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November 22, 2013

The City of Dallas
C/O Charles Estee
Office of the City Attorney
City Hall
Dallas, TX 75201

SUBJECT: LETTER OF FINDINGS OF NON-COMPLIANCE
1600 Pacific LP v. City of Dallas
HUD Case File Nos. 06-10-0449-9 (Sec. 109),
06-10-0449-4 (Sec. 504), & 06-10-0449-6 (Title VI)

Dear Mr. Estee:

The U.S. Department of Housing and Urban Development ("Department" or "HUD") has completed its investigation of the subject case filed under Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. 2000d, and its implementing regulations found at 24 C.F.R. Part I, Section 504 of the Rehabilitation Act of 1973 ("Sec. 504"), 29 U.S.C. §794 and its implementing regulations found at 24 C.F.R. Part 9, and Section 109 of the Housing and Community Development Act of 1974 ("Sec. 109"), 42 U.S.C. §5309 and its implementing regulations found at 24 C.F.R. Parts 6, 8 & 570.

Based on the evidence obtained during the investigation, the Department has determined that the City of Dallas ("Recipient" or "the City") is in noncompliance with Title VI, 24 C.F.R. Part I, Section 504, 24 C.F.R. Part 8, and Section 109, 24 C.F.R. Part 6 with respect to the allegations raised by 1600 Pacific, L.P. ("the Complainant" or "1600 Pacific"). Further, the City certified that its programs would be conducted and administered in conformity with the Civil Rights Act of 1964, 42 U.S.C. 2000a et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, Section 109 of the Housing and Community Development Act of 1974, 42 U.S.C. §5309, and Title VIII of the Civil Rights Act, 42 U.S.C. § 3601 et seq. ("civil rights laws"). A summary of the evidence upon which these determinations are based is presented below.

I. Jurisdiction

The recipient is subject to the various civil rights laws by virtue of its receipt of HUD financial assistance in the form of Community Development Block Grant funds ("CDBG"), including proceeds from loans guaranteed under the Section 108 Loan Guarantee program. A complaint

was filed with the Department on or about February 4, 2010, alleging that the Complainant was injured by a discriminatory act. It is alleged that the Recipient was responsible for: refusing to approve a Section 108 application, refusing to approve an application for HERA Bonds, engaging in different terms and conditions of approval of an application, and a failure to affirmatively further fair housing. It is alleged that the Recipient's acts were based upon race, color, national origin, and disability. The most recent act is alleged to have occurred on June 1, 2009. The property is a multi-story office building located at 1600 Pacific Avenue, Dallas, TX, which was intended for conversion into a mixed use, multi-family development.

II. Complainant Allegations

1600 Pacific alleged that, in wrongfully denying their redevelopment plan for the 1600 Pacific Building, a development that would provide 590 units of housing with at least 40% of those units dedicated to low- and moderate-income households, the City of Dallas (1) made housing unavailable because of race and disability; (2) discriminated based on race and disability in the terms and conditions of its administration of its housing programs; (3) violated Title VI of the Civil Rights Act of 1964; (4) violated Section 504 of the Rehabilitation Act of 1973; (5) and violated the Housing and Community Development Act of 1974.

The Complainant alleges that it has been injured by Recipient's discriminatory actions insofar as it lost predevelopment costs and expected profits if Recipient's discriminatory actions were permitted to stand. The Complainant further alleges that the City receives federal financial assistance from the Department of Housing and Urban Development.

The Complainant specifically alleges that the City arbitrarily created a boundary that divided the City into two sectors. The Northern Sector is predominantly non-minority, and includes the downtown business district. The Southern Sector is predominantly minority.

The Complainant alleges that the City took \$75 million in CDBG Section 108 Loan Guaranty money for low- and moderate-income housing and arbitrarily split that money evenly between the Southern and Northern Sectors. The complainant further alleged that the City then actively solicited and selected proposals that would require a waiver of the national objective of 51% low- and moderate-income housing in the Northern Sector.

The Complainant alleges that the City encouraged development of numerous Low Income Housing Tax Credit projects for low- and moderate-income families exclusively in the Southern Sector while discouraging Low Income Housing Tax Credit projects in the Northern Sector.

Complainant further alleges that the City used Tax Increment Financing ("TIF"), to provide incentives to developers for upscale hotels, condominiums and luxury rental apartments with large floor plans targeted at upper 35% of the market, while rejecting incentives for developers targeting the lower 65% of the market. Complainant alleges that the City provided \$140 million in TIF incentives to create roughly 2,400 rental units but did not provide any affordable housing

to low- and moderate-income households which resulted in the limitation of housing opportunities based on race and disability.

Complainant alleges that the City created the Downtown Connection TIF District ("DC TIF") with a budget of nearly \$190 million, but only allocated \$3 million of that budget to affordable housing development within the DC TIF. Complainant further alleges that the City misrepresented the amount of funding available within the DC TIF, asserting there was only \$89 million available when the sum was actually \$125 million. The complainant asserts this was done to create the impression that resources were scarce, and as a result, to discourage support for the Complainant's proposal.

Complainant alleges that the City secured \$150 million in HERA Bonds from the State of Texas and subsequently awarded \$102 million to the Complainant, only to rescind that award less than 90 days later.

Finally, Complainant alleges that the City failed to approve its application for CDBG Section 108 Loan Guarantees at \$82,600 per unit, which would have met the national objective of the National Affordable Housing Act by providing 51% of the units as low- and moderate-income housing, while supporting applicants that were providing units at a cost of \$190,000 per unit and only providing 20% of the units to low- and moderate-income households.

Conceptually, the complainant's allegations touch upon: the rejection of the 1600 Pacific project, the Atmos stock transfer agreement, the administration of the Section 108 Loan Program (e.g., inconsistent standards), the administration of the HERA Bond Program, spatial deconcentration issues, and monitoring issues.

III. Recipient's Defenses

The Recipient asserts that the Complainant's Section 108 Loan Guaranty application failed because it did not identify a repayment source. The City's Section 108 Loan Program requires that applicants identify one or more sources of repayment. Some projects have identified TIF as a source of repayment, which the Complainant did, but the Complainant had not received approval from the DC TIF.

The Recipient asserts that when a loan is contingent upon using TIF funds to repay, the applicant first has to be approved by the TIF Board. If approved, the City Council then has to adopt the Board's recommendation. Once adopted, the City's Housing and Community Services Department can complete the City Council Committee briefings and complete the 108 Loan review. If not approved by the TIF Board, the process ends at that point.

The Recipient asserts that the Complainant's project is within the DC TIF District. The requirement within this TIF district is that 10% of the housing meets the affordability guidelines for 15 years. The primary goal of the DC TIF is economic development with the primary evaluation criterion being the creation of value in the tax base. Development goals for the TIF include but are not limited to improving access between downtown and uptown, diverse mixture of uses, and developing or expanding transportation, business and commercial activity.

The Recipient further asserts that the Complainant's TIF funding request was rejected because it was excessive in comparison to the total amount of funds available for the TIF District.

The Recipient asserts that the complainant's first proposal of 307 units was approved on February 12, 2007 and a development agreement was authorized. The complainant's development agreement expired on December 31, 2008. The initial proposal was followed by two revisions, after the expiration of the development agreement. The complainant attempted to increase the number of units to 700 units and then revised it down to 509 units. Recipient asserts that the majority of these units were 600 square feet, which was much smaller than many of the other units in the area. The Complainant was also proposing adding 8 floors of units over a parking garage. Recipient further asserted that the Complainant was requesting \$67,000,000 million of the \$78,000,000 left in the DC TIF. Because of the amount requested and the Complainant's revised proposal, the Recipient felt that the proposal was not structurally or financially feasible.

The Recipient asserts that its Section 108 Loan program is not administered in a discriminatory manner.

The Recipient asserts that the Section 108 Loan Program has created 197 affordable units. When all mechanisms for creating affordable housing are considered, there are 314 affordable units in the DC TIF area.

Recipient asserts that on June 14, 2006, the City adopted Ordinance 26371, which is a long-term development plan for the City. The purpose of the ordinance is to support balanced growth between the Northern and Southern Districts.

Recipient asserts that on January 28, 2009, the City adopted a program statement for its Section 108 Loan Guarantee Program that would encourage new construction and rehabilitation in areas with the highest number of CDBG eligible tracts (the Southern Sector).

Finally, the Recipient alleges that 1600 Pacific's bankruptcy and an alleged inability to service debts justified its denial of approval for the 1600 Pacific project.

IV. Findings

As set forth more fully below, an analysis of the evidence supports the conclusion that there was a significant need documented by the City for affordable housing for persons whose incomes are below 50% AMFI, a population which in Dallas is disproportionately black, Hispanic and persons with disabilities. The evidence also supports a conclusion that the reasons advanced by the City for failing to fund the 1600 Pacific project are either not supported by the evidence or that there is other evidence that shows that similar projects which would provide less affordable housing were not treated in the same fashion. In addition, the evidence shows that there was a pattern of negative reactions to projects that would provide affordable housing in the Northern Sector of Dallas and that those decisions were inconsistent with the goals required by HUD program obligations.

