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# **AFFIRMATIVE FAIR HOUSING AND CIVIL RIGHTS POLICY**



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## **I. Introduction**

*“Access to housing is a key to success and stability, for individuals and families as well as communities.... We must now re-commit to continuing in the spirit of fair housing work. Because despite improvements to the law and the dedicated work of many, the battle for fair housing persists today.”*

*Governor Deval Patrick, May 21, 2008*

The principle of fair housing – that all individuals and families should have equal access to housing of their choice wherever it is situated – is a civil right fundamental to the values and operation of the Patrick/Murray Administration. “...[H]ousing determines a family’s location, and because of that, housing is the fulcrum of opportunity, linked to many factors critical to success of adults and children in American society.”<sup>1</sup> The opportunity to choose where one lives is essential to endowing individuals and families, across a spectrum of race, ethnicity and disability, with the opportunity to have a choice in the selection of schools, access to job opportunities, and an ability to engage as fully equal members of their community.

The relationship between fair housing and the economic vitality of the Commonwealth also has become more critical and will continue to grow in significance. Consider the following facts that provide some insight into this equation:

### **We Are Dependent Upon a More Diverse Workforce.**

- Nationwide, the college graduate pool has become more diverse and racial and ethnic minorities account for a larger portion of degrees conferred at the associate, bachelor’s, and master’s degree levels.
- Immigrants are a critical and growing part of the Commonwealth’s workforce, working in all sectors of the economy, including many of the Commonwealth’s most successful growth sectors – life sciences, health care, and software. In less than 15 years, (1990 – 2004), the number of immigrants living in MA increased by nearly 40% and new immigrants have increasingly become a critical source of labor. In 2004, immigrants comprised 17% of the MA labor force, up from 8.8% in 1980.<sup>2</sup>

### **Consistent with the overall change in demographics, our young families are increasingly diverse.**

- On average, minorities are younger than whites. While “white household growth in the next decade will be almost entirely among older couples with minor children...minorities will continue to post a net increase in married-couple households with minor children.”<sup>3</sup>

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<sup>1</sup> ©Gary Orfield and Nancy McArdle, Prepared by the Civil Rights Project of Harvard University; Published by the Joint Center for Housing Studies, Harvard University, August 2006, p.3.

<sup>2</sup> The Changing FACE of Massachusetts, by Andrew Sum, et al., June 2005, pp.1, 7 and 16.

<sup>3</sup> “The State of the Nation’s Housing 2008”, Joint Center for Housing Studies of Harvard University, p.13.

## **Minorities remain highly concentrated in urban areas, regardless of income.**

- Nationally, “the fact of severe and persistent racial segregation of housing patterns in metropolitan areas is not contested...”<sup>4</sup>
- The 2000 U.S. Census figures indicate that in the greater Springfield SMSA, an area that includes 28 cities and towns, the minority population is concentrated in the urban core cities of Springfield and Holyoke. The area is ninth in the country in the dissimilarity index of white-Hispanic residential segregation and 65<sup>th</sup> for white/black segregation, out of 331 MSA’s listed.<sup>5</sup>
- In metropolitan Boston, high-income blacks and Latinos are as segregated from high-income whites as low-income blacks and Latinos are from low-income whites.<sup>6</sup>
- In 80% of Metropolitan Boston’s municipalities, African-Americans and Latinos are purchasing homes at less than half the rate that one would expect based on affordability alone.<sup>7</sup>

## **However, employment opportunities are moving away from urban areas.**

- Consistent with national spatial patterns, job growth has been fastest in Metro Boston’s outer suburbs....Over the 1990s, the rate of job growth in the outer suburbs was almost ten times that of Boston’s urbanized satellite cities and twice that of the City of Boston or the inner suburbs.<sup>8</sup>

Although this increasing geographic divergence between employment opportunities and demographic housing patterns is often attributed to differences in income between Whites and persons of color, the data, as indicated above, does not support such a simple and single-faceted response. A 2005 report of the Harvard Civil Rights Project found that over half of African

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<sup>4</sup> “Housing Segregation in the United States: Does Race Matter?”, Gregory D. Squires, Samantha Friedman, and Catherine E. Saidat, © 2001, Lincoln Institute of Land Policy Conference Paper.

<sup>5</sup> “City of Springfield Analysis of Impediments to Fair Housing”, p.4 @ [http://www.springfieldcityhall.com/planning/fileadmin/community\\_dev/Fair%20Housing%20AI%20FINAL.pdf](http://www.springfieldcityhall.com/planning/fileadmin/community_dev/Fair%20Housing%20AI%20FINAL.pdf), July 3, 2008.

<sup>6</sup> “The Challenge of Racial Equity and Opportunity in Metro Boston, Summary of Research Findings”, The Civil Rights Project, Harvard University, June 2005, p.2-1.

<sup>7</sup> “More than Money: The Spatial Mismatch Between Where Homeowners of Color in Metro Boston Can Afford to Live and Where They Actually Reside,” Harris and McArdle, Metro Boston Equity Initiative of the Harvard Civil Rights Project, January 2004, pp., 23.

