the issue of whether state and local housing agencies must affirmatively further fair housing—decided that the terms of this regulation only apply to the rental of units and do not apply to the criteria used by a state or local finance agency to allocate tax credits, the court ultimately did decide, on other grounds, that state and local housing agencies must affirmatively further fair housing pursuant to Title VIII. *In re 2003 QAP*, 848 A.2d at 14. The court failed to explain why the provision requiring the agency to comply with HUD site selection regulations would not impose a duty on a state or local housing agency to affirmatively further fair housing. *See id.* After all, the HUD site selection regulations focus on both project location and overall composition of sites.

43. 24 C.F.R. § 941.202 (2006).

44. *Id.* § 941.202(b).

45. Appellants’ Brief on Appeal, *supra* note 42, at 40. HUD site selection regulations further state that low-income housing sites cannot be located in a neighborhood 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)

Furthermore, the requirement of 26 C.F.R. § 1.42-9(a) that units eligible for tax credits must be “rented in a manner consistent with housing policy governing non-discrimination” cannot mean only that owners may not deny housing opportunities to applicants based on race or other characteristics.⁴⁶ It would be very difficult, if not impossible, to rent a housing unit “consistent with housing policy governing non-discrimination”⁴⁷ if the unit is within an area that basically guarantees that the development will be exclusively used by racial minorities.⁴⁸ Thus, in order for a unit to not violate 24 C.F.R. § 941.202, the term “rented” should be interpreted to refer to the whole tax credit transaction, starting from the housing development site selection to the renting.⁴⁹

One recent case addressed this issue of first impression: whether state and local housing finance agencies were bound by the “affirmatively to further” requirement under Title VIII. The court specifically addressed whether the Fair Housing Act’s “affirmatively to further” duty applied to a state or local finance agency’s allocation of the Federal LIHTC program pursuant to its adopted QAP.⁵⁰

In *In re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan* (“*In re 2003 QAP*”),⁵¹ public interest organizations alleged that the New Jersey Housing Mortgage Finance Agency (“HMFA”), the finance agency administering the federal LIHTC program, funded projects pursuant to its newly adopted QAP in urban areas that perpetuated racial segregation.⁵² The public interest organizations noted that in the present QAP, HMFA set development priorities that were not congruent with its mandate to affirmatively further fair housing.

The challenge against HMFA actually began with the state housing finance agency’s 2002 QAP; however, while those appeals were pending, the 2003 QAP regulations were proposed.⁵³ When challenging the 2002 QAP, the public interest organizations alleged that seventy-five percent of LIHTC program tax credits would be funding housing projects in racially segregated areas, only

the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area.” 24 C.F.R. § 941.202(c)(1)(i).

46. Appellants’ Brief on Appeal, *supra* note 42, at 41.

47. 26 C.F.R. § 1.42-9(a).

48. Appellants’ Brief on Appeal, *supra* note 42, at 41.

49. *Id.* (“For a unit to be rented ‘consistent with housing policy governing non-discrimination,’ it must first be sited and constructed in that manner.”). Appellants’ Brief on Appeal, *supra*, provides a good example. “[J]ust as a developer could not construct a non-handicapped accessible unit and claim to be in compliance with civil rights law by affirmatively marketing to handicapped tenants, a developer cannot ignore the racial composition of a neighborhood and claim to be in compliance with Title VIII.” *Id.*

50. *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003 QAP)*, 848 A.2d 1, 6 (N.J. Super. Ct. App. Div.), *cert. denied*, 861 A.2d 846 (N.J. 2004).

51. *Id.*

52. *Id.* at 5.

53. *Id.* at 6.

perpetuating racial segregation as a whole.⁵⁴ Although the public interest organizations noted that the changes within the 2003 QAP were somewhat significant, they continued to argue that the 2003 QAP remained unchanged in the most relevant aspect.⁵⁵

The 2003 QAP, like the previous 2002 QAP, made no attempt to award points to proposed development projects that were specifically designed to encourage racial integration.⁵⁶ “As it has in the past, HMFA fails to require the collection of data on the racial characteristics of a proposed project and its surrounding area, or any assessment of whether an affirmative marketing plan helped achieve integration.”⁵⁷ Thus, the public interest organizations were troubled with the idea that the state housing finance agency made no attempt to affirmatively further fair housing through its QAPs. Furthermore, the public interest organizations stressed that children attending the public schools would suffer a very negative impact on their education and preparation for their adult lives.”⁵⁸

When determining whether HMFA were bound under Title VIII—whether or not HMFA must not only prohibit discrimination but also promote integration—the court first noted that HMFA is a “public housing agency” defined by federal law as “any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage or assist in the development or operation of low-income housing.”⁵⁹ The court also cited federal court cases⁶⁰ which had addressed the “affirmatively to further” issue and decided that state and local finance agencies were bound under Title VIII. Finally, the court noted the Executive Branch of the government had expressed the belief that state and local housing authorities were obliged to affirmatively further fair housing pursuant to Title VIII. President Clinton had declared that executive agency heads have to take appropriate measures to ensure that all participants in federal housing programs furthered the

54. *Id.* at 8.

55. Appellants’ Supplemental Letter Brief at 3, *In re 2003 QAP*, 848 A.2d 1 (No. A-109-03T3).

56. *Id.*

57. *Id.* The appellants also noted that the 2003 LIHTC allocations showed the consequences of the 2003 QAP: “it has resulted in no family projects in suburban areas” *Id.*

58. *In re 2003 QAP*, 848 A.2d at 9.

59. *Id.* at 12 (quoting 42 U.S.C. § 1437(a)(b)(6) (2000)).