A. Background & Demographic Data

On or about February 4, 2010, 1600 Pacific LP ("the complainant" or "1600 Pacific") filed a complaint alleging that the City of Dallas ("the City" or "the recipient") had discriminated against it in its administration of the Section 108 Loan Program, the Downtown Connection TIF ("DC TIF"), the low-income housing tax credit program (LIHTC), and the use of HERA Bonds.

The Section 108 Loan Program is federal money originating from Community Development Block Grants ("CDBG money"), which is made available to entitlement cities. The City of Dallas is an entitlement city and participates in the Section 108 Loan Program.

TIF¹ stands for tax increment funding and is based on the collection of property taxes within the TIF District created by the City. The taxes collected (or anticipated taxes) are then used by the TIF District to fund development (typically within that district). The City used its funds as the guarantee for the repayment of federal money. While this is not illegal or prohibited, the Section 108 Program required a repayment source and this practice was a way for the City to obtain the loan money for developments it supported within the DC TIF.

The Housing and Economic Recovery Act of 2008 (HERA²) provided funds for emergency assistance for redevelopment of abandoned and foreclosed homes and residential properties, and provides that, unless HERA provided otherwise, these grants would be considered CDBG funds.

Through HERA, the Department of Housing and Urban Development was given the authority to allocate approximately \$4,000,000,000 in federal funds to the states. The Department was responsible for using its funding criteria (see Public Law 110-289) for determining the size of disbursement to each state. The State of Texas was a recipient of these funds, which included bond money (HERA Bonds) intended for the development of low-income housing. The State disbursed those funds to the housing finance agencies ("HFA's") of local municipalities that requested an allocation. The City of Dallas Housing Finance Corporation ("DHFC") was one of the HFA's that requested an allocation. Although the Dallas Housing Finance Corporation is a public non profit institution, it was advised in its decision making in this matter by city officials. As such, the actions of the DHFC are attributable to the City of Dallas.

Tax credits are not considered by the Department of the Treasury to be federal financial assistance. A developer gets the benefit of lower taxes by providing affordable housing that is typically regulated by a land use restriction agreement (LURA). The State of Texas administers the LIHTC program, but a component of that process entails the developer obtaining the support of the municipality where the proposed property is to be developed. In this instance, that is the City of Dallas.

¹ Chapter 311 of the Texas Tax Code, which provides the parameters for governance of TIF districts, reserves to the governing body of the municipality (i.e., the City Council), final approval of project plans. Thus, the City is always the final arbiter for each proposal brought before it.

² Pub. L. No. 110-289, July 30, 2008.

A critical piece of this analysis involves considering the various income strata within the City; as the affordable rental rates will determine who benefits. These levels are as follows:

- 30% Adjusted Median Family Income (AMFI) = Deep Subsidy (Housing Choice Voucher ("HCV") eligible renters and rents) (extremely low-income)
- 50% AMFI = HCV renters but typically above low market rents (considered low-income) (if LIHTC property but not a HCV holder, can pay as much as 45% of income in rent)
- 60% AMFI = Above income levels for HCV renters, and rents are at the low end of market rates (low-mod income to low-income) (if LIHTC property but not a HCV Voucher holder, can pay as much as 45% of income in rent)
- 80% AMFI = upper end of spectrum and is market rate (moderate-income) (usually no subsidy at this level, may not be subsidy below this rate either)³
- 140% AMFI = not subsidized at all (high moderate-income)

The 2010 Census reflects the following as it relates to median incomes in the City of Dallas:

Protected Class	Person	Family [^]
With a Disability	\$18,236	Not Available
Male	\$26,403	\$60,567*
Female	\$23,428	\$51,804*
White	\$31,025	\$59,273
Black	\$23,086	\$31,658
Hispanic	\$19,598	\$35,112

*Non-family household not living alone

[^]Family of four (4) is the standard

the following rates were set as the income caps for qualifying for affordable housing in Dallas for 2011:

Median Income	1 Person	2 Persons	3 Persons	4 Persons
30% (Very Low-Income)	14,550	16,600	18,700	20,750
50% (Low- Income)	24,200	27,650	31,100	34,550
80% (Moderate-Income)	38,750	44,250	49,800	55,300

Based on this data, the groups served by housing that is available at or below 50% of the median income in Dallas are black persons, Hispanics, females and people with disabilities.

The City's 2011-2012 Action Plan, articulated what the average rental rates are for the City of Dallas:

Type of Unit	Rent (2008)	Rent (2011)
Studio	\$575	\$584
1-bedroom	\$640	\$793

³ For purposes of the CDBG Program, 80% AMFI is the maximum rate, beyond that it is not considered affordable under the Section 108 Program. The 140% AMFI figure is considered affordable under the guidelines regarding HERA Bonds.

2-bedroom	\$777	\$1,045
3-bedroom	\$1,031	\$1,290
4-bedroom	\$1,249	\$2,667

When considering the rate of affordability (e.g., 50% AMFI), the amount of monthly income paid toward rent is typically calculated at 30%. Therefore, using the assumption of 1.5 persons per-bedroom means that a two-bedroom unit would have three (3) persons. The amount of money that should be spent on rent is \$633 ($\$31,100 \times .3 = \$9,330/12 = \$778 - \145 (utility allowance) = \$633). The conclusion is that the average rent for a two-bedroom is too expensive for anyone at the 50% AMFI strata. If affordable rents are set at 80% AMFI, then the monthly rental payment would be \$1,100 (applying the same assumptions and formula). This exceeds the average rental rates for the City, but more importantly, the monthly rental payment for a person at 50% AMFI nearly doubles and makes the payment cost-prohibitive to persons located in the 50% or lower income strata. The implications of the various rent structures illustrate the potential impact upon renters based solely upon where the rate of affordability is set. When this is cross-compared against median incomes based upon race, national origin, disability, and sex, the correlation is apparent.

Based on the City's 2011-2012 Action Plan, persons at 30% and 50% AMFI cannot afford the average rental rate in Dallas. The City noted that the need for affordable housing has increased every year, but that the number of affordable units had not increased. The City then explains that it will seek to increase the number of affordable units set at 80% AMFI (despite evidence that persons at 30% & 50% AMFI cannot afford the average rents already). The evidence shows that 80% is essentially market rate (thus 80% is not affordable to anyone at or below 50% AMFI).

Based upon the 2010 Census, the City of Dallas has 1,241,162 residents. Of this group, the population is 42.4% Hispanic and 25% black.

The 2010 Census Tract data for the location where 1600 Pacific would have been located (Tract 31.01⁴) for race and national origin reflected that the overall population was 2,474. Hispanics accounted for 371 (15%) of the individuals and blacks accounted for 281 (11%). Therefore, the area is not more than 74% white. This means that the percentage of white residents at the Tract Level is more than twice the rate for the City as a whole, and blacks and Hispanics are significantly underrepresented in comparison to their population in the City as a whole.

Year 2010 Census Block 1008⁵ data revealed that there are a total of 89 persons identified. Of this number, 10 (11%) are Hispanic and 7 (8%) are black. Therefore, the approximate total minority population is at least 19%, meaning that the white population cannot be greater than 72 (81%). Compared to citywide data, the representation of white, non-Hispanic persons at the block level is more than three-times the rate for the City as a whole.

As illustrated by the complainant's application for Section 108 funding, the affordability component of these developments relies upon a readily identifiable and measurable beneficiary: tenant-based voucher holders

⁴ Tract 31.01 includes the locations of 1600 Pacific, the Atmos Complex and the Continental Building; all of which are within less than one-half mile of each other.

⁵ This block includes only 1600 Pacific. The Atmos is located in Census Block 1037 and the Continental Building is located in Census Block 1029.

(formerly the Section 8 Program). Tenant-based vouchers are portable documents that allow participants to select their own housing. Voucher holders are eligible for affordable housing built with Section 108 funding and are likely candidates for this housing (assuming an affordable rent structure). Within the City of Dallas, there are two potential sources of portable voucher holders: Dallas County Housing and the City of Dallas Housing Authority (hereinafter, "the Dallas Housing Authority.")

The Dallas Housing Authority provides assistance to over 60,000 persons through its programs (public housing and Housing Choice Vouchers). The Dallas Housing Authority's Fact Sheet explains that its clientele is 86% African American, 6% Hispanic, 7% Anglo Americans, and 1% Asian American. A review of the Dallas Housing Authority's tenant-based voucher program for new admits between July 2009 and January 2011 revealed 737 new admissions. Of this sampled group, 571 (77%) were African American, 93 (13%) were Anglos, and 71 (10%) were Hispanics. Thus, the Dallas Housing Authority's voucher program is overwhelmingly minority (over 87%). Disabled participants were found to be 297 (40%) of the group, thus comprising a substantial group that is nearly double the representation of persons with disabilities in the City as a whole. The demographic data reflects that the Dallas Housing Authority, based upon participation data, is predominantly minority with a considerable number of persons with disabilities participating in its programs. Minorities and people with disabilities are overrepresented in this population in comparison to their representation in the population of the city of Dallas.