<sup>8</sup> “Racial Equity and Opportunity in Metro Boston Job Markets.” Nancy McArdle, Metro Boston Equity Initiative of the Harvard Civil Rights Project, December 2004, pp.,3.

Americans and over a third of Hispanics polled in the Metropolitan Boston area believe that "...members of their group 'very often' miss out on good housing because they fear that they will not be welcome in a particular community".<sup>9</sup> Among the cohorts that are "...more likely that their counterparts to believe that fears of community hostility keep many from seeking better housing..." are those with "higher incomes and college degrees."<sup>10</sup> This may in part explain The Harvard Civil Rights Project's finding that in 80% of cities and towns in Metro Boston, African American and Latino homebuyers purchased homes at less than one-half the rate that would be expected based on the homes they are able to afford.<sup>11</sup>

Moreover, the fear of exclusion in predominantly white communities is corroborated by existing discriminatory practices in the rental, sales, and lending markets. The Fair Housing Center of Greater Boston testing results revealed that at least half of African Americans, Latinos, Section 8 subsidy holders, and families with children were discriminated against in their efforts to find rental housing in the greater Boston area.<sup>12</sup> The Fair Housing Center of Greater Boston similarly found discrimination against persons of color through sales and lending testing.<sup>13</sup>

Clearly, adopting the Governor's challenge to recommit to fair housing principles in our policies and programs is essential to the ability of the Commonwealth to nurture and sustain a strong economy. Fair housing law establishes not only prohibitions against discrimination, but also the obligation to act affirmatively to prevent and overcome discrimination and segregation. These obligations flow, in varying means, to the Commonwealth, as whole, to all of the operations and programs of DHCD, to municipalities of the Commonwealth that receive federal funding, and, in part, to the entities that do business with the Commonwealth, DHCD and/or municipalities.

The document presents a comprehensive set of policy and program recommendations to carry out the fair housing responsibilities of the Commonwealth, in general, and DHCD, in particular, with respect to the manner in which we establish and foster open communities.

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<sup>9</sup> Josephine Louie, *"We Don't Feel Welcome Here: African Americans and Hispanics in Metro Boston"*, Cambridge: The Civil Rights Project, Harvard University, April 2005, p.25.

<sup>10</sup> Ibid.

<sup>11</sup> Harris, David J. and Nancy McArdle. *More than Money: The Spatial Mismatch between Where Homeowners of Color in Metro Boston Can Afford to Live and Where They Actually Reside*. The Harvard Civil Rights Project. January 2004.

<sup>12</sup> *We Don't Want Your Kind Living Here," a Report on Discrimination in the Greater Boston Rental Market*. The Fair Housing Center of Greater Boston. <http://www.bostonfairhousing.org/publications.htm>; *Access Denied: Discrimination Against Latinos in the Greater Boston Rental Market*, The Fair Housing Center of Greater Boston. <http://www.bostonfairhousing.org/publications.htm>.

<sup>13</sup> *You Don't Know What You're Missing: A Report on Discrimination in the Greater Boston Home Sales Market*. The Fair Housing Center of Greater Boston. October 2005. <http://www.bostonfairhousing.org/publications.htm>; *The Gap Persists: A Report on Racial and Ethnic Discrimination in the Greater Boston Home Mortgage Lending Market*. The Fair Housing Center of Greater Boston. May 2006. <http://www.bostonfairhousing.org/publications.htm>.

It is important to note that although this document repeatedly refers to the duty to “affirmatively further fair housing” and primarily addresses housing issues in response to such a duty, it is not intended to diminish DHCD’s commitment to civil rights compliance and advancement in its non-housing programs. DHCD’s civil rights obligations, such as to provide reasonable accommodations for persons with disabilities, to serve persons with limited English proficiency, and to otherwise ensure non-discrimination against protected classes of persons, apply to all of its programs. Furthermore, this document aims to promote open and diverse communities and thereby foster equal opportunity and enjoyment of civil rights in various aspects of life for residents across the Commonwealth.

## **II. Legal Context**

The promotion and exercise of fair housing requires freedom from the impediments of discriminatory rental, sales, lending and insurance practices, exclusionary zoning and land use practices, and from other barriers to housing choice and residence in communities of opportunity. There is an extensive legal framework addressing these issues that creates obligations on the Commonwealth, as a whole, on DHCD and other housing agencies in particular, on municipalities, and on private entities involved in housing and community development activities. The legal framework establishes two distinct obligations: (1) to not discriminate, including the prohibition on creating “disparate impact”, and (2) to affirmatively further fair housing.

### **A. Duty not to Discriminate and Disparate Impact**

State and federal laws, including the Massachusetts anti-discrimination law (Massachusetts General Laws Chapter 151B), the federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended), Title VI of the Civil Rights Act of 1964, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act, prohibit discrimination in housing. In Massachusetts, discrimination because of the following is prohibited: race; color; national origin; religion; sex; disability/handicap; familial status/children; marital status; age; sexual orientation; military status (veteran or member of the armed services); public assistance reciprocity/housing subsidy; genetic information; and ancestry.