60. *Wallace v. Chicago Hous. Auth.*, 298 F. Supp. 2d 710, 719 (N.D. Ill. 2003) (finding that the Fair Housing Act and applicable HUD regulations imposed a duty on the city housing authority to act affirmatively to further fair housing); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 73 (D. Mass. 2002) (stating that “[w]hen viewed in the larger context of Title VIII, the legislative history, and the case law, there is no way—at least, none that makes sense—to construe the boundary of the duty to affirmatively further fair housing as ending with the Secretary”); *Reese v. Miami-Dade County*, 210 F. Supp. 2d 1324, 1329 (S.D. Fla. 2002) (stating that the “affirmatively further fair housing” requirement “imposes a binding obligation upon the States”), *aff’d*, 77 F. App’x 506 (11th Cir. 2003).

goals of Title VIII.⁶¹ The court held that the HFMA was bound “affirmatively to further” fair housing, concluding that all HFMA housing development activities, most definitely including the construction of QAPs, were subject to Title VIII obligations.⁶²

Once the court concluded that the affirmatively to further fair housing duty was imposed on the state housing agency, the court discussed how the HMFA must satisfy the duty.⁶³ The court began its analysis by stating that “HMFA’s ‘affirmatively to further’ duty must be defined congruent with its statutory powers.”⁶⁴ The court noted that the state finance agency was created in order to ensure that financing was available to construct, rent, and rehabilitate low-income housing structures; to promote the construction, rental, and rehabilitation of low-income housing “so as to increase the number of opportunities for adequate and affordable housing . . . , including particularly New Jersey residents of low and moderate income;”⁶⁵ and to help revitalize the urban areas of New Jersey.⁶⁶ The court concluded that although the state finance agency should promote racial integration pursuant to its obligation under Title VIII, HMFA had an “overriding mission” to promote the construction, rental, and rehabilitation of low-income affordable housing within the state; HMFA’s obligation under Title VIII should not compromise this goal.⁶⁷

The court backed up its conclusion by asserting that 26 U.S.C. § 42(m)(1)(B) and (C) required the state finance agency to set certain priorities within its adopted QAP that prevented the state housing agency from focusing on racial composition in proposed housing project areas.⁶⁸ The court focused on two of the three preference categories, projects serving the lowest-income tenants and those located within qualified census tracts,⁶⁹ to conclude that the economic status of the tenants must be the primary focus of the state finance agency. “Title VIII may require the agency to administer its tax credit program so as to achieve a condition in which . . . all races have equal housing-market choices. But

61. Executive Order No. 12,892, 59 Fed. Reg. 2939 § 5-502 (1994) states that If any executive agency concluded that any person or entity (including any State or local public agency) applying for or participating in, or supervised or regulated under, a program or activity relating to housing and urban development has not complied with this order or any applicable rule, regulation, or procedure issued or adopted pursuant to this order, it shall endeavor to end and remedy such violation by informal means, including conference, conciliation, and persuasion.

62. *In re 2003 QAP*, 848 A.2d at 11.

63. *Id.* at 13.

64. *Id.* at 14.

65. N.J. STAT. ANN. § 55:14K-2(e) (West 2005).

66. *In re 2003 QAP*, 848 A.2d at 14.

67. *Id.* at 15.

68. *See supra* text accompanying note 19.

69. *See supra* note 18 and accompanying text. The other preference category, “projects obligated to serve qualified tenants for the longest periods,” was not discussed by the court. *See* 26 U.S.C. § 42(m)(1)(B)(ii)(II) (2000).

achievement of that goal, by focusing primarily on the racial composition of a relevant housing locale, may compromise HMFA's fundamental mission."⁷⁰ The court finally pointed to the changes within the 2003 QAP which "expands the potential" for tax credits to be awarded to housing projects within non-minority areas.⁷¹

Thus, although the court did agree with the public interest organizations when holding that the state finance agency is required by Title VIII to promote integration through its QAP, the court also concluded that the state finance agency, in light of other statutory obligations, did administer low-income housing tax credits through its QAP in a manner that did *not* frustrate the goals of Title VIII.⁷² The state finance agency was not ordered to take into account race or segregation when determining to which proposed developments to allocate tax credits. According to the court's decision, the state finance agency, because of its "overriding" mission to focus on the construction and rehabilitation of low-income housing, could fund housing "exclusively in the most troubled and racially-segregated neighborhoods in the state."⁷³

The court, of course, never said that the Title VIII obligation is exclusive of the other statutory obligations that the state housing agency must follow. But the overall tone of the court's decision reflects the court's belief that it was unrealistic for the state housing agency to focus on racial integration and still succeed in fulfilling its other statutory obligations.⁷⁴ In fact, the court stated that "[t]he promotion of racial integration may be a desirable *by-product* of HMFA's exercise of these [other statutory] duties."⁷⁵ By using the term "by-product,"⁷⁶

70. *In re 2003 QAP*, 848 A.2d at 15.

71. *Id.* at 16. The court noted that HMFA has "recognized the need for the revision by acknowledging 'a growing chasm forming between suburbs and cities . . .'" *Id.* However, no family projects resulted in suburban areas as a result of the 2003 QAP. See *supra* note 57.

72. *In re 2003 QAP*, 848 A.2d at 15.

73. Petitioners' Brief in Support of Petitioners' Motion for Reconsideration of the Court's October 21, 2004 Denial of Petitioners' Petition for Certification at 3-4, *In re 2003 QAP*, 848 A.2d 1 (No. A-109-03T3) [hereinafter Petitioners' Brief]. The public interest organizations noted that not only is the state finance agency allowed to exclusively fund housing in the most racially segregated and troubled neighborhoods within the state but that the state finance agency actually *did* fund low-income housing only in racially-segregated neighborhoods. *Id.* at 4.

74. See *supra* text accompanying note 67. The court did not seem to believe that the obligation imposed under Title VIII and the other statutory obligations of the state housing agency were on equal footing. *In re 2003 QAP*, 848 A.2d at 15. The court was worried that if the state housing agency directed its efforts toward achieving racial integration, it could "compromise" the state housing agency's other statutory obligations. *Id.* The court never expressed concern that focusing on the other statutory obligations could impair a state housing agency's ability to fulfill its obligations under Title VIII. *Id.*

75. *In re 2003 QAP*, 848 A.2d at 15 (emphasis added).