B. Need Identified

In its 1991 to 1992 Analysis of Impediments⁶ ('92 AI) the City identified a need for affordable housing and the barriers to it. In the '92 AI the City noted that housing opportunities followed moderate to upper income individuals, predominantly white, northward. Because development followed them, it left the southern portion of the City with fewer housing choices⁷. Expounding upon the problems related to choice: "Housing assistance programs, primarily through some form of subsidy, provide low-income families with a better opportunity to secure acceptable housing. Unfortunately, there is a limited supply of subsidized and/or affordable units and all low-income residents cannot be accommodated. As a result, freedom of choice is limited."⁸

Furthermore, the '92 AI noted: "As defined in the Community Development Block Grant Regulations, fair housing choice means the ability of persons regardless of race, color, religion, sex, handicap, familial status, or national origin, of similar income levels to have available to them the same housing choices (24 CFR 570.901.c.1). One of the key issues in fair housing choice, then, involves the market place. In order for freedom of choice to exist, affordable housing, especially for persons of low-income is constricted, then freedom of choice will be limited ..."⁹

The '92 AI also made the point that the Section 8 Voucher Program is largely viewed as a positive among those who responded to surveys. It explained, "Informants like the Section 8 program because it introduces locational

⁶ "Identification and Analysis of Impediments to Fair Housing Choice." 1991-1992.

⁷ See pages 1-26 to 1-27 of the 1991-1992 AI for the City of Dallas.

⁸ See page 2-6 of the 1991-1992 AI for the City of Dallas.

⁹ Ibid.

choice to low-income families' housing decisions and thereby enhances fair housing outcomes, at least potentially."¹⁰ Despite this positive potential, the authors note the conundrum of there not being enough supply to help realize this potential, and this is viewed as a barrier to fair housing choice (often alluded to as a structural barrier by the authors).

The AI concluded that affordability options had a direct correlation to race and national origin in Dallas.

Throughout this impediments analysis reference has been made to affordability as an element in fair housing choice. While this analysis has emphasized deficiencies in the existing supply of low-moderate income housing, the intent is not to imply that affordability is the only, or even the primary, component of fair housing choice. The limitations on housing choice that result from an inadequate supply of low and moderately priced housing units and the financial restrictions that face low and moderate income households when they enter the housing market come to the surface because they are obvious and direct limitations. One major reason that the restricted supply of low/moderate income housing has a direct fair housing impact is the socioeconomic status of Dallas minority citizens: in 1989, nearly three of every four Black and Hispanic households in Dallas were classified as moderate income or below. In this context, a housing market with few low/moderate income housing choices is, in effect, tantamount to de facto discrimination against Dallas minority households¹¹.

In response to the identified barriers, the '92 AI recommended that the City expand the supply of affordable housing. To this end, it suggested both rehabilitative efforts and new construction of affordable housing¹² as well as incentives to underwrite the costs of construction. Additionally, the '92 AI recommended addressing the concentration of African Americans and Hispanics by creating mixed and dispersed housing choices:

The City and other fair housing agencies should consider designing a scattered housing strategy allowing for placement in impacted and non-impacted communities. This new policy should enable public housing recipients to express where they might want to live, and if a family wants to move, it should be able to select a non-impacted area. The overall goal should be to create a mix of economic groups in a dispersed housing pattern rather than creation of low-income concentrations in one area ...¹³

The City's next AI covered the years 2007-2012 ('07 AI).

Surveys in the '07 AI indicated that there was not an adequate supply of low- or moderate-income housing. The typical response noted that supply was not keeping up with demand. Despite general language about housing choice in the earlier sections of the AI, the City did not list housing choice as an item that required additional attention when listing the issues to be addressed, even though the survey elicited some response pointing to limitations related to choice. Stated a different way, the '07 AI does not identify any supply-

¹⁰ See page 3-2 of the 1991-1992 AI for the City of Dallas.

¹¹ See pages 4-24 to 4-25 of the 1991-1992 AI for the City of Dallas.

¹² See page 4-28 of the 1991-1992 AI for the City of Dallas.

¹³ See page 4-30 of the 1991-1992 AI for the City of Dallas.

side issues, and therefore, offered no proposed solutions to the lack of affordable housing opportunities for African Americans and Hispanics.

An analysis of 2005-2009 American Community Survey data found that Dallas was the 52nd most segregated city in America by race. Based on 2010 Census data, Dallas is the second most segregated city by race in Texas, with a dissimilarity index of 71.5.¹⁴

On April 13, 2011, the City of Dallas adopted the Downtown Dallas 360 Plan (the "360 Plan").¹⁵ The 360 Plan is the development vision for the City going forward. The 360 Plan encompasses the Central Business District, an area located in the Northern Sector of the City, and includes the DC TIF where the subject property is located. This plan offered the following on housing choice:

*The urban core of Dallas has experienced strong population growth, especially since the year 2000. Luxury apartments, condos, and "condotel" developments have successfully transformed formerly undesirable locations into complete neighborhoods with ample density to support walkability and transit use. However, since the vast majority of housing developed has been for the upper or upper-middle income brackets, the area does not boast the diversity of residents or housing choices more reflective of a large urban center. For Downtown and its environs to fully capitalize on the potential to be a 24-hour, 21st-century urban neighborhood, residential offerings must be diversified to attract all income brackets, ethnicities and interests.*¹⁶

The city followed this observation with the following: "Much of the housing development in the past decade has focused on the upper-income market, driven in many cases by the costs of land and construction."¹⁷ A critical component of the 360 Plan is diversifying housing in the Central Business District, a vision which includes middle-income and lower income levels.¹⁸

To that end, the 360 Plan identified programs that may assist in diversifying the housing stock of the Central Business District. The City notes that one of those is the Tax Increment Fund Districts. The City notes that these require that at least 10% of the housing provided be affordable, which is for persons making 80% of the Area Median Income.¹⁹ The 360 Plan also identified Section 108 funding for this purpose. After noting that the majority of housing stock available for sale within the Downtown area is at or about \$500,000 and requires a base salary of at least \$100,000, the City writes:

While higher-income households may provide the greatest support for upper-end shops, restaurants, and cultural venues, other desired results may be achieved best by providing housing for middle- and lower-income households. Numerous Downtown employers have indicated that the lack of housing attractive and affordable to entry-level employees is a major deterrent to the start-up and growth of creative and professional services

¹⁴ CensusScope, http://www.censusscope.org/us/s48/rank_dissimilarity_white_black.html. The dissimilarity index ranks areas on a scale of 0 - 100, with 0 being totally diverse and 100 being totally segregated.

¹⁵ See www.downtowndallas360.com

¹⁶ http://www.downtowndallas360.com/docManager/1000000061/Dallas360_FinalAdopted.pdf (p.14).

¹⁷ http://www.downtowndallas360.com/docManager/1000000061/Dallas360_FinalAdopted.pdf (p.20).

¹⁸ http://www.downtowndallas360.com/docManager/1000000061/Dallas360_FinalAdopted.pdf (p.72).

¹⁹ As a reference point, the Department considers 80% of AMFI to be moderate-income and 60% to be low-income.

in Downtown. Lower- and middle-income workers also have a greater tendency to make use of public transit, so the major transit investments ongoing and envisioned for Downtown could be best supported through the addition of these likely riders.²⁰

Notably, "the 360 plan recommends that areas with lower land costs such as the Farmers Market, Cedars, and Deep Ellum be targeted areas for middle-class housing, while areas with higher land values such as Main Street and the South Arts District should be targeted toward upper-income households."²¹ Based on this proposal, the city intended to move its affordable housing away from the Central Business District. Because of land costs, the City proposed to seek out subsidies that would make housing more affordable for those making 60% to 175% of median income, which is \$35,000 to \$100,000 for a family of two.²²

The City again emphasized the need for affordable housing in its 2011-2012 Action Plan (the Action Plan). According to the Action Plan, the City estimated that its low- and moderate-income (LMI) renter needs were over 33,000 units for small, related households. The City estimated that the LMI renter needs are over 26,500 for large, related households. This pushed the unmet need for low- and moderate-income housing to 59,500 units.²³ According to the City, the Census income data and Dallas Housing Authority data reflect that the greatest need is for one-bedroom units for extremely low-income, minority families. Additional data suggests that the City has determined that extremely low-income families and elderly persons have the highest percentage of need.²⁴

Approximately 96% of the persons on the DHA waiting list for public housing are extremely low-income; 81% are African American. Compounding these figures is the fact that the City has grown at a pace of 2% to 2.5% per year with over 50% of these persons being families with low incomes (below 80% of AMFI). However, the number of affordable units has not increased. An additional strain on the situation is the current economic climate, as explained by the City:

Since unemployment has increased, income levels have remained flat, the residential foreclosure rate is up, and average rents have increased in this sluggish economy affecting renters of all low-mod income groups, and since the needs of extremely low minority families remains high, the City continues to identify high priority needs ... for low-income families and is increasing the priority of moderate income renters from medium to high.²⁵

Because of these factors, "...the majority of households at 30% and 50% of Area Median Family Income cannot afford an average rental unit in Dallas. These cost burdens further increase the demand for affordable units."²⁶ Due to the difficulty in paying the average rents in the City of Dallas, the City decided that some of its HOME funding would be used to supplement rents for the purpose of assisting these income groups.²⁷ It was also noted in the

²⁰ http://www.downtowndallas360.com/docManager/1000000061/Dallas360_FinalAdopted.pdf (p.74).

²¹ http://www.downtowndallas360.com/docManager/1000000061/Dallas360_FinalAdopted.pdf (p.75).

²² http://www.downtowndallas360.com/docManager/1000000061/Dallas360_FinalAdopted.pdf (p.76).