Discriminatory housing practices include: refusing to rent, sell, negotiate, or otherwise make unavailable or deny a dwelling; steering; discriminatory terms, conditions, or privileges or discriminatory provision of facilities or services; discriminatory statements, notices, and advertising; misrepresenting availability; blockbusting; refusing to make reasonable accommodations and/or modifications for persons with disabilities; non-compliance with federal and state accessibility design and construction requirements; discriminating in residential real-estate related transactions, credit, and brokerage services; sexual harassment; and interfering, coercing, intimidating, or threatening any person in the exercise or enjoyment of their fair housing rights. Additionally, the Massachusetts law also prohibits denial of housing and discrimination against families with children under six years of age because of the existence of lead paint.<sup>14</sup>

Disparate impact is an important legal theory in which liability based upon a finding of discrimination may be incurred even when the discrimination was not purposeful or intentional. Generally, under federal precedent, the disparate impact theory applies when the plaintiff is able to prove through strong statistical evidence, that a rule or policy, albeit neutral on its face, has an adverse effect on persons protected under fair housing laws. However, in the recent *Langlois v. Abington Housing Authority* case, a Massachusetts federal court recognized a disparate impact claim, absent any showing of intent, where the defendant local housing authorities failed to

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<sup>14</sup> M.G.L. c.111, § 199A.

affirmatively further fair housing to evaluate and address such an impact.<sup>15</sup> The court also imposed the burden on the defendant housing authority to show that its actions were the least discriminatory alternative.<sup>16</sup>

DHCD, then the Executive Office of Communities and Development, also previously opined (in 1986) on disparate impact in the context of state-aided public housing minority affirmative action preferences for tenant selection:

Disparate impact on racial minorities cannot be ignored by a state agency charged with regulatory oversight of a state wide, publicly supported housing program. Remedial efforts are justified and warranted. Nor is the effect likely to change without such affirmative efforts given the percentages of local minority residents in the state's communities.<sup>17</sup>

Some federal courts have required some showing of discriminatory intent when evaluating whether the public defendant has a legitimate justification for its actions.<sup>18</sup> However, in contrast to equal protection claims under the U.S. Constitution, the Supreme Court has held that evidence of discriminatory intent is *not* necessary under a federal statutory prohibition against discrimination.<sup>19</sup>

Establishing disparate impact may be achieved through a variety of measures.<sup>20</sup> The defendant must then generally establish that there was a legitimate justification for the policy and that there were not less discriminatory actions the defendant could have alternatively taken.

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<sup>15</sup> 234 F. Supp. 2d 33 (D. Mass. 2002) (finding disparate impact on minorities where the community had a smaller proportion of minority residents than the larger geographical area in which Section 8 applicants were drawn, where local preferences applied to the PHA program waiting lists led to significantly fewer minorities actually participating in PHA programs than minorities waiting to participate in PHA programs, and where the justification of need for the residency preferences was not sufficient); *see also Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994).

<sup>16</sup> *Id.*

<sup>17</sup> Memorandum by Hollis Young, Chief Counsel, December 1, 1986.

<sup>18</sup> *See e.g., Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7<sup>th</sup> Cir. 1977) (holding the following four-factor analysis should be applied: 1) the strength of the plaintiff's showing of discriminatory effect; 2) evidence of the defendant's discriminatory intent (though this be insufficient to make out an intentional violation); 3) the defendant's interest in taking the challenged action; 4) whether the plaintiff seeks to compel the defendant to affirmatively provide housing or merely to refrain from interfering with others who wish to provide housing).

<sup>19</sup> *Id.* (holding that absent evidence of discriminatory purpose, the Village of Arlington Heights could not be held in violation of the Equal Protection Clause of the Fourteenth Amendment for denying the rezoning necessary for the development of low-income housing, even though the denial disproportionately affected African Americans); *but see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (employment discrimination case in which the Supreme Court holding that the absence of evidence of discriminatory intent does not absolve the defendant from liability under Title VII of the Civil Rights Act of 1964).



Similar to disparate impact claims, perpetuation of segregation claims may also be brought to address actions that have a discriminatory effect on communities. Perpetuation of segregation claims have generally been brought against municipal defendants based upon their zoning and land use actions or decisions (even when not based upon a policy) to impede the development of housing that would increase integration in areas that are predominantly white.<sup>21</sup> Perpetuation of segregation claims derive unique legitimacy under the federal Fair Housing Act due to the Act's legislative intent of desegregation. Therefore, it is arguably more difficult for governmental entities to defend against a perpetuation of segregation claim under the Fair Housing Act than against a Constitutional claim or other type of disparate impact claim.

### **B. The Duty to Affirmatively Further Fair Housing**

While the obligation not to discriminate obviously is critical, it is the obligation to further fair housing that is most commonly overlooked and/or misunderstood, and which establishes the requirement that the Commonwealth and its political subdivisions assume an active, affirmative posture with respect to fair housing.