76. The term by-product is defined as "a secondary and sometimes unexpected consequence." See Dictionary.com, <http://dictionary.reference.com/search?q=by-product> (last visited May 19, 2006).

the court placed very little importance on the state housing agency's obligation to affirmatively further fair housing pursuant to Title VIII.⁷⁷

The *In re 2003 QAP* decision is not consistent with prior caselaw addressing situations in which a possible conflict with the Title VIII obligation to affirmatively further fair housing and other statutory obligations may occur. In *Project B.A.S.I.C. v. Kemp*,⁷⁸ the court noted that although "HUD . . . has an obligation to generally meet low-income housing needs,"⁷⁹ "desegregation is not the only goal of national housing policy,"⁸⁰ and HUD cannot "avoid its affirmative duty under the Fair Housing Act."⁸¹ The court relied on *Otero* in order to stress that the duty imposed by Title VIII requires a housing authority to truly recognize and act upon its obligation to promote integration even though it has other statutory obligations with which to deal.⁸²

A state housing agency's obligation under Title VIII should be met in conjunction with its other statutory obligations.⁸³ Thus, although the *In re 2003 QAP* court correctly held that a state housing agency also was bound by Title VIII to affirmatively further fair housing, the court placed a stamp of approval on the state housing agency's minimal effort to promote integration, leaving one to believe that the "affirmatively to further" fair housing mandate was meaningless to the court. After all, the court approved the 2003 QAP even though the "predominant focus [was] still on the allocation of tax credits to the urban areas."⁸⁴ The public interest organizations rightfully note that "[t]he decision is

77. By using the term "by-product," the court ignored the state finance agency's obligation to "affirmatively" further fair housing or, in other words, promote integration. See *supra* text accompanying notes 27-28.

78. 776 F. Supp. 637, 643 (D.R.I. 1991).

79. *Id.* at 642.

80. *Id.*

81. *Id.* at 643.

82. *Id.* "Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).

83. Appellants' Brief on Appeal, *supra* note 42, at 42. For example, "[a]ppellants contend that the preference given to qualified census tracts must be read in *pari materia* with Title VIII." *Id.* (underlining omitted). *In pari materia* is "a canon of construction that statutes [on the same subject] may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." BLACK'S LAW DICTIONARY 352-53 (2d pocket ed. 2001). Therefore, "[c]onsistent with the basic canons of statutory construction, an appropriate analysis must examine both the Fair Housing Act and the LIHTC authorizing statute to determine the manner in which the Fair Housing Act's requirements can be met within the specific framework of the LIHTC." Brief of Amici Curiae in Support of Granting Certification Based upon the Presence of a Question of General Public Importance that Should Be Settled by the Supreme Court at 14, *In re 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003 QAP)*, 848 A.2d 1 (N.J. Super. Ct. App. Div.) (No. 1A-109-03T3), *cert. denied*, 861 A.2d 846 (N.J. 2004).

84. *In re 2003 QAP*, 848 A.2d at 6; see also *supra* note 57.

a dangerous precedent nationally, especially in view of other states' perception of New Jersey's progressive housing jurisprudence and because this is the first case of its type in the nation."⁸⁵

III. RACE-BASED REMEDIES WITHIN QAPS

The public interest organizations have much to worry about because racial and ethnic segregation is a national problem; the situation in New Jersey is far from unusual. "The lack of civil rights controls in the LIHTC program" has led to serious racial segregation in many states throughout the country.⁸⁶ In other words, allocation of tax credits pursuant to QAPs is not being used to promote integration in the segregated parts of the country.⁸⁷ "In 1996, for instance, an independent audit showed that, in cities, half the apartments built through the tax credit program have been in minority neighborhoods."⁸⁸ Unfortunately, not much has changed since then. "A more recent study by . . . a public interest law firm[], has shown that low-income housing tax credit projects in that city have concentrated blacks and Latinos in historically black and Latino neighborhoods, and particularly in the poorest communities."⁸⁹ The impact of the New Jersey decision could potentially lead other courts faced with challenges against housing agency QAPs to also render the Title VIII obligation insignificant, thus allowing the perpetuation of racial segregation to continue within low-income housing communities.

But what are courts to do? After all, how can state housing agencies' other statutory obligations be reconciled with Title VIII obligations? As stated earlier, state housing agencies have been given minimal direction when developing their QAPs, and none of this guidance actually helps state housing agencies comply with Title VIII. "The Department of Treasury's failure explicitly to require compliance with fair housing policy is accompanied by specific competing incentives in the LIHTC statute that promote low income housing development in 'qualified census tracts,' which are often the poorest census tracts in a jurisdiction."⁹⁰ The other priorities do not focus on the racial composition of tenants; thus, it is not surprising that state housing agencies have concentrated all of their efforts on serving the poor without consideration of promoting racial integration. After all, "[t]he LIHTC statute fails to give direction as to how much priority to assign these . . . goals, or how to reconcile them with the compelling

85. Petitioners' Brief, *supra* note 73, at 67.

86. POVERTY & RACE RESEARCH ACTION COUNCIL, CIVIL RIGHTS MANDATES IN THE LOW INCOME HOUSING TAX CREDIT (LIHTC) PROGRAM 1 (2004), <http://www.prrac.org/pdf/crmandates.pdf> [hereinafter PRRAC]. "Evidence also suggests that this concentration [of minorities] is even more pronounced when multifamily LIHTC projects are distinguished from those designated for elderly use." *Id.* at 2.

87. Neuwirth, *supra* note 10, ¶ 30.

88. *Id.*

89. *Id.*

90. PRRAC, *supra* note 86, at 1.

goal[] of . . . racial integration mandated by the Fair Housing Act.”⁹¹ The seemingly obvious solution to this problem would be to require state housing agencies to incorporate some sort of race-based classification within their QAPs when determining which proposed housing sites will be awarded tax credits.

