

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES, INC. §
Plaintiffs, §

v. §

THE TEXAS DEPARTMENT OF §
HOUSING AND COMMUNITY §
AFFAIRS, AND MICHAEL GERBER, §
LESLIE BINGHAM-ESCARAÑO, §
TOMAS CARDENAS, C. KENT CONINE, §
DIONICIO VIDAL (SONNY) FLORES, §
JUAN SANCHEZ MUÑOZ, AND §
GLORIA L. RAY IN THEIR OFFICIAL §
CAPACITIES, §
Defendants. §

CIVIL ACTION No. 3:08-cv-00546-D

DEFENDANTS’ MOTION TO DISMISS AND BRIEF IN SUPPORT

TO THE HON. SIDNEY A. FITZWATER, CHIEF UNITED STATES DISTRICT JUDGE:

COMES NOW the Defendants Texas Department of Housing and Community Affairs, and Michael Gerber, Leslie Bingham-Escareño, Tomas Cardenas, C. Kent Conine, Dionicio Vidal (Sonny) Flores, Juan Sanchez Muñoz and Gloria L. Ray in their official capacities (collectively the “Defendants” or “TDHCA”), and move this Honorable Court to dismiss all claims against them pursuant to Rules 12(b)(1) and 12(b)(7) of the Federal Rule of Civil Procedure.

I.
INTRODUCTION AND NATURE OF CASE

The Plaintiff, Inclusive Communities Project, Inc. (“ICP” or “Plaintiff”), is a not for profit fair-housing and civil rights organization based in Dallas, Texas, that focuses on racial segregation, and policies and practices which exclude low income families from the opportunity to live in the

predominately white or “non-minority” communities in the Dallas metropolitan area. (Plaintiff’s Original Complaint, ¶ 3.) ICP assists African American families who are eligible for Section 8 housing in the suburban communities in the Dallas area. (Plaintiff’s Original Complaint, ¶ 8). ICP complains that the State of Texas is aware its Low Income Housing Tax Credit program perpetuates racial segregation in the Dallas region and avers the Texas Department of Housing and Community Affairs (“TDHCA”) has failed to take the necessary steps to remedy the alleged segregation, but instead has continued its concentration of Low Income Housing Tax Credit to low-income minority areas. (Plaintiff’s Original Complaint, ¶¶ 1-3.) Plaintiff further alleges TDHCA has failed to correct the “disproportionate allocation of housing tax credits to low income minority areas,” and thus interferes with Plaintiff’s ability to find housing for its clients in the “higher opportunity,” predominantly white areas of the Dallas metropolitan area. (Plaintiff’s Original Complaint, ¶¶ 1-3.)

Plaintiff seeks injunctive relief of defendants’ alleged segregation of Low Income Housing Tax Credit assisted developments into low income and minority concentrated locations in the Dallas metropolitan area.

II. **ARGUMENT AND AUTHORITY**

A. Plaintiff’s Complaint Must Be Dismissed For Lack Of Article III Standing.

It is well settled that a Complaint must be dismissed if “the court lacks the statutory or constitutional power to adjudicate the case.” *See Home Builders Ass’n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). It is the burden of the party who seeks federal jurisdiction to “clearly allege facts demonstrating that [it] is a proper party to invoke the judicial resolution of the dispute.” *United States v. Hays*, 515 U.S.737, 743 (1995) (internal quotations and citation omitted). Moreover, standing under Article III is jurisdictional, such that it must be

addressed before the court may undertake a consideration of the merits of Plaintiff's claims. *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 247-8 (5th Cir. 2008).

Furthermore, "Article III standing, at its 'irreducible constitutional minimum', requires Plaintiffs to demonstrate: they have suffered an 'injury in fact'; the injury is 'fairly traceable' to the defendant's actions; and the injury will 'likely . . . be redressed by a favorable decision.'" *Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).¹ Accordingly, a plaintiff "may not merely 'champion the rights of another,'" *Audler* 519 F.3d at 248, quoting *Scottsdale Ins. Co. v. Knox Park Constr., Inc.*, 488 F.3d 680, 684 (5th Cir. 2007), and "must establish that [plaintiff] has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Audler* 519 F.3d at 248, quoting *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). In addition, standing is not generally recognized when it is based on "economic harm that is merely a consequence of an injury suffered by another party." *Garzes v. Lopez*, 2008 WL 2337277 at *2 (5th Cir. June 9, 2008) (unpublished).