²³ Refer to page 15 of the Action Plan.

²⁴ Extremely low-income is understood to be 30% of AMFI. Refer to page 17 of the Action Plan.

²⁵ Refer to page 20 of the Action Plan.

²⁶ Ibid.

²⁷ While issuing a HOME Voucher will address increasing rents, the problems with affordable rents in the City will continue to be an issue because many housing providers are not obligated to accept the HOME Voucher, thus the underlying problem continues to persist.

Action Plan that the City had designated moderate-income (80% AMFI) as a high priority need, meaning that it would give equal prioritization to this income strata in addition to the low-income strata, despite the evidence that the greatest housing need was at the 30% and 50% AMFI level.

In summary, there is overwhelming evidence reflecting a need for affordable housing for the low-income strata (at or below 50% AMFI) in the City of Dallas. As discussed, there is an overrepresentation of minorities and persons with disabilities at this income level. Furthermore, the Central Business District and Downtown Connection TIF ("DC TIF") are overrepresented by white, non-disabled residents. Lastly, the average rents in the Central Business District and DC TIF are not affordable for persons at the 30% or 50% income strata. In addition, the evidence indicates that there was a need for affordable housing to be available in Dallas in an equitable manner and that there was in particular a need for affordable housing in the downtown area for which TIF and Section 108 financing should be resources.

C. 1600 Pacific

Complainant's proposed project at 1600 Pacific would have provided affordable housing to minorities and disabled persons in the low-income strata by providing a substantial number of units to meet unmet demand. The City offers a multitude of reasons for not supporting the project, which are discussed in more detail below.

In 2007, the City had agreed to support the redevelopment of 1600 Pacific for 307 units with 20% of the units affordable at 80% AMFI. This agreement expired without being executed because the private sector loan funding dissipated during the recession.

By October/November 2008, 1600 Pacific proposed to provide approximately 700 units funded through the use of HERA Bonds and other public subsidies at the following rates: 20% at 50% AMFI, 20% at 80% AMFI, 50% at 140% AMFI, and 10% at market rate. The HERA Bond component included an automatic tax-credit component, meaning that 1600 Pacific would accept Housing Choice Vouchers. As noted previously, the potential site is in an area that has relatively low representation by African Americans and Hispanics. The Department finds that this proposal would have helped to address the housing needs identified by the City, especially those of low-income minorities and would have been consistent with the City's own plans for the downtown area. Despite this project meeting an identified need, the City expressed concerns about the concentration of affordable housing.

After encountering concerns expressed in a January 2009 meeting with the 2009 DC TIF about its initial proposal, complainant understood that there were concerns about the number of units proposed and therefore submitted a second proposal with fewer units. The new proposal was modified to reflect approximately 590 units with 40% at 60% AMFI, 50% at 140% AFMI, and 10% at market rate. The revised proposal also included an LIHTC component, which is significant because it meant that units would be required to house persons with Housing Choice Vouchers. This proposal would have provided housing opportunity to very low income and low-income minorities in the City. There

was no immediate response to this proposal, and it would be months before it was addressed. Instead, the new proposal was tabled by the DC TIF and DHFC rescinded the HERA Bonds.²⁸

Throughout the process, the City expressed its "concerns" about the project. In an October 16, 2008 email, Karl Zavitkovsky, the Director of the Office of Economic Development for the City, told the complainant he did not see Section 8 as a viable component. Once the project was presented to the DHFC, there was internal email traffic among board discussing a similar theme expressed by the City.²⁹ Around the time that the proposal was presented to the DC TIF, an unnamed City source uttered a similar sentiment to the blog UnfairPark, which covers Dallas politics.³⁰ In this blog, the unnamed city official stated that they were concerned with the 40% of units at 60% AMFI. The Department notes that the 40% implicated would have been the component benefitting low-income, minority households, while no concern was expressed over the 60% that would serve moderate- to upper-income households (80% AMFI or higher).

The significance of using the 80% AMFI rate is that it functions like market rate rent despite being categorized as affordable. Between October 2009 and January 2010, the City supported numerous projects with this set as the affordable rate.³¹ While 80% is affordable, it is moderate-income housing and does not serve low- or very low-income persons and it does not provide opportunities to the underrepresented population of African Americans, Hispanics, and persons with disabilities in the community. Emphasizing this point are minutes from the Joint Development Committee, which expressed concerns over the 40% concentration at the 60% affordable rate for 1600 Pacific.³²

City Councilwoman Angela Hunt, whose district includes the area impacted by the complainant's proposed development, expressed concerns about the concentration of affordable units in the building. Councilwoman Hunt told a local television station that she did not think it was a good idea to concentrate all of the affordable units in one building and that they should be spread out across multiple developments.³³ Despite this being a negative for 1600 Pacific, the City would later support the Atmos Complex, which was initially proposed as luxury housing located near the 1600 Pacific proposed site, even though that project would concentrate 90% of its affordable units in one building of a multi-building development.³⁴

²⁸ Additional discussion is located throughout this analysis.

²⁹ The Department observed that some of these board members were also City employees. For instance, Karen Schaffner was on the board and also an employee for the City as a Projects Manager.

³⁰ This occurred on or about February 29, 2009 and documented in investigator observations.

³¹ For example, Zang Triangle, the Courtyard at La Reunion, the Orleans at La Reunion, the Shamburger, and the Continental.

³² This meeting occurred on or about June 8, 2009.

³³ As reported by WFAA on August 15, 2009.

³⁴ See Subsection 4, which discusses the Atmos Project. The 1900 Jackson, which is one building included within the Atmos complex, would later become 100% affordable, but only after it was divided into phases by Hamilton Properties (see analysis of the Atmos project for additional discussion).

In addition, the complainant encountered significant problems with the City in its effort to apply for HERA Bonds from the State of Texas and TIF funding which were necessarily components for approval. Initially, the plan was for the complainant to apply directly to the Texas Bond Review Board. By November, the City rejected the proposal and instead chose to reserve a non-project specific allocation. This change made the City the deciding entity on funding, and allowed it more control over how the funding was to be used. This change in direction occurred after 1600 Pacific had proposed using Housing Choice Vouchers (HCVs) as a portion of the affordable component.

The City netted \$150 million in HERA Bonds from the State of Texas, and the Dallas Housing Finance Corporation ("DHFC"), the entity that administers the bond programs, initially voted to approve the complainant's request for \$102 million of that money. The DC TIF falls under the purview of Mr. Karl Zavikovsky, who is the Director of Economic Development for the City, and the Section 108 Loan Program is under Mr. Jerry Killingsworth, who is the Director of Housing & Community Development. Mr. Zavikovsky and Mr. Killingsworth perform advisory roles for the Dallas Housing Finance Corporation.

In a series of actions, the City and DHFC delayed actions and required complainant to make changes in its proposal, including a reduction in the number of units proposed and reducing the number of units available for very low income residents.

The investigation found that on October 15, 2008, Karl Zavikosky, the Director of Economic Development for the City, told the complainant that the City did not see Section 8 as an option on the project (a matter that had been discussed as a possibility at a previous meeting with Mr. Zavikosky). Just over a month later, the DHFC Board met and approved the complainant's request for the HERA Bonds, which included an automatic, non-competitive tax credit. The overall result was to severely reduce the number of affordable units in the proposed property.

On December 2, 2008, Monique Allen, the Secretary for the DHFC Board, wrote the following:

At the last meeting of the DHFC, this project was brought up and the Board thinks the addition of the 258 units of affordable housing is extremely important to housing CBD workers. In addition (sic) it creates jobs and improves the CBD. Contrary to what Karl believes, we need workforce housing. The rents appear to be a lot closer to reality and have a chance of being rented. Since the Kirby, 1900 Elm, Davis ... will probably lose their affordable units, that leaves us with about 148 affordable units.

Later she wrote, "I am extremely concerned that neither Jerry Killingsworth nor Karl Zavikosky are really interested in this project. Both appear to have their own plans and do not include affordable housing."

1600 Pacific attempted to secure additional time to secure the Sec. 108 and DC TIF components, but the DHFC Board was not responsive, and as of March 9, 2009, the requirements imposed by the Board remained unfulfilled. Due to the lack of Section 108 and DC TIF approval, DHFC voted to rescind a bond inducement. At the time of the rescission, DHFC explained that it would be willing to offer another inducement, but that any future inducement was contingent on the other funding sources (e.g., the DC TIF or Section 108

Program).³⁵ This was followed by an email communication from Killingsworth setting out the parameters of any future activity on this matter (TIF and Section 108 would have to be secured first, before the HERA Bonds would be considered again).

The City did not use any of the HERA Bonds that were allocated to it. In April 2010, the City voted to return at least \$75 million to the State for use by a group out of Austin, TX. The remainder of the bonds was allowed to expire.

Complainant also alleged that the City treated 1600 Pacific differently than other developments or developers seeking City assistance because of the potential beneficiaries. The City defended its treatment of 1600 Pacific on the basis of Complainant's bankruptcy. However, investigation revealed inconsistencies in how the City evaluated applicants. While bankruptcy³⁶ and an inability to service debts were two of the reasons cited for rejecting the complainant's proposal, other developers were not subjected to the same standard of evaluation. Several developers that the City had contracted with them previously and continued to engage in development deals had similar issues which did not adversely affect their projects from the City's perspective.