However, the *In re 2003 QAP* court addressed this issue of race as a factor within QAPs and agreed with the state housing agency that a “race-based remedy” would likely be struck down on equal protection grounds.⁹² Government imposed race-based classifications are always subject to strict scrutiny.⁹³ Thus, the classification will be held valid only if it is narrowly tailored to effectuate a compelling governmental interest.⁹⁴

The *In re 2003 QAP* court noted that “[i]n the housing context, federal courts have held that the ‘affirmatively to further’ obligation of Title VIII will not save race-based quota systems from equal protection scrutiny even if they were designed to promote integration.”⁹⁵ In *United States v. Starrett City Associates*,⁹⁶ an apartment complex used racial quotas when accepting or denying rental applicants. The apartment complex claimed that under *Otero* it was obligated affirmatively to promote racial integration and that using the racial quotas helped prevent “white flight” within the communities.⁹⁷

Although the *In re 2003 QAP* court did not determine whether the apartment complex was run by state actors and thus was under an obligation to affirmatively further fair housing, the court found that even if state actors were involved, “the racial quotas and related practices employed . . . to maintain integration violate the antidiscrimination provisions of the Act.”⁹⁸ The court further explained that “while quotas promote Title VIII’s integration policy, they contravene its antidiscrimination policy, bringing the dual goals of the Act into conflict.”⁹⁹

91. *Id.* “[T]he tax credit statute itself encourages developers to apply for allocations . . . for areas which are likely to be areas of minority concentration.” Roisman, *supra* note 8, at 1043.

92. *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003 QAP)*, 848 A.2d 1, 16 (N.J. Super. Ct. App. Div.), *cert. denied*, 861 A.2d 846 (N.J. 2004). “[Prior caselaw] do[es] lend substance to HMFA’s concern that criteria that are primarily race-based, may be constitutionally vulnerable, and may run counter to its statutory duty . . .” *Id.* at 17.

93. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *see also Grutter v. Bollinger*, 539 U.S. 306 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (1978) (stressing that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination”).

94. *Grutter*, 539 U.S. at 326.

95. *In re 2003 QAP*, 848 A.2d at 17.

96. 840 F.2d 1096 (2d Cir. 1988).

97. *Id.* at 1100. The apartment complex used the testimony of housing experts to explain the phenomena of “white flight” and “tipping.” It was described as a situation “in which white residents migrate out of a community as the community becomes poor and the minority population increases, resulting in the transition to a predominantly minority community.” *Id.* at 1099.

98. *Id.* at 1101.

99. *Id.*

However, the court did not hold that all race-based classifications within the housing context would be struck down as violating the anti-discrimination provisions of Title VIII. The court deemed certain characteristics of race-based housing practices to be more acceptable than others, setting forth "a framework for examining the affirmative use of racial quotas under the Fair Housing Act."¹⁰⁰ Basically, racial distinctions within the housing context should be temporary with a "defined goal as its termination point"¹⁰¹ and "should be based on some history of racial discrimination."¹⁰² Furthermore, the court made a distinction between the acceptable quota systems "designed to increase or ensure minority participation"¹⁰³ with the less acceptable quota systems "designed to maintain integration by limiting minority participation."¹⁰⁴

Although the *Starrett* court did not engage in an equal protection strict scrutiny analysis, it did seem to suggest that racial quotas utilizing the more acceptable characteristics would be more likely to pass strict scrutiny on equal protection grounds than those with less acceptable characteristics. Because the quota system used by the apartment complex in the *Starrett* case lacked any of the favorable characteristics, the quota system was struck down as violative of Title VIII's anti-discriminatory policy. However, the court made certain to clarify that it did "not intend to imply that race is always an inappropriate consideration under Title VIII in efforts to promote integrated housing."¹⁰⁵

As in *Starrett*, the court in *United States v. Charlottesville Redevelopment & Housing Authority*¹⁰⁶ determined that a public housing tenant selection policy that favored white applicants in order "to achieve a 50/50 mix of black and white residents" was also violative of the anti-discrimination provisions of the Fair Housing Act.¹⁰⁷ The court agreed that the housing authority was under a duty to integrate but determined that the method which the housing authority imposed was "legally impermissible."¹⁰⁸ The court noted that the promotion of integration is as important as the avoidance of discrimination; however, the court further observed that there will be times when the two policies of the Fair Housing Act will come into conflict.¹⁰⁹ In those cases, the court proclaimed that "the duty to

100. *Id.*

101. *Id.*

102. *Id.* at 1102.

103. *Id.*

104. *Id.*

105. *Id.* at 1103.

106. 718 F. Supp. 461 (W.D. Va. 1989).

107. *Id.* at 462.

108. *Id.* at 463.

109. *Id.* at 467. The court clarified that it did not "ascribe[] to integration a status inferior to nondiscrimination in the pantheon of legal values." *Id.* at 468. However, the court explained that the duties to prohibit discriminatory practices and promote integration will inevitably clash at times. *Id.* "These legal values of nondiscrimination and integration are like the moral values which spawned them in that the two principles are not either necessarily or always fully congruent." *Id.* at 467.

avoid discrimination must circumscribe the specific particular ways in which a party under the duty to integrate can seek to fulfill that second duty.”¹¹⁰ Although the court struck down this particular race-conscious housing policy, it relied on *Starrett* when stating that not all race-based classification aimed at promoting integration within housing would be struck down. “A race-conscious preferential policy could survive legal scrutiny if it is narrowly tailored, remedial in character, and temporary in duration.”¹¹¹

It is important to look at cases in which affirmative race-conscious housing plans aimed at promoting integration have survived equal protection or Title VIII challenges.¹¹² In *South-Suburban Housing Center v. Greater South Suburban Board of Realtors*, the Seventh Circuit held that a race-conscious marketing plan did not violate the anti-discriminatory provisions of the Fair Housing Act.¹¹³ The affirmative marketing plan, in order to maintain the integrated state of the neighborhood, required that real estate agents bring the availability of homes within the neighborhood to the attention of white purchasers. However, the marketing plan in no way deterred or delayed black purchasers from pursuing their interests in the homes or prohibited real estate agents from showing homes to potential black purchasers.¹¹⁴ The court concluded that the case was distinguishable from both *Starrett* and *Charlottesville* in that it was “not dealing with conflicting goals [of prohibiting discrimination and promoting integration], for the affirmative marketing plan furthers the goal of integration while providing equal opportunities to all.”¹¹⁵

Thus, although the *In re 2003 QAP* court was correct in stating that a race-based remedy within a QAP would subject such a provision to strict scrutiny, the court should have provided some guidance to the state housing agency as to what sort of race-based remedy would be permissible. Instead, the court focused on cases in which race-conscious housing plans had been struck down because of their poor construction instead of cases in which race-conscious housing plans were constitutionally and statutorily permissible.