The first element of the Article III standing analysis is whether the plaintiff has suffered an "injury in fact." Such injury is an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. In this case, ICP alleges that it has been injured as a result of TDHCA's allegedly discriminatory application of the Low Income Housing Tax Credits. Despite devoting almost 3½ pages of the Complaint to a discussion of standing, however, ICP fails to identify a

¹ If any of these three elements is lacking, a plaintiff has no standing in federal court to assert their claim. *See Okpalobi v. Foster*, 244 F.3d 405, 425 (5th Cir. 2001) (en banc).

direct injury. Rather, ICP claims that its business has been impaired because *the people it serves* (i.e. “Black families seeking to use their DHA Section 8 voucher to move into low-poverty, non-minority concentrated areas throughout the Dallas metropolitan area.” (Plaintiff’s Complaint at paragraph 29)) have been injured by TDHCA’s alleged actions. To that end, ICP’s standing claim rests on the following alleged injuries: (a) that there are fewer “units that ICP can use to help *its clients* find housing in non-minority concentrated market areas;” (b) that as a result of the decreased number of units, ICP has had to increase the “amount of time per client that [it] must spend in order to help its clients find and retain modest rental housing . . .;” (c) that ICP has had to give more financial assistance to its clients; and (d) that ICP has had to discourage its client families “from choosing dwelling units in market areas that offer racially integrated housing because of the cost factors involved in such a choice.” (Plaintiff’s Complaint at paragraph 36.)

Although ICP’s business and ability to serve its clients with regard to finding low-income housing in non-minority concentrated areas may ultimately be impacted by the alleged actions of TDHCA, this impact, if any, flows only through their clients: those persons eligible to receive Section 8 housing. “[T]he ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be [itself] among the injured.” *Rivera v. Wyeth-Ayert Laboratories*, 283 F.3d 315, 320 (5th Cir. 2002), quoting *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). Essentially, ICP can only claim injury as a “consequence of an injury suffered by another party,” *Garzes*, 2008 WL 2337277 at *2, and therefore does not have standing in this matter. Accordingly, the Complaint must be dismissed.

B. Plaintiff's Complaint Must Be Dismissed For Failure To Join Indispensable Parties.

In addition to ICP's lack of standing to bring this lawsuit, it has failed to name, among others, the United States Department of the Treasury (Internal Revenue Service) and the City of Dallas as parties. Without these parties, the claimed relief cannot be accorded. Pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure, a Complaint may be dismissed for failure to join parties required by Rule 19. A required party under Rule 19 is: "A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in the person's absence, the court cannot accord complete relief among existing parties, . . ."

The tax credit program that ICP complains of is a federal program governed by the federal tax code at 26 U.S.C. § 42. The United States Department of the Treasury and the Internal Revenue Service (IRS) promulgate regulations, rules and opinions that govern the basic operation of this program consistent with federal law. The low income housing credit program provides a per capita allocation of marketable tax credits for the owners of a property. Therefore, tax credit syndicators provide large amounts (often more than 60%) of the equity needed to construct housing developments based on the sale of the credits. In exchange, the developers and syndicators agree to provide limited-rent units to members of the general public with incomes at or less than 60% for approximately 30 years through a Land Use Restriction Agreement executed by TDHCA, but governed extensively by federal law and regulations.

One basic premise of the low income housing tax credit program is that, within statutory and interpretive rules, the private sector is an active partner in the program, submitting applications that include the selection of where they have temporary site control to develop

properties in accordance with a Qualified Allocation Plan (QAP) developed by the state and governed by state and federal laws and regulations. The IRS Code, at 26 U.S.C. § 42, provides incentives for private sector developers to make development location choices. The location choices are entirely selected by the developer *prior* to any application being made to TDHCA for tax credits, and may be based on how the developer believes the low income development will work best for their particular financial needs. TDHCA does not actively solicit applications from developers for any particular area or region but does provide notice of the application round and its rules.

The first incentive determines what is included in the eligible basis (the base figure from which credits are calculated that may be obtained by the developer for any one development) for the award of tax credits. Tax credit applications are reviewed by TDHCA to establish what portion of the development is eligible for the award of credits. The IRS, in 26 U.S.C. § 42(c) “Qualified Basis;” (d) “Eligible basis” and (e) “Rehabilitation expenditures treated as separate new buildings,” has a significant impact on where property is acquired by the developer. Given that land acquisition is not usually included within the permitted eligible expenses, low cost land is generally necessary in many applications to make the transaction financially feasible and still provide the required low income rent reductions.