Prohibition of discrimination and/or the enforcement of antidiscrimination laws is not sufficient. Liability may arise when there is a failure to affirmatively further fair housing as required. Such a failure may include perpetuating racial segregation patterns and adopting other policies and activities that have a disparate impact on a protected class. Case law has not clearly established whether the duty to affirmatively further fair housing under the Fair Housing Act extends to recipients of federal housing and urban development funding beyond government entities, although federal executive orders indicate that HUD is to extend its duty to affirmatively further fair housing to the recipients of its funding. Federal Executive Order 12259 followed by Executive Order 12892 provide that federal agencies shall require applicants or participants of federal agency programs relating to housing and urban development to affirmatively further fair housing.

HUD provides examples of potential methods for affirmatively furthering fair housing, such as:

- Establishing fair housing enforcement organizations in needed areas;

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<sup>20</sup> As outlined by the Citizens' Housing and Planning Association, one method is performing standard deviation statistical analysis, or calculating the extent to which actual outcomes deviate from expected outcomes; another method is the "four-fifths rule," or the standard that a selection rate of a group that is less than 80% of the selection rate of the group with the highest selection rate is evidence of disparate impact. *Meeting Local Housing Needs: A Practice Guide for Implementing Selection Preferences and Civil Rights Requirements in Affordable Housing Programs*. Citizens' Housing and Planning Association. September 2004. See also *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002). Note also that in *Commonwealth v. Lora*, 451 Mass. 425 (2008), a criminal case in which a disparate treatment claim under the Massachusetts Declaration of Rights was raised, the Massachusetts Supreme Judicial Court recognized that credible statistical evidence raising a reasonable inference of impermissible discrimination shifts the burden to the Commonwealth to provide a race neutral explanation for its actions.

<sup>21</sup> See e.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.) aff'd per curiam, 488 U.S. 15 (1988); *Metropolitan Housing Development Corp. v. Village of Arlington Heights* at 1290 (see supra note 18).

- Developing counseling programs promoting housing choice voucher use outside minority and low-income concentrated areas;
- Providing outreach to housing providers outside minority and low-income concentrated areas;
- Marketing available housing to persons less likely to apply for housing in a particular area; and
- Encouraging banks and other lending institutions to operate in underserved areas and for underserved populations, and to make credit and loan amount determinations that are inclusive to protected classes.

The duty to affirmatively further fair housing has statutory bases discussed in the Statutory Framework Section below. One such statute is the Housing and Community Development Act of 1974, under which state and local grantees of certain HUD funding are required to certify that they affirmatively further fair housing.<sup>22</sup> In order to certify that it has affirmatively furthered fair housing, a jurisdiction must conduct an analysis of impediment to fair housing, take appropriate actions to overcome the impediments identified in the analysis, and maintain records reflecting action and analysis. Under the Consolidated Plan, HUD funded recipients, including DHCD and entitlement communities, are required to: (1) examine and attempt to alleviate housing discrimination within their jurisdiction; (2) promote fair housing choice for all persons; (3) provide opportunities for all persons to reside in any given housing development, regardless of race, color, religion, sex, disability, familial status, or national origin; (4) promote housing that is accessible to and usable by persons with disabilities; and (5) comply with the non-discrimination requirements of the Fair Housing Act.

Key fair housing case law relevant to the duty to affirmatively further fair housing is included in the Appendix of this document.

### **C. Statutory Framework**

Federal Fair Housing Act (FHA) – Title VIII of the Civil Rights Act of 1968 requires that the U.S. Department of Housing and Urban Development (HUD) and all executive departments and agencies “affirmatively further the Fair Housing Act.”<sup>23</sup> This obligation has been interpreted to extend to recipients of HUD funding thereby extending its requirements, at a minimum, to state and local jurisdictions, and, arguably, to the ultimate grantee of such funds.<sup>24</sup> The FHA also supports DHCD’s affirmative civil rights obligations pursuant to state regulations at 760 CMR

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<sup>22</sup> Note that in the recent case *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, New York* (S.D.N.Y. 2009), the U.S. District Court for the Southern District of New York denied defendant’s motion for summary judgment, finding that Westchester County violated the False Claims Act by knowingly making false certifications to affirmatively further fair housing when its Analyses of Impediments to Fair Housing did not identify impediments on the basis of race.

<sup>23</sup> 42 U.S.C. §3608(d).

47, which require DHCD to take into consideration fair housing compliance by potential grantees in the award of all discretionary grants.<sup>25</sup>

Housing and Community Development Act of 1974 -- Requires Community Development Block Grant (CDBG) recipients – states and local government -- to affirmatively further fair housing by promoting housing opportunity and accessibility for the classes of persons protected under the Fair Housing Act. (42 USC 1437f and 5301 et seq.). The award of CDBG funds is conditioned on the certification by the state or local government that it will affirmatively further fair housing (see e.g., 42 USC 5304(b)(2)).

The Quality Housing and Work Responsibility Act of 1998 --Applies to public housing and public housing agency-administered (PHA) Housing Choice Voucher programs and requires certification to affirmatively further fair housing.