The court should have guided the state housing agency to find ways to encourage “project siting that avoid[ed] perpetuation of segregation and further[ed] fair housing goals.”¹¹⁶ For example, a QAP could award more points or give preference to developers of low-income housing in predominantly white communities that are committed to affirmative marketing to attract minorities and *also* to developers of low-income housing in predominantly minority areas

110. *Id.* at 468.

111. *Id.* at 469.

112. *See, e.g.,* *Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998); *South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868 (7th Cir. 1991); *see also* Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395.

113. *South-Suburban*, 935 F.2d 868.

114. *Id.* at 873.

115. *Id.* at 883.

116. PRRAC, *supra* note 86, at 4.

committed to affirmative marketing to attract white purchasers.¹¹⁷ It seems as though race-based remedies would be relatively easy to incorporate within QAPs, thus allowing state housing agencies to accomplish the Title VIII mandate of promoting integration. On the other hand, state housing agencies, like the HMFA, are hesitant to make racial classifications within their QAPs because of the sensitive nature of such classifications and the possible (and probable) challenges to the QAP that would arise.¹¹⁸ Thus, it is unlikely that state housing agencies will take it upon themselves to use race-based remedies for fear of being challenged; furthermore, the *In re 2003 QAP* case has shown that courts may be unwilling to compel state housing agencies to incorporate race as a factor within their QAPs.

However, ignoring the need for some sort of factor within QAPs that would allow the promotion of integration would be highly problematic. Currently, racially segregated urban areas in which low-income housing is located are subject to a variety of social ills, including poverty.¹¹⁹ “[W]ith high rates of poverty come a variety of other social and economic conditions: reduced buying power, increased welfare dependence, high rates of family disruption, elevated crime rates, housing deterioration, elevated infant mortality rates, and decreased educational quality.”¹²⁰ Furthermore, urban revitalization is not the answer to curing these social issues. “Government . . . programs to assist the poor and revitalize inner-city areas, though well-intentioned . . . have limited success at best. Often, such programs unintentionally maintain the status quo, a politically comfortable arrangement that leaves the neediest people confined to the inner city.”¹²¹ Not surprisingly, studies which allowed families to move from high-poverty inner city areas to low-poverty areas resulted in a great number of benefits for the families involved including “significant improvements in safety, child and parent physical and mental health, as well as youth delinquency and behavior problem [sic].”¹²² Thus, not only is there a legal mandate by Title VIII

117. *Id.* (suggesting numerous other ways in which state housing agencies can promote racial integration through their QAPs).

118. *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003 QAP)*, 848 A.2d 1, 17 (N.J. Super. Ct. App. Div.), *cert. denied*, 861 A.2d 846 (N.J. 2004). The court noted that “mayors of inner cities or developers in urban areas may argue that emphasis on race-based selection criteria violates the equal protection clause by discriminating against minorities, or at the very least that such criteria would have a disparate impact on minorities in violation of Title VIII.” *Id.* at 18.

119. See MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 70 (2002).

120. Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 AM. J. SOC. 329, 342 (1990).

121. ORFIELD, *supra* note 119. “In a recent study of the effects of several of the country’s largest and most successful inner-city focused antipoverty initiatives, family and individual poverty rates substantially increased . . .” *Id.* at 82.

122. Alessandra Del Conte & Jeffrey Kling, *A Synthesis of MTO Research on Self-Sufficiency, Safety and Health, and Behavior and Delinquency*, POVERTY RESEARCH NEWS, Jan.-Feb. 2001, at

that compels state agencies to promote integration through their QAPs, there are also current serious policy concerns that command racial integration. These are the same policy concerns that were noted by those who enacted Title VIII¹²³; unfortunately not much has improved in the area of racial segregation within low-income housing since the passage of Title VIII. Therefore, it is important to ask whether there are any other factors which could be included within QAPs that would serve the purpose of promoting integration pursuant to Title VIII and also evade equal protection or Title VIII anti-discriminatory provision challenges.

IV. QUALITY OF SCHOOLS AS A FACTOR WITHIN QAPs

Finding a factor that awards more points to housing developments that is not a race-based classification but somehow effectively promotes integration is difficult. After all, a quality of such a factor would have to be strongly correlated with race in order to achieve integration within low-income housing communities. In other words, if more points are given to proposed housing development sites that include this non race-based classification factor within their QAPs, a definite consequence should be racial integration, regardless of the fact that race was not considered. Therefore, those opposed to proposed low-income housing sites could not challenge the state agency's QAP on equal protection grounds or Title VIII anti-discriminatory provision grounds because the included factor would encourage racial integration without using a racial classification. Including the quality of schools within a QAP, due to the strong correlation between high minority schools and low performance, may be the most effective manner in which to achieve integration but also to shield state agencies from costly court challenges.