For instance, Hamilton Properties has been involved in foreclosures and receivership for two developments in downtown Dallas. On or about February 2, 2010, DallasNews.com reported that the Mosaic Building was scheduled for a foreclosure sale on March 2, 2010 and it was sold on that date.³⁷ A week prior, on February 24, 2010, the City voted to support the LIHTC application for the Atmos Complex operated by Hamilton. Later, the Davis Building went into receivership.³⁸ Hamilton Properties could not pay the note on the property and defaulted after they were unable to refinance the property. Thus, there are at least two negative events involving Hamilton Properties with no effect on how they were viewed or treated by the City.

On or about May 28, 2009, Forest City Enterprises, Inc. was a defendant in a bankruptcy case.³⁹ While that matter was ultimately resolved on or about February 3, 2010, the City supported Forest City's development of the Continental Building and was actively involved in negotiations with the Department concerning Section 108 funding for this project. On September 26, 2011, Forest City announced that it had secured its financing and was to begin construction on the Continental Building.⁴⁰ The Department notes that this is less than two years after the bankruptcy action, and five years short of the standard stated as a requirement for Section 108 loans.

On or about May 4, 2009, Prescott Realty Group was placed in bankruptcy by Turner Construction for \$4.7 million in unpaid work. On June 24, 2009, the City approved roughly \$15 million in Section 108 money by the City of Dallas,

³⁵ To be sized in accordance to the other funding sources going to the project.

³⁶ The Section 108 Program Statement included in the City's Section 108 Questionnaire included the following language, "The Developer, or any of its associated companies, must not have any bankruptcies in the last seven years."

³⁷ The lender (Prudential) became the owner of this project.

³⁸ As reported by DallasNews.com on September 10, 2010.

³⁹ See bankruptcy case 8-09-ap-00349.

⁴⁰ See <http://www.bizjournals.com/dallas/news/2011/09/26/forest-city-secures-financing-to-begin.html>.

which is well within the Section 108 prohibition of having a bankruptcy within the last 7 years.

The City had also asserted that the Complainant lacked adequate resources for repaying the loan and/or equity in the project. However, the investigation demonstrated that another applicant, Prescott Realty Group, also proposed using future refinancing as a source for their project.⁴¹ The Department's investigation found that it was not an uncommon practice to use TIF money as the repayment source for the Section 108 loan. The complainant had requested using TIF funds as a repayment source as well but the TIF funding was denied by the City.

The Shamburger project further illustrates how Prescott Realty Group was treated more favorably than 1600 Pacific. Prescott Realty Group was the developer obtaining approval for this project while the Stoneleigh Hotel went into foreclosure.⁴² While the foreclosure occurred after the City voted to support Section 108 funding, the evidence suggests that the property was likely in arrearages for some period prior to this event.

FINDING: The City violated 24 CFR §1.4 (b)(2)(i) and 24 CFR §8.4(b)(4)(ii) when it subjected 1600 Pacific to criteria and/or methods of administration that had the effect of defeating or substantially impairing accomplishment of the objectives of the Section 108 Loan Program based on the beneficiaries' race, national origin or disability.

Additional Allegations by Complainant

Two additional issues were raised by complainant. First, the complaint alleged that projects funded by the City were less cost efficient than the 1600 Pacific project. This defense was not raised by the City. The investigation revealed that the complainant had sought \$67 million in TIF money for 590 units (approximately \$114,000 per unit in TIF funds)⁴³. For the Continental, the TIF funding was \$13.3 million for 180 units (approximately \$74,000 per unit). For the Atmos Complex, the TIF funding was \$12.5 million for 233 units (approximately \$54,000 per unit). This evidence does not support 1600 Pacific's allegation.

The Department also considered the cost per unit in terms of Section 108 funding. Complainant's project would have had a cost of roughly \$33,000 per unit.⁴⁴ The Continental's cost per unit under Section 108 is/was \$37,000 per unit and the Atmos was at \$44,000 per unit. The Shamburger had a per-unit-cost just under \$37,000.⁴⁵ The evidence demonstrates that 1600 Pacific was more cost efficient than the other projects with respect to Section 108 expenditures.

The Department next considered the cost per affordable unit.

⁴¹ As related to the Shamburger Development.

⁴² Some articles reference the Stoneleigh Condominiums instead of Stoneleigh Hotel, but same ownership listed in all conflicting stories (Prescott Realty Group).

⁴³ The City had asserted that this request was roughly 62% of the DC TIF budget. The Frequently Asked Questions page on TIFs on the City's website included discussion of how much TIF funding is available for a project. The explanation on this page indicated that TIF funding is typically not more than 10% of the total project cost (complainant's had requested \$67 million for a project costing more than \$112 million (approximately 60% of project costs).

⁴⁴ \$19,500,000/590 units = \$33,050.8474576.

⁴⁵ \$15,300,000/417 units = \$36,690.647482.

The Shamburger provided affordable units at a cost of \$147,000 per unit.⁴⁶ The Continental provided affordable units at a cost of \$185,000 per unit.⁴⁷ The Atmos Complex would provide affordable units at a cost of \$77,000 per affordable unit.⁴⁸ The complainant's project would provide affordable units at a cost of \$83,000 per unit.⁴⁹ The 1600 Pacific project was more cost efficient than the Continental and the Shamburger projects in this respect and comparable to the Atmos project.

The Department then considered these projects on a cost per unit and cost per affordable unit basis based upon total estimated subsidy (TIF money plus Section 108 money).

Property	Total Subsidy	Units / Affordable Units	Cost Per Unit	Cost Per Affordable Unit
Shamburger	\$15.3M	417/104	\$37,000	\$147,000
Continental	\$17.6M	203/41	\$87,000	\$429,000
Atmos	\$21.6M	230/117	\$94,000	\$185,000
1600 Pacific	\$84.9M	590/236	\$144,000	\$360,000

This chart reflects that 1600 Pacific would have been more expensive on a cost per affordable unit basis than the other comparators except for the Continental and is the most expensive on a cost per unit basis.⁵⁰ The chart also illustrates that the complainant's request was four to five times higher than the other requests. The Department finds that the cost per unit would have been higher for 1600 Pacific. However, cost per unit was not identified as an explanation by the City to justify any of its actions and it does not appear that this issue was dispositive in light of the other evidence. In particular, it does not undercut the affirmative evidence that demonstrates the City's opposition to this project because it would contain more affordable housing units, especially for very low and low income residents.

The second allegation raised by the complainant addressed its claim that the City only supported tax credit developments in the Southern Sector of Dallas. As explained previously, the City identified development patterns reflecting that too much development occurred in the Northern Sector and not enough in the Southern Sector.⁵¹ The City had also identified a disparity in the location of LIHTC properties, with most being located in the Southern Sector. In response to this disparity, the City instituted a moratorium on LIHTC properties as a measure to slow this practice.⁵² The City eventually lifted its moratorium on LIHTC properties when it supported some projects located in the Northern Sector of the City (e.g., the Atmos Complex and City Walk at

⁴⁶ $\$15,300,000/104 = \$147,115.384615$.

⁴⁷ $\$7,6000,000/41 = \$185,365.853658$.

⁴⁸ $\$9,000,000/117 = \$76,923.076923$.

⁴⁹ $\$19,500,000/236 = \$82,627.118644$.

⁵⁰ The City has supported an application for the Continental Building, but it was not approved by the Department.

⁵¹ See for example, the Mayor's 2002 Task Force on Housing, the July 2007 update to the Analysis of Impediments to Fair Housing, the City's Economic Development Plan created in 2005, which included the observation that 79% of the developable land is in the Southern Sector of the City, and the "Realizing Potential" report produced in 2008.

⁵² Arising from the Mayor's 2002 Task Force on Housing.

Akard). Based upon this evidence, the complainant's allegations concerning the LIHTC process are not substantiated.

Finally, the complainant asserted that the amount of TIF funding available for development was intentionally misstated or underestimated for the purpose of interfering with the approval of the project. The City denied this assertion and noted that the amount of funding available is an estimate that is subject to change. The City further explained that the funding is typically recalculated three times a year; this process involves projected values, protests, and final outcomes that affect the process. The Department did not find evidence to support this allegation and notes that this issue remains in dispute by the parties.

The City noted during the investigation that one of the concerns was that the project was going to require a substantial portion of the available TIF Funds. According to the City, the available amount of funding was approximately \$74 million. At one point the complainants were requesting approximately \$67 million, which is approximately 91% of the anticipated DC TIF funds available at the time. The Economic Development Committee recommended \$48 million in DC TIF funding, which was still 65% of the available funds at that juncture. Comparatively, the Continental and the Atmos were both recommended approximately \$13 million each or \$26 million total; which would obligate roughly 18% of the TIF funding each or 36% total. Based upon this, the Department finds that the complainant's request would have obligated a substantial portion of the DC TIF funds but that there was adequate TIF funding to support the 1600 Pacific project.

FINDING: The Department finds that the City's failure to fund 1600 Pacific because it would serve high percentages of very low and low income residents who were disproportionately minorities and people with disabilities violated 24 CFR 6.4(a)(1)(ix), 24 CFR 1.4(b)(2)(i) and 24 CFR 8.4(b)(4) by defeating or impairing the objectives of the program and by denying housing opportunities based on race, national origin and disability and has perpetuated segregation based on race in violation of 24 CFR 1.4(b)(3).