The Americans with Disabilities Act –

Title II of the Americans with Disabilities Act of 1990 (ADA) prohibits discrimination in services, programs, or activities by state and local governments and their departments, agencies, and instrumentalities.

Chapter 151B of the Massachusetts General Laws –

Chapter 151B closely mirrors the Fair Housing Act. However, Chapter 151B significantly expands the classes of persons protected under the Fair Housing Act and reduces the exemptions from liability available to a housing provider under the Fair Housing Act. Chapter 151B does not independently impose an obligation to “affirmatively fair housing.”

Chapter 40B of the Massachusetts General Laws –

Chapter 40B is a fair housing response to zoning and associated local permitting requirements that limit housing access through the exclusion of certain forms of housing. Although it does not explicitly address racial segregation, “...in its thirty-four year history...40B has proven to be a vital tool for racial inclusion by creating a more varied and affordable mix of housing types—entry points for diverse families—in local communities.”<sup>26</sup>

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<sup>25</sup> 760 CMR 47.04(1), “Affirmative Action Regulations Governing Recipients of EOCD/DCA Financial Assistance.”

<sup>26</sup> Glover, Blackwell, and Bell. 2005. “Equitable Development for a Stronger Nation.” In *The Geography of Opportunity: Race and Housing Choice in Metropolitan America*. Edited by Xavier De Souza Briggs, pp. 300. Brookings Institution Press.

**Table 1: Applicability of Key Fair Housing Statutes to Protected Classes**

	<i>Federal Statutes:</i>							<i>State Statute:</i>
<b>Protected Class=X</b>	Fair Housing Act (Title VIII)	Civil Rights Act of 1866 § 1981 and 1982	Title VI of the Civil Rights Act	Housing & Comm. Dev. Act (Title I, § 109)	Section 504 of the Rehabilitation Act	Title II of the Americans with Disabilities Act	Age Discrimination Act	Massachusetts Civil Rights Act (M.G.L. §151B)
Race	X	X	X	X				X
Color	X	X	X	X				X
National Origin	X		X	X				X
Religion (creed)	X			X				X
Sex	X			X				X
Familial Status	X							X
Disability	X				X	X		X
Age							X	X
Marital Status								X
Public Assistance/Housing Subsidy Reciprocity								X
Sexual Orientation								X
Military Status/Veteran								X
Ancestry/Genetics		X						X

**Table 2: Applicability of Key Fair Housing Statutes to Government Units & Housing Providers**

<b>Y = Covered Entity</b>	<b>Z = Duty to Affirmatively Further Fair Housing</b>							
	<i>Federal Statutes:</i>							<i>State Statute:</i>
	Fair Housing Act (Title VIII)	Civil Rights Act of 1866 § 1981 and 1982	Title VI of the Civil Rights Act	Housing & Comm. Dev. Act of 1974	Section 504 of the Rehabilitation Act of 1973	Title II of the Americans with Disabilities Act	Age Discrimination Act	Massachusetts Civil Rights Act (M.G.L. c. §151B)
Commonwealth of Massachusetts	Y, Z	Y	Y	Y, Z	Y	Y	Y	Y
DHCD	Y, Z	Y	Y	Y, Z	Y	Y	Y	Y
Municipalities	Y, Z (Z if receive federal funding)	Y	Y (if receive federal funds)	Y, Z (if receive HUD housing or community development funding specified in Act)	Y (if receive federal funds)	Y	Y (if receive federal funds)	Y
Other housing providers (including MA quasi-public agencies, property owners, developers, managers, real estate agents, brokers, etc.)**Some exceptions apply.	Y, Z * *Case law not clear whether Z extends to recipients of federal funding beyond gov't entities	Y	Y (if receive federal funds)	Y (if receive federal funds per the Act, see 24 CFR 6)	Y (if receive federal funds)	Y (to state/local government departments, agencies, and instrumentalities)	Y (if receive federal funds)	Y

