

16 August 2013

Re: Galveston Initiative II, L.P. aka the rebuilding of Public Housing at the Cedar Terrace site

To: The Texas Department of Housing and Community Affairs
(TDHCA) Board of Directors
221 East 11th Street
Austin, Texas 78701-2410

Sent via email to:
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Members of the Board, you have received a set of plans for this project along with hundreds of pages of supporting materials that make it look quite appealing on paper. There is little doubt that if it were to be completed, it would produce some well-built and nice looking buildings, but that is NOT the real issue for your consideration. **You must consider how the location of this project will affect the residents, not the buildings.**

The Galveston Open Government Project (GOGP) does not object to this project being built, we simply argue that **it should NOT be built at this location.** After reviewing the short summary of the problems and deficiencies with this site, provided below, we hope that you will share our deep concerns and decline to issue housing tax credits for any project to be built on this site. We have a great deal more evidence to support our position, if you would like to review it, but **what we have provided should be sufficient to demonstrate this site's unsuitability.**

The Cedar Terrace site, in Galveston, where the applicant proposes to build the Galveston Initiative II, **is clearly the worst site in the entire County for Public Housing for the simple reason that it has the highest level of poverty.** Building in a census tract with hyper concentrated poverty **will violate the Fair Housing Act,** and is contrary to many judicial rulings in fair housing cases.

In ICP v. TDHCA, the court found in favor of ICP on its disparate impact claim against the TDHCA under 3604(a) and 3605(a) of the Fair Housing Act (FHA) which left no doubt that **the TDHCA is subject to the current definitions and applications of the Fair Housing Act when it selects where to allocate the State's housing tax credits.**

The Cedar Terrace site is so obviously unacceptable that it begs the question **why there is so much political pressure to build this project on this particular site,** and not on a site that would conform to all of the fair housing laws? This issue is not addressed in the application before you. This is what the applicant does not want you to consider, because if you do, you will never allow this project to be built on this site. However, in all fairness, **the applicant did not choose this site; it was forced on the applicant by local "special-interest groups".**

The reason that this project is slated to be built on an unacceptable, and in fact unlawful site, is simply because these **local "special-interest groups" have been able to "pressure" local, state, and federal authorities to do so,** in a corrupt political bargain, because building on this site provides these groups political power and financial gain.

In May 2012, the voters in the City of Galveston finally had had enough of the undue influence on local public policy that these groups enjoyed, and elected six of seven City Councilmembers who **promised to shut down the isolated segregated reservations of poverty** north of Broadway, and replace them with either a voucher system or a regional Public Housing plan that would fully conform to the requirements and the spirit of the Fair Housing Act.

However, within days after the election, Councilmembers had already begun to buckle under the pressure from these “special-interest groups”. By the time of the final vote, on 28 September 2012, **four of the six broke their promises to integrate Public Housing, and we are back to the unlawful segregated plan you must consider today.** It is has been a enormous disappointment to the voters of this city to have these Councilmembers deviate from their campaign promises in such a dramatic way, but they are clearly afraid of these “special-interest groups”.

Recently these same groups were **alleged to have interfered with the federal procurement process** for the Human Capital Plan that the Galveston Housing Authority (GHA) put out on an RFP, and they were referred to federal and state authorities for investigation.

<http://www.GalvestonOGP.org/GHA/Human-Capital-1.pdf>

<http://www.GalvestonOGP.org/GHA/Human-Capital-2.pdf>

When the rebuilding of Public Housing became necessary after Hurricane Ike, **there was absolutely no effort to start with a clean slate and search for the best sites throughout the County,** as required by HUD and numerous court rulings, because tremendous political pressure was applied to force rebuilding at the former Public Housing sites, especially this one, **regardless of the harm it would do to the residents.**

The corrupt political decision to rebuild at the Cedar Terrace site has **completely ignored what is best for the impoverished residents of Public Housing in violation of several laws.** Under the current application of these laws, as refined by judicial rulings, **Public Housing is supposed to be built in so-called “high-opportunity neighborhoods”** (HOAs) that will offer its residents the best chance to escape from poverty. A census tract with 61% of its residents living below the poverty level is the very definition of a low-opportunity neighborhood; the exact opposite of an acceptable location, and completely unsuitable for Public Housing.

Who are these “local special-interest groups” who want this project built at this site so very badly? If you receive any letters in support of this application, they are likely to be from them, or were written at their “request”. The only other “support” for this application could come from uniformed sources unfamiliar with the conditions at the site and in the neighborhood that surrounds it.