D. The Atmos Complex

At one time the Atmos Complex⁵³ was owned by the City and then assigned to Forest City Enterprises in connection with the Mercantile development. It was envisioned that the Atmos Complex would be a catalyst project that spurred additional development in the Central Business District and the DC TIF. Forest City was unable to develop the project and assigned it to Hamilton Properties with the City's approval. Due to the economic climate and economic penalties built into the assignment agreement for the Atmos between the City and Forest City, there was an impetus to push development forward. In light of this, transferring ownership to Hamilton Properties was believed to be the best option by the parties. As the Department learned in September 2010, the City was not interested in having the Atmos returned to

⁵³ As noted in footnote 5, the Atmos Complex is located within ½ mile of the proposed 1600 Pacific site.

its inventory.⁵⁴ Atmos developed a proposal for tax credit units which was supported by the city, in contrast to the City's opposition to 1600 Pacific.

The Atmos project was developed with an initial plan that would have concentrated 90% of the affordable units in one building. When HUD CPD expressed concerns about the concentration of affordable units in one building and indicated it would not support that proposal, Hamilton Properties split the development into two phases and left 1900 Jackson with the bulk of the affordable units. In its current form, the two phases will result in 230 total units, with 170 of those units being affordable (74% of all units). 107 of the 170 units are located in one building (63% of all affordable units). Notably, that building is now 100% affordable (Phase I, which is 1900 Jackson). The remaining 63 affordable units are scattered over two residential buildings (in phase II of the development). The net result is that while more affordable units will be introduced into the market, the City supported concentrating the majority of the affordable units into one building, a building that became 100% affordable. Since the project is now proposed in phases, with Phase I not having Section 108 or other federal funding, the City and developer avoided addressing concerns about spatial deconcentration previously raised by HUD CPD with respect to 1900 Jackson.

During investigation, the President of Hamilton Properties, Ted Hamilton, stated the Atmos was intended to be luxury housing, and based on the stock purchase agreement, the complex was not intended to be publicly subsidized housing. In October 2008, Forest City Enterprises, Inc. and Hamilton Properties negotiated the transfer of the Atmos Complex from Forest City to Hamilton. Initially, the Atmos Complex, which is a four-building complex, was transferred to Forest City by the City of Dallas for redeveloping the properties (or complex).⁵⁵ The City was notified of the intentions of Forest City and Hamilton Properties in November 2008 after Forest City had failed to begin development of the Atmos Complex pursuant to a development deal with the City. Once Hamilton Properties and Forest City notified the City of their intent, the three parties proceeded to negotiate the transfer of the property along with the subsequent development agreement for Hamilton Properties, and the supplemental development agreement for Forest City.

Initially, the transaction was intended to be a real estate sale, but later the real estate became part of a stock purchase agreement. Because the City owned land and assigned it to a third party for development purposes, the City had to concur with either transaction. The City also had to negotiate the development terms with Hamilton. By January 2009, the City was reviewing the agreement, and on February 11, 2009, Dallas City Council approved the stock purchase agreement that transferred ownership from Forest City to Hamilton Properties. By March of 2009, the parties, including the City, had completed the deal, and all the requisite approvals and signatures had been

⁵⁴ This statement was made during a presentation to the Department's CPD Office regarding the Atmos development, and concerns that had been raised about the concentration of affordable housing into one building.

⁵⁵ The Atmos Complex was part of the inducement for Forest City to redevelop the Mercantile, which was intended to be a catalyst project intended to spur development activities in downtown Dallas, and more specifically, the DC TIF District.

collected by all involved.⁵⁶ The terms of the stock transfer agreement executed between Hamilton and Forest City, and approved by the City of Dallas imposed an explicit limitation on the placement of low income housing:

[Hamilton Properties] shall not cause the Company to use the Real Property or the Project for the construction, development or operation of a facility primarily devoted to the lodging of indigent and homeless persons ... substance abusers ... or publicly subsidized low income housing project. (emphasis added.) Such limitation shall not, however, limit the right of the Company, its successors or assigns, to meet the City of Dallas' requirement to obtain a Tax Increment Financing Grant or a Section 108 loan, both of which include requirements for affordable housing components ...

The agreement also imposed a restriction on the use of properties by Forest City. Those properties were listed under the following:

This deed restriction will automatically terminate and be of no further force or effect upon the earlier of: (1) twenty (20) years from the date hereof, (ii) the date that any one or more of the following buildings is used for one or more of the purposes restricted above: the Wilson Building at 1623 Main Street, the Mercantile on Main at 1800 Main Street ... or (iii) the date that any other project operated by Forest City Enterprises, Inc. or one of its subsidiaries, affiliates, successors or assigns within one half mile of the Real Property is used for one or more of the purposes restricted above.

Ted Hamilton indicated that the phrase "publicly subsidized low-income housing" meant affordable housing.⁵⁷ While the clause includes an exception for the TIF and Section 108 programs, the parties agreed to create limitations on certain types of affordable housing (such as no homeless shelters or housing for recovering addicts) that house persons with disabilities.⁵⁸ These provisions explicitly discriminate against a group of persons with disabilities, and indirectly present limitations on affordable housing development which, in Dallas, limits program participation opportunities for black persons, Hispanics, families with children and people with disabilities.

When Hamilton Properties took the position that it would seek LIHTC money⁵⁹, which was excluded under this agreement because it was not an accepted form of low-income housing, Forest City filed (on March 16, 2010) an affidavit of facts with the Dallas County Clerk's Office articulating the terms of the stock transfer agreement.⁶⁰ This action could later serve as the basis for an action to enforce the stock purchase agreement to prevent the inclusion of low-income housing in the project. The agreement limits housing choice by reducing potential options not just at the subject property but also for any development activities within one-half mile of the Atmos Complex by either Hamilton Properties or Forest City. The stock purchase agreement

⁵⁶ The stock purchase was signed by Hamilton and Forest City on March 3, 2009. The City executed amended development agreements with both parties that incorporated and referenced the subject stock purchase agreement. Furthermore, the City required a review of the stock purchase agreement before approving the development agreements.

⁵⁷ In response to a question posed by EOS Banis to Mr. Hamilton on September 24, 2010.

⁵⁸ Recovering, non-using addicts are considered to be persons with a disability under Section 504.

⁵⁹ Receiving tax credits creates an affirmative obligation on the part of the housing provider to accept Section 8 Vouchers.

⁶⁰ Thus making public some of the terms of the agreement that had otherwise not been made known to the public prior to this event.

substantially impaired or defeated the intent of the CDBG program by limiting housing opportunity for African Americans, Hispanics, and people with disabilities.

FINDING: The Department finds that the City approved a stock purchase agreement involving the City, Hamilton Properties and Forest City, which included requirements that effectively limited the availability of the housing based on race, national origin and disability. By endorsing the contract, the City violated 24 CFR 6.4(a)(1)(ix), 24 CFR 1.4(b)(2)(i) and 24 CFR 8.4(b)(4) by engaging in acts that through contractual arrangements used methods of administration have the effect of subjecting persons to discrimination based on race, national origin and disability. This action has also substantially impaired the activities of the CPD program or activity.

FINDING: The Department finds that the City violated 24 CFR 6.4(a)(1)(ix), 24 CFR 1.4(b)(2)(i) and 24 CFR 8.4(b)(4) when it allowed the Atmos Complex to be developed with one building consisting of 100% affordable units, which subjected persons to segregation, restricted access to housing choice, and denied persons the opportunity to participate in a program because of race, national origin and disability.

E. The Section 108 Loan Questionnaire

Rehabilitation activities funded by the Section 108 Loan Program are subject to 24 CFR §570.208, which requires participating developers to meet the national objective of making 51% of the units offered affordable to low- and moderate-income families. While the process allows for deviation from the 51% objective through a waiver process⁶¹, the Department concludes that the City had a practice of routinely permitting or supporting waiver requests to permit as few as 20% of the units to be affordable.

The investigation revealed that the Section 108 Questionnaire provided by the City does not include a statement of the national objective while simultaneously asking these developers how they intend to satisfy the national objective. Invariably, the responses were either vague or indicated that 20% of the units would be affordable, despite the national objective. On at least one occasion, the applicant answered they would make 10% of the units affordable, which was struck through during a review by the City and increased to 20%.⁶² These actions of the City resulted in a practice of routine approval for applications for Section 108 Loans where the percentage of affordable units to be provided is 20%, rather than the 51% (or higher) required under program requirements.

For instance, the InTown Housing Program utilized Section 108 Funding which resulted in 5 developments. This program resulted in 798 units, of which 234 were affordable, 32% of the units. If the national objective had been met, the City would have supported an additional 173 units that would have provided additional housing opportunities. While the Atmos & Continental did not utilize Section 108 funding, both had been supported by the City with Section 108 as a component. The Atmos was proposed at 233 units at 20% affordable (46 units) and the Continental was supported at 199 units at 20%

⁶¹ See 24 CFR §5.110.