Low-income housing sites for families are often located within minority neighborhoods.¹²⁴ "In urban areas, where the bulk of the federal tax credits are used, developers most often build family housing, which tends to be overwhelmingly occupied by poor black and Latino families, thus further concentrating poverty."¹²⁵ On the other hand, tax credits are used by developers in suburban and rural areas to build elderly housing developments which are occupied mostly by white residents.¹²⁶ This pattern of placing low-income family housing developments within high minority populated communities has affected

6, available at <http://www.nber.org/~kling/synthesis.pdf>. The Moving to Opportunity Program ("MTO") is a "project [which] ultimately tests the assumption that neighborhood has an effect on the health and well-being of its residents, and moving to higher-income neighborhoods will improve opportunities for families;" thus, the program "encourages families living in public housing to move to lower poverty neighborhoods with the help of vouchers to pay for housing." Joint Center for Poverty Research, *In This Issue: Moving to Opportunity*, http://www.jcpr.org/newsletters/vol5_no1/this_issue.html (last visited May 19, 2006).

123. See *supra* notes 28-29 and accompanying text.

124. See *supra* text accompanying notes 86-89.

125. Neuwirth, *supra* note 10, ¶ 2.

126. *Id.*

the schools within those communities. Specifically, “[r]acially separate housing patterns [have] perpetuate[d] segregated schools.”¹²⁷ This is an understandable consequence as the majority of children living in racially segregated urban communities with low-income housing developments are minorities; thus, the proximate schools to these urban communities are populated by mostly minority students.

However, a state agency cannot use the racial composition of a school as a factor within its QAP without being subject to possible court challenges. In other words, awarding more points to a proposed housing development site that is near a more racially integrated school versus a more segregated school would still be prone to the same challenges faced by any racial classification.¹²⁸ It is important to examine whether there exists among these segregated schools a common characteristic that can be used by state agencies as a factor within their QAPs.

Unfortunately, the common characteristic between these segregated schools is the daily exposure of the many minority students residing in the area to a failing educational system. Simply put, “[s]egregated schools provide diminished learning opportunities.”¹²⁹ Regrettably, this is an assertion that can hardly be contested. “A wealth of research also shows that students educated in economically and racially segregated schools receive substandard educations. When a large number of students in a school face these challenges, the cumulative effect is that the ability of the school to provide a quality education is significantly impeded.”¹³⁰

A main reason that segregated minority schools are substandard is because of “the link between segregation by race *and* poverty.”¹³¹ Thus, low-income

127. Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 71 (2002).

128. This is not to say that utilizing such a factor within a QAP is discouraged. As stated earlier, race-based classifications can survive equal protection and Title VIII anti-discriminatory challenges if constructed in a proper manner. However, state agencies that are wary of race-based classifications due to the probability of court challenges will not benefit from using the racial composition of a school as a factor within their QAPs.

129. Ware, *supra* note 127, at 71; *see also* Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 420 (2004) (“[W]e . . . face a concentration of poverty in our inner cities and in our low income housing developments, which has brought with it . . . poor education . . .”); Massey, *supra* note 120, at 350 (stressing that “the concentration of poverty in neighborhoods inevitably concentrates deprivation in schools”). *See generally* John A. Powell, *Opportunity-Based Housing*, 12-WTR J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 188 (2003).

130. Powell, *supra* note 129, at 198. “[I]t is inevitable that racial segregation in the public schools has devastating implications for the education environment. Racially segregated schools more often rely upon transitory teachers and have curricula with greater emphasis on remedial courses, higher rates of tardiness and unexcused absence, and lower rates of extracurricular involvement.” *Id.* at 199.

131. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE?*, at 21 (2004), *available at* <http://www>.

housing developments placed in urban segregated minority communities perpetuate segregation by race and also poverty, leading to segregation by race and poverty within the proximate schools. Unfortunately, concentrated poverty in schools leads to lower achievement levels, schools lacking resources, high turnover rates of teachers, and many more educational disadvantages for students.¹³² Students attending racially integrated or segregated white schools are not likely to experience such educational disadvantages.

Many scholars rightfully believe that fixing racial segregation within the housing context through the promotion of integration would eventually remedy the segregation problems evident in today's schools.¹³³ A study by the Harvard Civil Rights Project of school segregation proposed using "housing subsidy programs more effectively to provide low income families access to middle class schools"¹³⁴ and implementing "plans that reward communities and metro areas that work to provide subsidized and affordable housing in suburbs and gentrifying areas."¹³⁵ Because of the difficulty in achieving residential integration, scholars are looking for new and innovative ideas that will lead to integration within housing and the schools located nearby. "We must think and act creatively to use affordable housing as a tool to ensure that every family has an opportunity to live in a community that has high-quality schools."¹³⁶

One possible consideration is to use the current failing segregated school system as the catalyst for improving low-income housing residential segregation. This, in turn, would lead to integration within the schools. Because the correlation between high minority populated schools and low performance or quality of those schools has been established, it would seem reasonable to have state agencies award more points to proposed housing development sites that will be located in proximity to better performing, higher quality schools.

After all, it is most likely that higher quality schools, which are most often segregated white schools or racially diverse schools, will be located in low-poverty concentrated areas.¹³⁷ Because of the correlation between high

civilrightsproject.harvard.edu/research/reseg04/brown50.pdf (emphasis added). "Only 15 percent of . . . intensely segregated white schools were schools of concentrated poverty In contrast, 88 percent of the intensely segregated minority schools . . . had concentrated poverty . . ." *Id.* at 21. The study concluded that "students in highly segregated neighborhood schools are many times more likely to be in schools of concentrated poverty." *Id.*

132. *Id.* at 21-22.

133. See Wade Henderson & Judith A. Browne, *Building Housing and Communities Fifty Years after Brown v. Board of Education*, 13-SUM J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 437, 441 (2004) ("[I]f we fix our housing dilemma, we will ultimately have a chance to live out the promise of Brown."); see also Powell, *supra* note 129, at 189 ("Accessing stable, affordable housing in a vibrant area contributes greatly to improvements in other key life areas, such as . . . education . . .").

134. ORFIELD & LEE, *supra* note 131, at 40.

135. *Id.* at 41.