If you do not stand in opposition to the pressure from these local “special-interest groups”, and deny this application, **it will condemn several more generations of impoverished minorities to live in the isolated reservations of segregated poverty** that this application supports.

Fundamental reasons why the Board should reject this application for housing tax credits to rebuild on the Cedar Terrace site:

1. Poverty

In ICP v. TDHCA:

<http://www.tdhca.state.tx.us/multifamily/htc/inclusive-communities-project.htm>

<http://www.danielbesharalawfirm.com/Pages/ICPvTDHCA.aspx>

In a memorandum of opinion and order filed March 20, 2012, *“the court finds in favor of ICP on its disparate impact claim under the FHA...”* Page 39. In other words, **the court found that the TDHCA violated the Fair Housing Act, in the Dallas metro area, by issuing housing tax credits for projects in unacceptable locations.**

<http://www.danielbesharalawfirm.com/Documents/memorandum%20opinion%20and%20order%202012%20WL%20953696.pdf>

The court adopted a remedy which was designed to prevent the TDHCA from FHA violations in the future, and while the TDHCA has not yet adopted it as an administrative remedy statewide,

and the court did not order it as a statewide judicial remedy, it is very instructive as to what most likely will not pass judicial scrutiny on the use of housing tax credits in the City of Galveston.

*“The Plan embraces the notion of providing maximum permissible incentives for areas that truly reflect the **greatest opportunity**, namely those **areas with the highest income, lowest poverty, and best public education opportunities.**”* May 18, 2012 Remedial Plan, Page 3
<http://www.danielbesharalawfirm.com/Documents/TDHCA%20notice%20of%20proposed%20remedial%20plan.pdf>

The Cedar Terrace site cannot possibly meet those criteria.

*“In order to qualify as being in an HOA (High Opportunity Area), a development must be in a census tract that has **BOTH a low incidence of poverty AND an above median income as well as being located in an area served by either recognized elementary schools or having a significant and accessible element of public transportation.**”* May 18, 2012 Remedial Plan, Page 5
<http://www.danielbesharalawfirm.com/Documents/TDHCA%20notice%20of%20proposed%20remedial%20plan.pdf>

The actual scoring system used in the remedy is looking for placement in census tracts where the **poverty rate is less than 15%, AND household income is in the top quartile for the county, and the schools are rated exemplary or recognized by the TEA.** May 18, 2012 Remedial Plan, Page 6
<http://www.danielbesharalawfirm.com/Documents/TDHCA%20notice%20of%20proposed%20remedial%20plan.pdf>

The poverty rate in the Cedar Terrace neighborhood is 61%, FOUR TIMES HIGHER than what the court ruled was acceptable in the Dallas metro area, household income is in the bottom quartile in the County, and the nearby school is NOT rated exemplary or recognized by the TEA.

Clearly building at this location is unconscionable due to the level of poverty and is highly unlikely to pass judicial scrutiny.

The ICP case is not absolute precedent for the rest of the State, and there may be slight differences in how rulings are applied to 4% and 9% tax credits, however, **there is simply no way that the TDHCA can justify trapping impoverished minorities in this poverty-stricken neighborhood for the next few generations**, just to appease the “special-interest groups” that demand that this project must be built on this site.

Build it in a high-opportunity neighborhood somewhere else in the County, and let the Galveston Housing Authority sell this land for industrial and/or commercial use. A residential development of any kind should not be built here.

2. Segregation

The Fair Housing Act mandates that Public Housing be built in locations that will reduce racial segregation. Typically this means it should be built in majority White areas. **The 2010 census found that the census tract containing the Cedar Terrace site has a population that is 60% Black and 34% Hispanic!**

The Galveston Housing Authority’s Human Capital Plan states that **the population that they intend to return to Cedar Terrace is 80% Black and 12% Hispanic**. This means that there is no conceivable way that building in this location will reduce racial segregation, and yet, the application is to build on this site!

Once again, everyone involved in this project knows why it should not be built in this location, but they push on in spite of this knowledge to appease the “special-interest groups” that demand that it be built here.

Clearly **building on this site will violate the Fair Housing Act for two fundamental reasons; the failure to de-concentrate poverty and the failure to de-concentrate racial segregation**. Building here will aggravate both demographic metrics.