⁶² See Section 108 Questionnaire for the Continental development.

affordable (40 units). For these two projects, requiring 51% of the units being affordable would have provided an additional 134 affordable units. Based on the City's 2011-2012 Action Plan, the greatest need is for one-bedroom units for extremely low-income minority families. Furthermore, there is an unmet need of 59,500 units for low- to moderate-income households. The City of Dallas is the 52nd most segregated city in the country with a dissimilarity index rating of 71.5. The Census Tract including 1600 Pacific, The Continental and the Atmos Complex is 74% white in contrast to the City of Dallas, which has a minority population of over 67% (Black and/or Hispanic). The evidence shows that the routine approval by the City of waiver requests to permit as few as 20% to be affordable has limited opportunities based on race and national origin and has perpetuated segregation.

FINDING: The Department finds that the City has administered the Section 108 Loan Program in a manner that restricts or denies housing opportunities to minorities and persons with disabilities by reducing potential housing choice through authorizing waivers of the program's requirement that 51% of units be affordable and by ensuring that fewer units were made affordable. Therefore the City is in violation of 24 CFR 6.4(a)(1)(ix), 24 CFR 1.4(b)(2)(i) & 24 CFR 8.4(b)(4) by using methods of administration which have the effect of subjecting persons to discrimination based on race and national origin. This action has also substantially impaired the goals and effectiveness of the Section 108 loan program.

F. Spatial Deconcentration Issues: The Atmos, Shamburger & Continental

During the course of the investigation, the City of Dallas submitted, on behalf of Hamilton Properties, a Section 108 application for the Atmos Complex.⁶³ Despite the financing covering three buildings and a parking garage, the proposed development concentrated the affordable units into one building. The City failed to require Hamilton Properties to disperse the affordable units throughout all of the residential buildings, and therefore did not provide the spatial deconcentration mandated by the Department.⁶⁴

42 USC §5301 includes the following:

*The primary objective of this chapter and of the community development program of each grantee under this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income ... the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives ... the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods ...*⁶⁵

As previously noted about the Atmos Complex, the City failed to ensure that the developer dispersed the Section 108-funded affordable units throughout

⁶³ Submitted to the Department on May 11, 2010.

⁶⁴ See 42 USC §5301 which establishes the policy regarding spatial deconcentration.

⁶⁵ For clarity, the Department applies "spatial deconcentration" in two manners. One, to bring about movement within a city from high minority areas to areas with lower concentrations, and two, by scattering low- and moderate-income units throughout a development. With respect to the Atmos Complex, the Department is applying the latter.

the development and supported a proposal with the affordable units concentrated in one building when three residential buildings were available. As previously noted, the City later allowed Hamilton Properties to split the complex into phases with the first phase consisting of a building that was 100% affordable. While the number of affordable units was increased for Phase II, which is funded via the Sec. 108 program, when the development is considered as a whole, roughly 63% of the affordable units are concentrated in one building. More importantly, the Department concludes that the decision to complete the project in phases had the effect of circumventing Departmental concerns about the concentration of the affordable units in one building and permitted the segregation of affordable units and thereby segregation based on race and national origin.

The Shamburger⁶⁶ Development was submitted to the Department by the City with spatial deconcentration issues, because the developer had not dispersed the affordable units over the full spectrum of floor plans, and had instead limited the affordable units to the smallest units within the complex. On or about February 1, 2010, the Department expressed its concerns and the City restructured the distribution of affordable units to ensure that these units were scattered throughout the project and not concentrated in the manner they had been.

The Continental Building was a Forest City development submitted to HUD CPD for review and approval by the City. The investigation has confirmed that the rent structures for this site were not affordable and would not benefit the applicant group of very low and low income eligible persons which is disproportionately black, Hispanic and people with disabilities. The Continental Building was to be constructed in an area where rents are 120% above the median.⁶⁷ The proposed rent for a one-bedroom unit was \$879 and a two-bedroom unit was \$1,055, plus an additional \$80 per-month for parking. At the time, the Fair Market Rent (FMR) for the City of Dallas was \$740 and \$894 respectively. The difference ranges from \$139 to \$161 per-month without including the monthly parking costs. Establishment of these rental ranges will create a significant cost burden for low-income households. The effect of these rent structures would preclude some of the goals of the CDBG Program by perpetuating isolation in income levels, not diversifying neighborhoods, etc.⁶⁸

In the summer of 2010, the City modified its Consolidated Plan to reflect that the housing needs of moderate-income families were of equal importance as those of the extremely low- and low-income categories. The Department believes this was done to justify supporting the Continental Building, which was not meeting the needs of low-income households. By making this change to the Consolidated Plan and subsequently the 2011-2012 Action Plan the City was able to rationalize that the Continental Building was continuing to address the housing needs of its citizens. Furthermore, the City asserted in its justification for supporting the Continental Building that the City was trying to balance the number of moderate-income units against the number of low-income units that had become available in the City. The Continental, as proposed, would not meet the housing needs of the low-income and most moderate-income households (anything at 80% AMFI or lower).

⁶⁶ The Shamburger application was eventually withdrawn by the City per the developer's request on or about January 31, 2011.

⁶⁷ Refer to the 2007 Analysis of Impediments to Fair Housing, which noted rents rose from 50% of median in the 1990 Census to the 120% amount in the 2000 Census.

⁶⁸ See 42 USC §5301.

The Department notes that 1400 Bellevue⁶⁹, which the City cites as evidence of its efforts to create housing opportunity, is not located within the Central Business District, the Downtown Connection TIF or within the Northern Sector. Instead, it is located in the Southern Sector, in what is considered the predominantly minority section of the City. Its approval is an example of more favorable treatment offered by the City to development of affordable housing in minority neighborhoods than affordable housing proposed in areas that are less concentrated by race, national origin or poverty.

Finding: The Department finds that the City's actions in permitting the concentration of affordable units by building demonstrated the use of methods of administration and the selection of housing that subjected persons to discrimination because of race, national origin and disability and had the effect of defeating or substantially impairing the accomplishment of the objectives of a program or activity based on race and national origin and violates 24 CFR 6.4(a)(1)(ix), 24 CFR 1.4(b)(2)(i), and 24 CFR 1.4(b)(3). Furthermore, the City's support of the Atmos Section 108 application appears to defeat and/or substantially impairs the national objectives of the CDBG Program.⁷⁰ The Department also finds that the effect of the City's approval of phased development had the effect of thwarting the requirements related to segregation by site and perpetuated segregation in violation of 24 CFR 6.4(a)(1)(iii), 24 CFR 1.4(b)(1)(iii) and 24 CFR 1.4(b)(2)(i).

Concern: The Department is concerned that the changes in the Action Plan, by which the City is now prioritizing moderate-income housing as a high need, may also violate 24 CFR 6.4(a)(1)(ix), 24 CFR 1.4(b)(2)(i) and 24 CFR 8.4(b)(4) by preventing integration within the Central Business District or the DC TIF. More precisely, the Department is concerned this decision will allow for rent structures above levels that are not affordable to minorities and the disabled, and this limits or defeats the purpose of the Section 108 Loan Program.

G. Monitoring & Enforcement Issues

The Department examined the City's monitoring of the Intown Housing Program and identified several issues that are a concern. As a preliminary matter, the City had incorrectly concluded that their duty to enforce the period of affordability for the affordable units ceased at the point the units were refinanced or were paid off.⁷¹ In a 2008 letter, the Department informed the City that:

The affordability requirements after prepayment of the note in full are to be determined by the City Council, based on what is reasonable and what was approved and authorized for the program. In this regard the City's Loan Contract with the developers establishes the "Affordable Unit Term" as the longer of the term of the Note or 15 years following the issuance of a certificate of occupancy. We believe that in order to comply with the intent of the program it is essential that the City continue to require compliance with this requirement, to which each developer agreed,

⁶⁹ Located at 1401 Browder, Dallas, TX 75201.

⁷⁰ See 24 CFR §1.4(2)(b)(i) which includes a prohibition against administering a program in a way that defeats the objectives of the program (Title VI). See also, 24 CFR §81.(b)(4)(ii) that imposes the same standard to Section 504.

⁷¹ An issue discussed in depth by the City and the Department between April and June 2008.

so that affordable units are made available regardless of any loan repayment.⁷²

The Department has consistently instructed the City that regardless of the status of a loan, affordable units must remain available for the longer of 15 years or the life of the loan.⁷³ The City incorrectly concluded that the Department's approval of the early payoff or refinance of Section 108 funded properties relieved the City of its obligation to continue monitoring.⁷⁴ Although the City indicates that it inserted 15-year affordability requirements into the deed restrictions of some of the subrecipients, this action does not assure continued compliance.⁷⁵ Compliance can only be expected up to the point that the property is still used for the same or a similar use, a consideration that is emphasized by the previous failures of other properties within the Central Business District.⁷⁶

The following chart identifies the properties which were paid off early, and which continue to provide affordable units.

Name of Property	Number of Affordable Units	Status
Deep Ellum Lofts	37	1997-2004
Kirby Building Lofts	57	Active
Treymore @ Cityplace	92	Active ⁷⁷
Davis Building	40	Active ⁷⁸
Majestic Lofts	51	1997-2006
Santa Fe Lofts	42	1999-2005
Eban Village	110	Active

The City also relies on the State of Texas to monitor some of its properties. For example, the City has relied on the monitoring of the State of Texas to

⁷² See the Department's June 5, 2008 letter to the City. See also the Department's April 28, 1998 letter to the City, in which it wrote, "This was an issue we discussed in our letter to Kathy Glegg, Assistant City Attorney, dated June 9, 1995, in which we stated that while compliance with the statutory national objective is based on initial occupancy we agreed that it is reasonable and appropriate to require that the developers ensure that lower income persons will benefit for at least the life of the Section 108 loan. However, if a developer repays the loan earlier than scheduled, what should happen to the public benefit requirement? It is our opinion that any such prepayment should not affect the period during which affordable units must be provided, as agreed to by the developer as a condition to receiving public funds ..."