136. Henderson & Browne, *supra* note 133, at 441.

137. See *supra* note 131 and accompanying text.

concentrations of poverty and race, developers will be encouraged to seek out sites that are outside of the high-minority urban inner cities in order to gain more points. And because concentration of low-income housing within urban areas has been a significant factor in perpetuating racial segregation, moving sites out of urban areas can only ameliorate the current situation.¹³⁸

Thus, including the quality of schools within a state housing agency's QAP may promote integration within housing. In order to figure out how to effectively include school performance within a QAP, an examination of current state housing agency QAPs is necessary. An evaluation of the various state housing agency QAPs demonstrates that a clear majority of state housing agencies do not currently take into account school performance when allocating tax credits to low-income housing developers.¹³⁹ In general, state housing agency QAPs award most points to proposed low-income housing sites on criteria such as the type of construction, rent affordability, size of project, location within qualified census tracts, etc. Although each QAP differs in the amount of points given to each project characteristic, the list of criteria for which points are awarded remains relatively similar.¹⁴⁰ Many of the QAPs do mention schools; however, almost all of the QAPs award points for proximity to schools and not for the quality of schools within the area.¹⁴¹

138. See *supra* text accompanying notes 86-89.

139. Novodrac & Co. LLP, QAPs and Applications, <http://www.novoco.com/QAP.shtml> (last visited May 19, 2006). State housing agency 2005 final QAPs were evaluated for the following states: Alaska, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming. Due to the unavailability of final QAPs for several states, state housing agency 2005 draft QAPs were evaluated for the following states: Alabama, Arizona, Delaware, Illinois, Massachusetts, Mississippi, and South Carolina. Due to the unavailability of a 2005 final QAP or draft QAP, a tax credit application form for Connecticut was evaluated. Finally, due to the unavailability of 2005 final or draft QAPs or 2005 tax credit applications, the following state agencies were not evaluated: Florida, Maryland, North Dakota, Utah, Vermont, and West Virginia.

140. For example, the Arkansas Development Finance Authority allocates four points for projects that "[e]xtend[] the duration of low-income use." ARKANSAS DEVELOPMENT FINANCE AUTHORITY, HOUSING CREDIT PROGRAM 2005 QUALIFIED ALLOCATION PLAN 19 (2004), available at http://www.novoco.com/QAP_Applications/Arkansas_final_05.pdf. However, the Iowa Finance Authority awards zero to twenty points to "[p]rojects obligated to serve qualified tenants for additional years beyond the minimum . . . required" IOWA FINANCE AUTHORITY, LOW-INCOME HOUSING TAX CREDIT PROGRAM 2005 QUALIFIED ALLOCATION PLAN 21 (2004), available at http://www.novoco.com/QAP_Applications/Iowa_final_05.pdf. Of course, it is important to note that one point may carry more weight under a particular state housing agency's point system than another state housing agency's point system.

141. For example, the Georgia Housing and Finance Authority awards points for desirable characteristics, including proximity to schools. GEORGIA HOUSING AND FINANCE AUTHORITY, 2005 QUALIFIED ALLOCATION PLAN FOR LOW INCOME HOUSING TAX CREDITS 65 (2005), available at

One QAP, however, did stand out from the rest. The Texas Department of Housing and Community Affairs awards points for proposed low-income housing development sites that are “to be located in an elementary school attendance zone of an elementary school that has an academic rating of ‘Exemplary’ or ‘Recognized,’ or comparable rating if the rating system changes.”¹⁴² This is a considerable change from the 2004 QAP which did not award any points for proposed low-income housing sites that were to be located near high performing schools.¹⁴³ Although this is a step in the right direction, the Texas 2005 QAP actually lists “an elementary school attendance zone of an elementary school that has an academic rating of ‘Exemplary’ or ‘Recognized[.]’” as one of eight development locations for which an applicant can receive points.¹⁴⁴ The applicant is awarded four points if the proposed low-income housing developments qualifies as one of the listed development locations. Unfortunately, if the applicant’s proposed low-income housing site qualifies for more than one of the development locations, the applicant is not awarded additional points, as four points is the maximum amount awarded under this criterion of development location.¹⁴⁵ Thus, it is questionable whether the particular point system will truly encourage developers to seek out sites that are located near higher quality schools or to just focus on one of the other seven possible development locations.¹⁴⁶ Furthermore, because the Texas 2004 QAP did not include school performance as a criterion, the effect of this inclusion within the Texas 2005 QAP will be unascertainable for some time. Nevertheless, including the quality of schools as a factor in QAPs is a promising means by which to achieve residential desegregation. States can utilize the accountability systems that they have been mandated to develop by the No Child Left Behind Act in order to develop the criteria that would award more points to higher

http://www.novoco.com/QAP_Applications/Georgia_final_05.pdf.

142. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, 2005 HOUSING TAX CREDIT PROGRAM 37 (2005), available at http://www.novoco.com/QAP_Applications/Texas_final_05.pdf.

143. See TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, 2004 HOUSING TAX CREDIT PROGRAM 1 (2004), available at http://www.novoco.com/QAP_Applications/Texas_final_04.pdf.

144. *Id.* at 37.

145. *Id.*

146. See *id.* Some of the other listed development locations include [a] geographical area which is an Economically distressed area; a Colonia; or a Difficult Development Area (DDA) as specifically designated by the Secretary of HUD[;] . . . a designated state or federal empowerment/enterprise zone, urban enterprise community, or urban enhanced enterprise community[;] . . . a city or county-sponsored area or zone where a city or county has, through a local government initiative, specially encouraged or channeled growth, neighborhood preservation, or redevelopment.