Likewise, the IRS, under 26 U.S.C. § 42(d)(4) and (5)(C), provides an adjusted basis to the amount of credits a developer can receive. In the lexicon of the program, this is frequently referred to as a “boost” and provides a 130% factor in the eligible basis, and as such the credits allocated to the property, thereby providing significant incentive to locate in a Qualified Census Tract (QCT) or a Difficult to Develop Area (DDA) that attracts developers. The list of QCTs

and DDAs are published by the federal government prior to each competitive round and are available to and reviewed by developers. Qualified Census Tracts are those tracts in which 50% or more of the households are income eligible for the tax credit program and the population of all census tracts that satisfy this criterion does not exceed 20% of the total population of the respective area.

Unless these provisions are removed from the federal statute, TDHCA has no legal ability to overcome the limitations of the program for the need to purchase inexpensive land for financial feasibility or the attraction of developers to the additional 30% boost to the property for developing in QCTs and DDAs that are overwhelmingly located in low income and minority areas.

In addition to the IRS and federal regulations, the City of Dallas, through its City Council and planning and zoning board, has a tremendous impact on the location of developments. To provide the cities with local control and prevent over-concentration of low income properties, state law *requires* developers desiring to build in areas which have more than twice the state average of housing tax credit or bond units per capita to obtain a resolution from the governing body of the community where the developer desires to build. See Tex. Gov't Code § 2306.6703(4). The City of Dallas qualifies under this provision, as it has more than twice the per capita average of affordable housing supported by tax credits and private activity bonds. This provides the City of Dallas with significant input into when and where a development will be located within the city, as each development built in Dallas *must* obtain such a resolution. In fact, for the two years prior to this application round, the Dallas City Council informed the development community through a memo issued by then-Mayor Laura Miller, that the City

Council would not be providing these certificates until further notice. During that moratorium, only one development received the required certificate during that period, which was located in the central business district of the City of Dallas. As a result, and in the absence of approval by the City of Dallas, TDHCA by state law cannot approve an application for tax credits.

In addition, TDHCA must adhere to local zoning ordinance and requires that applicable zoning permission be obtained prior to any construction being done. A tax credit application submitted to TDHCA may move forward subject to zoning, but zoning permission must be obtained prior to funding. In the event there is no zoning required by the governing body, TDHCA requires a letter of consistency by the local governing body that states that low income housing is needed and that this application is consistent with plans for development. As zoning is a central component of any development, therefore, the relief requested cannot be obtained without the City of Dallas as a necessary party.

In addition to the zoning issue mentioned above, the city has direct control of other developments. There are two types of tax credits available for development within the City of Dallas through TDHCA. The first is the highly competitive tax credit round that supplies a majority of the equity for developments, commonly called "9%" credits. The second type of credit is generally referred to as "4%" credits. Both are governed by federal law at 26 U.S.C. § 42(b)(1)(B). The 4% credits are used in conjunction with private activity bonds that are provided to the State of Texas through an IRS program. These bonds are provided by statute to both state government and local governments under Tex. Gov't Code § 1372.022.

The City of Dallas and the Dallas Housing Authority, through Housing Option, Inc., provide multi-family revenue bond programs through the private activity bonds provided under

the IRS program and allocated by the state to develop multi-family units. The Dallas Housing Authority has a current development request before TDHCA seeking 4% tax credits as a companion to its proposed bond issuance. Through the issuance of private activity bonds, both the City of Dallas and the Dallas Housing Authority have a major development role in low income housing and develop in the areas that are the subject of this very litigation.

Although TDHCA is the agency with the authority to grant Low Income Housing Tax Credits, its actions are not only constrained by state law, but also by federal laws and regulations. Moreover, before any decision can be made by TDHCA concerning the granting of tax credits, any applicant must have submitted its development plan to the municipality for approval. Importantly, it is this municipal control that ultimately informs where and to what extent low-income housing gets developed in the City of Dallas, not TDHCA. Accordingly, there cannot be complete relief with TDHCA as the sole defendant, such that the Complaint must be dismissed for failure to name indispensable parties.

C. Conclusion.

WHEREFORE, and for the foregoing reasons, the Plaintiff's Complaint must be dismissed for lack of standing pursuant to Rule 12(b)(1), and for its failure to name indispensable parties under Rule 19. Attached with this motion is a proposed Order.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on June 27, 2008, the foregoing Defendants' Motion to Dismiss and Brief in Support was filed electronically, via the CM/ECF filing system, with the Clerk of Court of the United States District Court for the Northern District of Texas, and that attendant to such filing the counsel of record identified below will receive a copy of this filing electronically. I further certify that a true and correct copy of this document has also been sent by facsimile (214.741.3596) to:

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