⁷³ Consider for instance, 28 CFR §42.105(a)(1), which allows for the responsible government official to specify the form of assurances, the extent to which those assurances will be required of subgrantees, transferees, and successors in interest.

⁷⁴ For instance, the City relies on a July 30, 2003 communication for the Department for its position. While the letter makes clear that monitoring and reporting for the subject properties is no longer required because the national objective was satisfied the Department expressed concerns over the loss of two properties to early payoff and expressed the opinion that they should remain affordable. To this end, the Department wrote, "We remain very concerned that affordable housing for LMI persons should continue to be made available through these projects for terms commensurate with the amounts of public funds that were invested and made these projects feasible."

⁷⁵ The respondent's supplemental answer explains that some of the properties in the Intown Housing program were paid off early, but two of those properties have the subject deed restriction ensuring continued affordability.

⁷⁶ 28 CFR §42.105(a)(2) essentially means that any assurances or covenants are applicable to the property so long as it is used for the same or a similar purpose. Thus, if the use changes wholeheartedly, e.g., from condo to hotel, the enforceability is lost.

⁷⁷ This property was paid off early but is subject to the State of Texas' 40-year Land Use Restriction Agreement.

⁷⁸ But, the Davis Building has gone into receivership and these units could be in danger.

ensure that Section 108 funded properties are in compliance. For instance, the Treymore @ Cityplace is subject to a 40-year Land Use Restriction Agreement ("LURA") with the State of Texas. While the LURA would require the continued availability of affordable units, the State is not responsible for monitoring the Section 108 affordability requirements, may not count the same units as affordable, and is under no obligation to enforce the Section 108 program requirements.

Emphasizing the City's lax monitoring and enforcement of funding requirements is the fact that there has been a drop in the number of affordable housing units. For example, the Kirby Lofts and Davis Building are required to provide 97 affordable units between them (57 units and 40 units respectively). The Kirby Building had 19 units that were either vacant or a resident who was over-income residing in the unit (33% of the affordable units). The Davis Building has 17 units that were either vacant or had a resident who was over-income residing in the affordable unit (43% of the affordable units).⁷⁹

Additional issues identified during investigation were the lack of a City plan in place for enforcing the affordability requirement if it is breached by the developer during the life of the loan. Additionally, there is no plan in place for addressing breach of the affordability period if it occurs after an early pay off or refinance. Lastly, there is not a plan in place for handling situations that arise where properties are foreclosed or sold via bankruptcy.

Compounding the issues identified by the Department is the interplay between the lack of an enforcement plan for the affordability period and the fact that the City continues to support developers who have violated its own program guidelines.⁸⁰ Considering that at least two of the developers working closely with the City have a documented record of failed projects, the Department is concerned about the potential impact upon the available stock of affordable housing in the City over the long run. The Department fears that the failure of any of these projects will ultimately equal a corresponding loss in housing opportunity for the potential beneficiaries of this housing (minorities and persons with disabilities).

Concern: The Department is concerned that the City has not adequately monitored its affordable housing activities to ensure that the intended beneficiaries are given the opportunity and benefits that were intended by these activities. By failing to adequately ensure the prolonged viability of the program, the City may be engaging in activity that substantially impairs the accomplishments of the objectives of the Section 108 Loan Program and discriminates based on race, national origin and disability.

The City noted during the investigation that one of the concerns was that the project was going to require a substantial portion of the available TIF Funds. According to the City, the available amount of funding was approximately \$74 million. At one point the complainants were requesting approximately \$67 million, which is approximately 91% of the anticipated DC TIF funds available at the time. The Economic Development Committee recommended \$48 million in DC TIF funding, which was still 65% of the

⁷⁹ Refer to the September 14, 2011 letter from the City of Dallas to the Department concerning the monitoring of the Davis Building and Kirby Lofts. See also the August 10, 2011 letter from the City to the Department which included demographic data for the subject properties.

⁸⁰ Such as providing Section 108 funding to developers who have had bankruptcies in the last seven years.

available funds at that juncture. Comparatively, the Continental and the Atmos were both recommended approximately \$13 million each or \$26 million total; which would obligate roughly 18% of the TIF funding each or 36% total. Based upon this, the Department finds that the complainant's request would have obligated a substantial portion of the DC TIF funds but that there was adequate TIF funding to support the 1600 Pacific project.

CONCLUSION

Based on the information set forth above, the Department concludes that the Recipient is in noncompliance with Title VI of the 1964 Civil Rights Act, Section 109 of the Housing and Community Development Act of 1974, and Section 504 of the 1973 Rehabilitation Act. The Department will be in contact with the City to discuss voluntary resolution of the issues raised in this finding. As part of such voluntary resolution, HUD will seek that the city:

- Develop a written long-term strategy to address siting of housing throughout Dallas that will address patterns of segregation and affirmatively further fair housing, including consideration of regional housing needs and opportunities, and include the strategy in an updated Analysis of Impediments.
- Adopt an Ordinance requiring any housing project funded through public subsidy including CDBG, TIF, and Federal Tax Credit, accept Housing Choice Vouchers or other types of publically subsidized rental assistance (e.g., HOME vouchers) in at least 25% of available units. This Ordinance or an alternative Ordinance should also prohibit the denial of applicants based upon source of income and require that ability to pay should be based on the tenant portion of the rent.
- Fund a project within the DC TIF District or Downtown Business Center that includes at least 51% of its units being offered at an affordable rate. Those affordable units should include rental structures that make units available to persons at 50% AMFI and at 80% AMFI. The proportion of the affordable units can be evenly split or can be weighted more heavily to 50% AMFI.
- Update its Section 108 loan program to more clearly reflect the program requirements, especially the national objective of 51% and monitor compliance with those requirements.
- Conduct an audit of all 108 funded housing developments to identify those developments that are not in compliance with program requirements for affordability and bring these developments into compliance.
- Encourage the development of affordable multi-family housing in areas of non-minority concentration and areas of greater economic opportunity by providing tax abatement and encouraging developers to organizations that counsel low and very low income person, including Inclusive Communities, Inc. and the resources it has to provide to them.

- Conduct a comprehensive study of the unincorporated areas of the County to determine the minimum infrastructure improvements and services necessary to create an environment equal to that enjoyed by residents living in the incorporated areas of the County (trash collection, water and sewer hookups, adequate drinking water, roads, lighting, etc.)
- Develop a 10-year plan aimed at providing infrastructure improvements and services necessary for the unincorporated areas of Dallas to function at the same level as the incorporated areas of the County.
- Provide relief for complainant consistent with the evidence.

VI. REVIEW PROCEDURE

The Complainant or Recipient may request a review of this letter of findings by the reviewing civil rights official, who is the Assistant Secretary for Fair Housing and Equal Opportunity. A request must be made within 30 days of receipt of this letter by submitting a written statement of the reasons the letter of findings should be modified in light of supplementary information. For the purposes of a request for review, supplementary information means new and material information not previously available to the party requesting the review during the course of the investigation. If the request does not include such information, it will be denied further review and a formal determination of compliance will be made.

A request for review must be submitted to the:

Lynn M. Grosso, Director, Office of Enforcement
Office of Fair Housing and Equal Opportunity
451 7th Street, S. W., Room 5226
Washington, DC 20410

If one party requests a review, the reviewing civil rights official shall send a copy of the request to the other party, who shall have 20 days to respond. The response may include supplementary material factual information. If neither party request that the letter of findings be reviewed, a formal determination of compliance will be issued within 14 calendar days after the 30-day period for the request for review has expired.

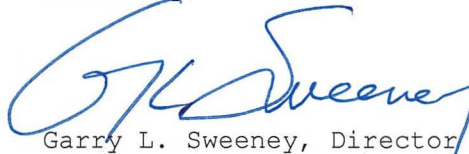
The Department would like to resolve these matters as soon as possible. Such resolution must be reduced to a written Voluntary Compliance Agreement (VCA) with a clear timetable for implementation (for Title VI, see 24 CFR §1.7(d), for Sec. 109, see 24 CFR §6.11(e) and for Sec. 504, see 24 CFR §8.56(j). After you receive this LOF, the Department will contact you to coordinate mutually convenient dates to negotiate the terms of the VCA. The Department will send you a proposed VCA in advance of the commencement of this meeting.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon a third party's request. In the event that the Department receives such a request, we will protect, to

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the extent provided by law, personal information, which, if released, would constitute an unwarranted invasion of privacy.

BY: 78
If you have any questions in this matter, please do not hesitate to contact Thurman Miles, Director, Fort Worth Program Center at 817-978-5870.

Sincerely,

A handwritten signature in blue ink, appearing to read "G. L. Sweeney".

Garry L. Sweeney, Director
Fort Worth Regional Office of
Fair Housing and Equal Opportunity
Region VI