Id. Thus, it is probable that applicants will choose to focus on the other listed criteria in order to gain the maximum four points; furthermore, these other development locations seem to reward applicants for proposing low-income housing sites in urban areas, perpetuating the cycle of residential segregation.

quality schools.¹⁴⁷

Including school performance or quality within a QAP would also serve another purpose—fulfilling a state constitutional obligation. “[S]tates generally have an obligation under their constitutions to provide all students with an adequate education.”¹⁴⁸ At least one scholar has stated that challenges based on state constitutional adequate education clauses should be successful for a number of reasons.¹⁴⁹ First, those challenging the adequacy of segregated minority schools, arguing that desegregation is a necessary component in providing an adequate education, “can assert that racial and socioeconomic isolation deprives . . . students of an adequate education,” based on studies “demonstrat[ing] that . . . students who suffer from the dual burdens of racism and poverty are far less likely than their white, middle-class counterparts to attend schools that emphasize academic achievement.”¹⁵⁰ Furthermore, challengers can assert that because desegregation “helps students develop the ability to coexist with persons from different cultures” it is a critical element of an adequate education.¹⁵¹

In *In re 2003 QAP*, the four public interest organizations challenging the state housing agency’s adoption of the 2003 QAP also argued that the 2003 QAP violated “sections of the New Jersey Constitution which prohibit segregation of public schools, and require that the Legislature provide a thorough and efficient education.”¹⁵² The court did not accept this argument and instead decided that neither of the two constitutional provisions imposed upon the state agency a duty to allocate tax credits to housing developments in non-urban locations.¹⁵³ The court stated that the state agency “has no jurisdiction over public education; [and] its statutory obligation is to administer the tax credit program in a manner consistent with the selection criteria and preferences specified by 26 U.S.C.A. § 42(m).”¹⁵⁴ The court decided that the statutory preferences compel that a substantial portion of tax credits be allocated to urban areas. Finally, the court stated that “it was not . . . unreasonable for HMFA to conclude that better housing in urban areas might facilitate the thorough and efficient education clause. Improved housing in urban areas could enable the children who reside in those housing units to develop a better focus on their scholastic endeavors.”¹⁵⁵

147. 20 U.S.C. § 6311(b)(2)(A) (Supp. I 2001) states that “[e]ach State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress”

148. Powell, *supra* note 129, at 214.

149. Preston Cary Green III, *Can State Constitutional Provisions Eliminate De Facto Segregation in the Public Schools?*, 68 J. NEGRO EDUC. 138, 151 (1999).

150. *Id.*

151. *Id.*

152. *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003 QAP)*, 848 A.2d 1, 17 (N.J. Super. Ct. App. Div.), *cert. denied*, 861 A.2d 846 (N.J. 2004).

153. *Id.* at 21.

154. *Id.*

155. *Id.* The court further noted “that substandard housing is one of many socio-economic

The court's logic is flawed. Because the HMFA is a state agency run by state actors, it is bound by the New Jersey State Constitution.¹⁵⁶ Thus, the HMFA must take into consideration the quality of education when allocating tax credits to high-minority urban areas of New Jersey. The question is not whether the HMFA has jurisdiction over public education. It is whether the HMFA, by allocating tax credits, is contributing to segregation within the schools. As stated earlier, placing low-income housing developments in high-minority, poverty concentrated areas exacerbates segregation overall and within the nearby schools.¹⁵⁷ The strong connection between residential minority segregation within inner cities and the poor quality of education is undeniable.¹⁵⁸ By significantly contributing to racial segregation within the schools and, thus, to the diminishing quality of education provided by such schools, HMFA is violating the New Jersey State Constitution. Furthermore, New Jersey Supreme Court cases reflect clear policy goals regarding racial segregation and its effect on the quality of education.¹⁵⁹ The allocation of tax credits in a manner that perpetuates segregation within the schools and, thus, diminishes the quality of education provided to the children who attend those schools defeats those clearly stated policy goals.

If state housing agencies make an effort to include the quality of schools within their QAPs, the state housing agencies would be complying, at least on some level, with constitutional educational clauses that promise an adequate education to all children, regardless of race or economic status. The allocation of tax credits to poverty-stricken, high minority areas would decrease, would lead to desegregation within the schools, and would improve the quality of education overall. Thus, two compelling arguments exist for state housing agencies to include the quality of schools within their QAPs. First, because quality of schools is not a race-based classification, a state agency can include it as a factor within its QAP without being subject to equal protection or Title VIII anti-discriminatory challenges and still achieve the Title VIII mandate to promote integration. Second, by considering quality of schools as a factor when deciding how to allocate tax credits, state housing agencies will fulfill their obligations to

conditions that impairs educational achievement" and that "[i]t would be contradictory and self-defeating to direct financing away from urban areas when the Court has ordered a massive infusion of public tax money to improve public education in urban areas." *Id.* at 21-22.

156. Appellants' Brief on Appeal, *supra* note 42, at 76.

157. *See supra* text accompanying notes 124-27.

158. *See supra* text accompanying notes 129-31; *see also* Appellants' Brief on Appeal, *supra* note 42, at 77 (describing the state agency's allocation of tax credits as a "perpetuation of segregation in a manner that keeps poor minority children trapped in our state's worst schools").

159. *See Abbott v. Burke*, 575 A.2d 359, 411 (N.J. 1990) (stating that "[o]ur large black and hispanic population is more concentrated in poor urban areas and will remain isolated from the rest of society unless this educational deficiency in poorer urban districts is addressed"); *see also Booker v. Bd. of Educ. of Plainfield*, 212 A.2d 1, 6 (N.J. 1965) (stressing that "heterogeneous student populations" are educationally advantageous and that "states may not justly deprive the oncoming generation of the educational advantages which are its due").

comply with state constitutional education clauses.

CONCLUSION

Current housing policies must change in order to effectuate integration within our nation's communities. State agencies that administer the largest federal subsidy program for low-income housing play an integral role in shaping the racial (and economic) composition of urban and suburban America. Although mandated by Title VIII to promote integration, state housing agencies have made little progress in the area; in fact, current court challenges have brought to light the impact of state agency planning in perpetuating segregation. State agencies may be hesitant to make racial classifications within their QAPs because of possible equal protection or Title VIII anti-discriminatory challenges. Therefore, state agencies should use quality of schools as a factor in determining how to allocate tax credits in order to effectively promote integration and also comply with state constitutional educational clauses.