**Table 3: Fair Housing Policy Implementation Tasks**

FAIR HOUSING TOPIC	IMPLEMENTATION TASK	RESPONSIBLE ENTITY	BASIS
<b>Expand Opportunities</b> - General	Incorporate a funding preference for project sponsors that will develop projects in locations that will expand opportunities and reduce concentrations of poverty for persons protected under fair housing laws	All state and local housing funding agencies	Fair Housing Act; <u>Thompson v. HUD</u> , 348 F. Supp. 2d 398 (D. Md. 2005); <u>Shannon v. HUD</u> , 436 F. 2d 809 (3d Cir. 1970); <u>U.S. v. Yonkers Board of Ed.</u> , 624 F. Supp. 1276 (SDNY 1985).
<b>Expand Opportunities</b> - General	Work with Office of Access & Opportunity to increase coordination among agencies to further Commonwealth’s Smart Growth principles	All state agencies	Fair Housing Act; <u>Thompson v. HUD</u> , 348 F. Supp. 2d 398 (D. Md. 2005); <u>Shannon v. HUD</u> , 436 F. 2d 809 (3d Cir. 1970); <u>U.S. v. Yonkers Board of Ed.</u> , 624 F. Supp. 1276 (SDNY 1985).
<b>Expand Opportunities</b> - General	Work with Office of Access & Opportunity to flesh out the fair housing evaluation criteria in Commonwealth Capital scoring for state discretionary grants (see chart at p. 22)	All state agencies	Fair Housing Act; Executive Order 215; Commonwealth’s Sustainable Development Principles; <u>Southern Burlington Co. NAACP v. Mount Laurel Tp.</u> , 67 NJ 151, 336 A. 2d 713 (1975); Massachusetts Constitution.
<b>Expand Opportunities</b> - General	Create fair housing evaluation standards for DHCD discretionary funding to communities	DHCD	Fair Housing Act; Executive Order 215; Commonwealth’s Sustainable Development Principles; <u>Southern Burlington Co. NAACP v. Mount Laurel Tp.</u> , 67 NJ 151, 336 A. 2d 713 (1975); Massachusetts Constitution; 760 CMR 47
<b>Expand Opportunities</b> - General	Review zoning bylaws for potential discriminatory effects of the zoning, in addition to the AGO Civil Rights Division review of language for violations of civil rights laws.	DHCD	<u>Southern Burlington Co. NAACP v. Mount Laurel Tp.</u> , 67 NJ 151, 336 A. 2d 713 (1975).
<b>Protected Classes</b>	Examine existing local preference policy for private assisted housing to determine if 70% threshold should be lowered and/or applicant pool balancing policy should be amended to ensure that local preferences are	DHCD	Fair Housing Act; Community Development Act of 1974; <u>Langlois v. Abington Housing Authority</u> , 234 F. Supp. 2d 33 (D. Mass. 2002); <u>U.S. v. Yonkers</u>

FAIR HOUSING TOPIC	IMPLEMENTATION TASK	RESPONSIBLE ENTITY	BASIS
	not either a violation of the duty to affirmatively further fair housing and/or have a disparate impact on protected classes		<u>Board of Ed.</u> , 624 F. Supp. 1276 (SDNY 1985); <u>U.S. v. Starrett City Associates</u> , 840 F. 2d 1097 (2d Cir. 1988).
<b>Protected Classes</b>	Examine 100% local preference for public housing authorities (c.121B, s. 32) in light of current statutes and case law	DHCD	Fair Housing Act; Community Development Act of 1974; <u>Langlois v. Abington Housing Authority</u> , 234 F. Supp. 2d 33 (D. Mass. 2002); <u>U.S. v. Yonkers Board of Ed.</u> , 624 F. Supp. 1276 (SDNY 1985); <u>U.S. v. Starrett City Associates</u> , 840 F. 2d 1097 (2d Cir. 1988).
<b>Expand Opportunities</b> - General	Revise C.40B regulations, as necessary, to improve implementation and administration	DHCD	
<b>Expand Opportunities</b> - Families w/Children - Households of Color - Persons with Disabilities	Revise Subsidized Housing Inventory Guidelines to require appropriate balance in development of age-restricted housing in relation to housing that is not so limited	DHCD	
<b>Expand Opportunities</b> - Families w/Children - Households of Color - Persons with Disabilities	Provide guidance on permissible use of CORI and criminal record screening	DHCD	
<b>Expand Opportunities</b> - Families w/Children	Condition funding to developments and communities on the inclusion of larger units (3+ bedrooms) when there are disproportionately low affordable housing opportunities in the community for larger families.	All state housing funding agencies	Fair Housing Act; M.G.L. c. 15B

FAIR HOUSING TOPIC	IMPLEMENTATION TASK	RESPONSIBLE ENTITY	BASIS
- Households of Color			
<b>Expand Opportunities</b> - Families w/Children - Households of Color	Modify the tax credit Qualified Allocation Plan (QAP)'s current threshold requirement that 75% of the units in a project have two bedrooms to include a partial requirement for three plus bedrooms, or at least require an average of two units in order to accommodate both small and larger households	DHCD	Fair Housing Act; M.G.L. c. 15B
<b>Expand Opportunities--</b> Persons with Disabilities	Allow for-profit developers to serve as project sponsors under the Community Based Housing (CBH) and Facilities Consolidation Fund (FCF) programs	Legislature	Americans With Disabilities Act (ADA); <u>Olmstead v. L.C.</u> , 527 U.S. 581 (1991); Fair Housing Act.
<b>Physical Accessibility</b>	Convene a focus group, including members of the Fair Housing Advisory Panel and the Housing Development Division, to determine the most practicable method for promoting visitability and universal design to broaden housing opportunities for persons with disabilities	DHCD	Americans With Disabilities Act (ADA); <u>Olmstead v. L.C.</u> , 527 U.S. 581 (1991); Fair Housing Act.
<b>LEP</b>	Create Limited English Proficiency (LEP) responsive Plan ("Language Assistance Plan or LAP") for all state programs and federal (state administered) programs (including IS – website)	All state housing funding agencies; local entities that are recipients of federal funds	Title VI of the Civil Rights Act of 1964; HUD regulations; Fair Housing Act
<b>LEP</b>	Create a list of resources, including interpreters, to address LEP concerns	DHCD	Title VI of the Civil Rights Act of 1964; HUD regulations; Fair Housing Act
<b>LEP</b>	Identify resources and collaborate with spectrum of counseling and fair housing agencies for outreach to underserved LEP groups in other languages, particularly in Spanish and Portuguese in the	DHCD	Title VI of the Civil Rights Act of 1964; HUD regulations; Fair Housing Act