CFR 941.202: Site and Neighborhood Standards

All Public Housing construction must meet the strict standards of CFR 941.202:

<http://www.gpo.gov/fdsys/pkg/CFR-2000-title24-vol4/xml/CFR-2000-title24-vol4-sec941-202.xml>

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

*“(b) The site and neighborhood must be suitable from the standpoint of **facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, E.O. 11063, and HUD regulations issued pursuant thereto.**”*

The Cedar Terrace site and its neighborhood are not suitable under CFR 941.202 (b), because it does NOT further full compliance with the Civil Rights Act and the Fair Housing Act.

*“(c)(1) **The site for new construction projects must NOT be located in: (i) An area of minority concentration unless (A) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, ...***

The Cedar Terrace site and its neighborhood are not suitable under CFR 941.202 (c), because it is located in an area of minority concentration AND comparable opportunities for the target population do NOT exist outside areas of minority concentration.

*“(d) The site must promote greater choice of housing opportunities and **avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.**”*

The Cedar Terrace site and its neighborhood are not suitable under CFR 941.202 (d), because it is located in areas of high concentrations of low-income persons, including the 192 project-based vouchers at Sandpiper Cove just a few blocks away.

*“(e) The site must **be free from adverse environmental conditions**, natural or manmade, such as instability, **flooding**, septic tank back-ups, sewage hazards or mudslides; harmful air pollution, smoke or dust; excessive noise vibration, vehicular traffic, rodent or vermin infestation; or fire hazards. The neighborhood must not be one which is **seriously detrimental to family life** or in which **substandard dwellings** or other **undesirable elements predominate**, unless there is actively in progress a concerted program to remedy the undesirable conditions.”*

The Cedar Terrace site and its neighborhood are not suitable under CFR 941.202 (e), because it is located in an area of adverse environmental conditions, it is seriously detrimental to family life, and substandard dwellings and undesirable elements predominate in the neighborhood.

*“(g) The housing must be accessible to social, recreational, educational, commercial, and health facilities and services, and other municipal facilities and services **that are at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing.**”*

The Cedar Terrace and Magnolia Homes sites and neighborhoods are not suitable under CFR 941.202 (g), because they are located in areas that are NOT accessible to facilities and services that are equivalent to neighborhoods of similar unassisted housing.

3. Environmental

Environmental Justice

*“Many communities are exposed to disproportionate health and environmental dangers because of their social, economic, or political position. **The impacts of agency projects must take account of these disproportionate dangers and alleviate them when recognized.** Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” establishes that the agency **“shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”** More information on environmental justice is in the Council on Environmental Quality publication, “Environmental Justice Guidance under the National Environmental Policy Act”. ”*

http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/EXO12898

In short, E.O. 12898 says that you can not use federal funds to subject minority and low-income populations to environmental conditions that are worse than those typically experienced by White middle-class populations.

There are five primary ways that building on the Cedar Terrace site will violate E.O. 12898:

a. Flooding

Hurricane winds push ocean water ahead of them, so they cause the flooding of low lying areas near the coastline, and on barrier islands. The lower the land and the closer to the coastline the more risk it has from hurricane flooding. **E.O. 12898 and E.O. 11988 should eliminate hurricane flood zones from consideration for Public Housing as a matter of public safety and the prudent use of taxpayer funds!**

E.O. 11988 mandates that a study be done to look for alternatives to using federal funds to build in a flood plain; something that the applicant has not yet produced for your review and consideration. There are many high-opportunity neighborhoods on the Mainland that do not have the flood risk from hurricanes found on Galveston Island.

Description and Intent

“Executive Order 11988 requires federal agencies to avoid to the extent possible the long and short-term adverse impacts associated with the occupancy and modification of flood plains and to avoid direct and indirect support of floodplain development wherever there is a practicable alternative. In accomplishing this objective, “each agency shall provide leadership and shall take action to reduce the risk of flood loss, to minimize the impact of floods on human safety, health, and welfare, and to restore and preserve the natural and beneficial values served by flood plains in carrying out its responsibilities for the following actions:

- ***Acquiring, managing, and disposing of federal lands and facilities;***
- ***Providing federally-undertaken, financed, or assisted construction and improvements;***
- ***Conducting federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulation, and licensing activities.”***

Summary of Requirements

“The guidelines address an eight-step process that agencies should carry out as part of their decision-making on projects that have potential impacts to or within the floodplain. The eight steps, which are summarized below, reflect the decision-making process required in Section 2(a) of the Order.