FAIR HOUSING TOPIC	IMPLEMENTATION TASK	RESPONSIBLE ENTITY	BASIS
	underserved southeastern Massachusetts area		
<b>Physical Accessibility</b>	Identify gaps in current state and federal accessibility requirements (e.g., housing typologies that are not covered) and address through regulation and/or policy	DHCD	Americans With Disabilities Act (ADA); 527 U.S. 581 (1991); Fair Housing Act.; Rehabilitation Act; MAAB regulations
<b>Physical Accessibility</b>	Ensure funding programs accurately scope and monitor compliance with state and federal accessibility requirements. Provide trainings on accessibility requirements for developers and architects	All state and local housing funding agencies	
<b>Education &amp; Technical Assistance</b> - Municipalities and Housing Industry	Identify opportunities to provide fair housing training, through staff resources and collaboration with other groups, for municipalities, local housing authorities, lottery agents, rental assistance administrators, developers and property managers	DHCD	Fair Housing Act; Americans With Disabilities Act (ADA); Equal Protection Clause of the 14 <sup>th</sup> Amendment; Community Development Act of 1974; DHCD Fair Housing Mission Statement
<b>Technical Assistance</b> - Municipalities	Provide financial and staff support to municipalities to assist in the development and implementation of comprehensive housing plans that is consistent with fair housing principles	DHCD	
<b>Education</b> - Consumers	Require that housing authorities, regional rental assistance administering agencies and Housing Consumer Education Centers provide information identifying the advantages of opportunity areas to households who are issued vouchers and/or relocated from public housing, or otherwise provided housing search assistance	DHCD	Fair Housing Act; HUD Memo, "Affirmatively Furthering Fair Housing in the CDBG," Feb. 9, 2007; Title VI of the Civil Rights Act of 1964; HUD Moving to Opportunity (MTO) Project
<b>Expand Opportunity</b> - General	Evaluate the state voucher programs, as well as the federal voucher program administered by the Commonwealth, on a regular basis and take action, as necessary, to ensure that the voucher payment standards are sufficient by market area to further mobility to low poverty, high opportunity areas	DHCD	Fair Housing Act; HUD Memo, "Affirmatively Furthering Fair Housing in the CDBG," Feb. 9, 2007; HUD Moving to Opportunity (MTO) Project

### **III. Policy Goals**

The Commonwealth of Massachusetts is a jurisdictional entity that receives funding from HUD and is thereby responsible for affirmatively furthering fair housing under the Housing and Community Development Act. As DHCD is the primary entity within the Commonwealth for implementing housing policies and programs, DHCD is pragmatically the locus for implementing actions that affirmatively further fair housing for the Commonwealth. Pursuant to its Fair Housing Mission Statement, DHCD is committed to being a leader in creating housing choice and providing opportunities for inclusive patterns of housing occupancy to all residents of the Commonwealth, regardless of source of income, race, religious creed, color, national origin, sex, sexual orientation, age, ancestry, familial status, or physical or mental impairment. DHCD's Fair Housing Mission Statement also commits the agency to ensuring that new and ongoing programs and policies affirmatively further fair housing, promote equity, and maximize choice. Said commitment is guided by the following principles: encourage equity; be affirmative; promote housing choice; enhance mobility; promote greater opportunity; reduce concentrations of poverty; preserve and produce affordable housing choices; balance housing needs; measure outcomes; and rigorously enforce all fair housing and anti-discrimination laws and policies.

Significant impediments to fair housing access currently exist in Massachusetts and are described in more detail in DHCD's Analysis of Impediments to Fair Housing. Such impediments include:

- Residential concentrations of poverty that are over-represented by minorities;
- Residential segregation of minorities of all income levels;
- Zoning laws that restrict multi-family housing;
- Local residency preferences that potentially have a disparate impact on minorities and other lower income groups;
- Inadequate opportunity and support for housing mobility towards lower poverty areas;
- Geographic inequity with respect to the location of subsidized housing and housing related amenities such as transportation, education, and employment opportunities;
- Inadequate integrated and community based housing for persons with disabilities;
- Inadequate supply of accessible housing;
- Discriminatory practices in the rental, sales, and lending markets; and
- Non-compliance with the Massachusetts Lead Law, including discrimination against families with children

Therefore, in order for DHCD to fulfill its obligations to expand housing opportunities across the Commonwealth, its fair housing policies must be broad in scope. It must address the numerous classes of persons protected under state and federal fair housing laws, and respond to the obligation to do more than prohibit and refrain from intentional discriminatory practices. DHCD must also take action to ensure that it does not enable policies and practices that have a discriminatory effect on opportunities for protected classes. Moreover, such action must sufficiently affirmatively further fair housing in accordance with federal mandates.