1. Determine if a proposed action is in the base floodplain (that area which has a one percent or greater chance of flooding in any given year).
2. Conduct early public review, including public notice.
3. Identify and evaluate practicable alternatives to locating in the base floodplain, including alternative sites outside of the floodplain.
4. Identify impacts of the proposed action.
5. If impacts cannot be avoided, develop measures to minimize the impacts and restore and preserve the floodplain, as appropriate.
6. Reevaluate alternatives.
7. Present the findings and a public explanation.
8. Implement the action.

Among a number of things, the Interagency Task Force on Floodplain Management clarified the EO with respect to development in flood plains, emphasizing **the requirement for agencies to select alternative sites for projects outside the flood plains, if practicable, and to develop measures to mitigate unavoidable impacts.**”

<http://www.fema.gov/plan/ehp/ehplaws/eo11988.shtm>

<http://www.fema.gov/plan/ehp/ehplaws/attachments-laws/eo11988.pdf>

http://www.access.gpo.gov/nara/cfr/waisidx_03/44cfr9_03.html

At this time, the applicant has not yet completed the 8-step evaluation process REQUIRED by E.O. 11988, identified alternative Public Housing sites outside of the floodplain, and presented a legitimate reason for building in a floodplain when many much better alternative sites exist, especially on the Mainland! Even when the applicant eventually completes the 8-step evaluation process, it should be obvious that the applicant has absolutely no legitimate justification for building in this high-risk floodplain, **at much higher cost to the taxpayers, and much higher risk of damage from future flooding, when many safer sites exist on the Mainland; sites that are also in high-opportunity neighborhoods.**

http://portal.hud.gov/hudportal/HUD?src=/program_offices/com_m_planning/environment/lawsandregs/compliance/forms/trngmanual/chapt2compliance

b. Wind

Hurricanes are powered by warm ocean water, so the minute that they move inland they begin losing wind speed. This means that any location right on the coast, including barrier islands, has the highest risk from wind damage.

Locations for Public Housing near the coastline and on barrier islands are very poor choices as a matter of public safety and due to the higher cost to the taxpayers!

Building Public Housing on a barrier island puts Public Housing residents, and their personal property, at much greater risk from hurricane winds than if it was built only a few miles inland.

c. Contamination

There are **54 identified “Facilities of Interest” and/or “Brownfields” within 3,000 feet of the perimeter of the Cedar Terrace site**. 3,000 feet is the distance set forth for scrutiny in HUD Form 4128, Page 5, Item 23.

The environmental analysis contracted for by the applicant acknowledged some of these 54 sites and also tested water and soil samples from the site itself. **Many of the water and soil samples were contaminated with arsenic, lead, mercury and polyaromatic hydrocarbons (PAH) above acceptable levels**. Water contamination was ignored, because residents won't be using water from the site, but the water beneath the site can certainly transport contamination throughout the soil.

The 12 July 2013 letter from SCI Engineering, that is part of this application states, ***“soil samples collected from the site exceeded the regulatory threshold for residential***

developments.” SCI Engineering went on to recommend removal of the top 12” of soil, replacement with clean soil, and a “cap and cover” of the entire site.

<http://www.GalvestonOGP.org/GHA/SCI-Voluntary-Cleanup-Marked.pdf>

These water and soil samples raise very serious questions about whether the proposed remediation is acceptable under E.O. 12898. This project is in a low-income minority neighborhood and its target group of residents is additional impoverished minorities. **No developer would build apartments on this site if the target group were middle-class White residents, because it would surely fail to gain enough residents to be financially viable.** Therefore, it must violate the dictates of E.O. 12898 by subjecting low-income minorities to contamination risk that middle class White people would surely find unacceptable.

d. Industrial/Commercial Neighborhood

The Cedar Terrace site is NOT in a viable residential area of the City. Most of the area around it is has commercial or industrial zoning, and uses, or is abandoned residential. A visit to the site will make it obvious that this location will be **totally unappealing for an apartment development targeted at middle-class White residents** which means a Public Housing development cannot be built on this site for impoverished minority residents without violating E.O. 12898.

e. Concentration of Public Housing

The 7246 census tract containing the Cedar Terrace site is **also the location of the infamous and notorious Sandpiper Cove apartments that feature 192 project-based voucher units** that were financed with housing tax credits. Sandpiper Cove has created the worst crime problem in the entire city.

Building another 63 Public Housing and project-based voucher units within a few blocks of Sandpiper Cove will also violate many of the laws discussed above and the guidelines for the proper placement of tax credits units.

4. Mixed Income

The pretense and excuse for building this project on this site is that it will be “mixed-income” and not 100% Public Housing. **The applicant wants you to believe that the “mixed-income” approach solves all of the problems outlined above. It does not.**

First, the whole theory of mixed-income is just the latest iteration in a whole series of failed Public Housing experiments. When the failures of the current fad can no longer be hidden, they just trot out a new experiment. **Professor Robert C. Ellickson has found little added benefit even from “successful” mixed-income developments.**

<http://www.uclalawreview.org/pdf/57-4-3.pdf>

However, this project will NOT be among the “successful” mixed-income developments. For it to be “successful”, middle-class people must occupy all of the market-rate units. There is no one in this city who actually believes that will happen, because of its location on the Cedar Terrace site. **If they are not filled with middle-class tenants, they will either remain empty, or eventually they will be filled with HCV holders.** In either case, the mixed-income aspect of the project will NOT be “successful”.

In addition, this city has over **7,000 vacant housing units**. That means that more than 23% of all the housing units in the city are vacant. That’s a higher percentage than in Detroit! **There is an over abundance of available housing, and, therefore, there is no need and no demand for these market rate units.** Given the small size of the City and the amount of vacant units, there is no incentive for middle class people to live in this neighborhood given the information about it shown above.

If middle class people even come to look at the development, they will be greeted by ***“a highly visible “witness barrier” as a warning barrier for future excavation on the site”***.

<http://www.GalvestonOGP.org/GHA/SCI-Voluntary-Cleanup-Marked.pdf>

In other words, they will be welcomed by signs noting the contamination on the site that the applicant wants them to live on.

Conclusion:

The Texas Department of Housing and Community Affairs is the lead affordable housing agency for the State of Texas, and has the **primary responsibility to ensure the State’s compliance with the Fair Housing Act.**

The TDHCA also has the primary responsibility to ensure the State’s compliance with Chapter 301 of the Texas Property Code (The Texas Fair Housing Act) which closely mirrors the federal Fair Housing Act.

The TDHCA sets forth administrative rules **designed to allocate housing tax credits to developers in a manner that MUST Affirmatively Further Fair Housing** and that does not violate the Fair Housing Act.

In ICP v. TDHCA, the court found that the TDHCA was not allocating the housing tax credits in a manner that conformed to the requirements of the FHA in the Dallas Metropolitan Area.

The basic changes in TDHCA’s scoring system due to the ICP case were noted above, but the ruling and remedy also looks for **factors that should be used to EXCLUDE certain locations from eligibility to receive housing tax credits so as not to violate the FHA.** These factors include:

*“As a part of the Plan, the Department will continue to include the same or similar criteria in its QAPs for **disqualifying***

proposed sites that have undesirable features. Additionally, the Department will incorporate a more robust process to **identify and address other potentially undesirable site features** in future QAPs. Under this criterion, an applicant proposing development of multifamily housing with tax credits must disclose to the Department and may obtain the Department's written notification of pre-clearance **if the site involves any negative site features at the proposed site or within 1000 feet of the proposed site such as the following:**

a. A history of significant or recurring flooding;

b. A hazardous waste site or a source of localized hazardous emissions, whether remediated or not;

f. Significant presence of blighted structures;

h. Locally known presence of gang activity, prostitution, drug trafficking, or other significant criminal activity that rises to the level of frequent police reports.” May 18, 2012 Remedial Plan Pages 13-14

<http://www.danielbesharalawfirm.com/Documents/TDHCA%20notice%20of%20proposed%20remedial%20plan.pdf>

In short, there are numerous reasons for the TDHCA to exclude this site from further consideration.

Finally, as stated above, the Galveston Open Government Project is NOT opposed to the construction of the Galveston Initiative II development; **we are simply opposed to it being built in a location that will offer so little opportunity to its impoverished minority residents, and that will violate so many laws.** Therefore, we ask you not to facilitate the violation of the Fair Housing Act, E.O. 12898, E.O. 11988 and CFR 941.202 by granting these housing tax credits. **Please reject this application until this development is moved to a suitable location; do not let these local “special interest” groups trap low-income minority families in this neighborhood for several more generations.**

Respectfully submitted,

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