To suffice as a policy and as a best legal practice, DHCD's fair housing mission must pervade all of its programs and activities; it must be an integral part of DHCD's decision-making, business

practices, and public relations. DHCD's collection and analysis of data on households being served through its funding programs and the funding programs of its quasi-public partners will aid this mission. DHCD must express that its fair housing mission is a civil rights obligation, that its implementation serves municipalities and housing providers in meeting their own civil rights obligations, and that increasing affordable housing opportunities outside of low-income areas will yield opportunities for such communities and for the Commonwealth as a whole.

Expressing such a mission, however, is still not enough. Perhaps DHCD's greatest contribution to fair housing in the Commonwealth, as it does not share the enforcement powers of the Massachusetts Commission Against Discrimination (MCAD) and the Attorney General's Office, is the use of its financial resources, as explicitly recognized and required by 760 CMR 47.00. As noted in the chart on pages 8 to 9, our sister agencies – CEDAC, MassDevelopment, MassHousing, and Massachusetts Housing Partnership – share many of the fair housing legal obligations of DHCD, and therefore similar program and policy obligations. Therefore, to the extent that these recommendations apply to these agencies as well, DHCD is working with them to ensure a consistent and comprehensive approach.

#### **IV. Leveraging Financial Resources to Further Fair Housing**

The discussion below delineates three powerful methods by which DHCD can utilize its financial resources to affirmatively further fair housing as required by law:

- Providing funding preferences to projects that further fair housing
- Conditioning new and continued discretionary funding to communities based upon their contributions to affordable housing and the furtherance of fair housing
- Promoting access through support for a diversity of housing types

##### **A. Funding Preferences for Projects in Opportunity Areas**

As DHCD has a strong interest in ensuring that it spends state resources in a manner that promotes and does not impede fair housing, DHCD must provide such resources to project sponsors that will develop projects in locations that will expand opportunities and reduce concentrations of poverty for persons protected under fair housing laws.<sup>27</sup> Key fair housing case law relevant to project siting is included in the Appendix of this document.

Data has overwhelmingly shown that high poverty concentrated areas are also disproportionately minority and subsidized housing concentrated areas in Massachusetts, often plagued with maladies such as high crime rates and poor schools. Studies have also established a relationship between poverty concentrated areas and health problems of the residents located in such areas.

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<sup>27</sup> See *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005). See also the recently filed complaint with the federal district court in Dallas, *Inclusive Communities Project v. Texas Dept. of Housing and Community Affairs*, (N.D. Texas Filed March 2008), seeking injunctive relief, including prohibiting defendants from administering the Low Income Housing Tax Credit program in a manner that causes or perpetuates racial and ethnic segregation.

DHCD has taken an important step in reversing this trend by increasing Low Income Housing Tax Credit points, through its 2008 Qualified Allocation Plan (QAP), for projects in areas of low poverty and low subsidized housing. However, additional amendments are necessary to completely address this issue. *DHCD will make additional fair housing amendments to the QAP and will incorporate explicitly such a funding preference in all of its development programs.* Notwithstanding, DHCD will not make a blanket policy of excluding development in higher poverty and minority concentrated areas. As recognized by the QAP, if a higher poverty concentrated area is undergoing significant revitalization and subsidized housing would contribute to the revitalization, then it should also receive a competitive preference.

### **A Community Development Approach**

*Success = Creating Opportunity Housing and Opportunity Communities*

It is important to note that developing affordable housing in economically stable communities in an effort to reduce the concentration and cycle of poverty will not satisfy the fair housing mission if it does not sufficiently attract persons protected under fair housing laws. In addition to requisite affirmative fair marketing of the project, such housing must also serve a range of:

- incomes (including extremely low incomes);
- housing types (rental and ownership, wheelchair accessible housing);
- household types (persons with disabilities, elderly, small and large families); and
- non-local households

It should also have adequate housing related amenities, i.e., located near transportation, job opportunities, and community services.

Project sponsors/developers that apply for state funding to develop affordable housing will be subject to fair housing considerations, including those listed above and those incorporated in the schematic tool below. DHCD will work with the Massachusetts Commission Against Discrimination and the Massachusetts Office of the Attorney General to evaluate fair housing compliance when making funding determinations.

**Funding Preferences for Project Sponsors/Developers**

**Table 4: Fair Housing Evaluation Criteria for Project Sponsors/Developers**

**Sponsor/Developer Practice for Evaluation**

	<b>Race/ Nat'l Origin</b>	<b>Familial Status</b>	<b>Disability</b>
-Diversity of housing (building) types	X	X	X
-Diversity of subsidized housing for range of income levels and family sizes (applications to subsidizing agencies considered)	X	X	X
-Discrimination complaints filed/discriminatory advertising	X	X	X
-Extent of affirmative fair marketing efforts	X	X	X
-Efforts to increase compliance with accessibility requirements and to increase Visitability and Universal Design			X
-Other efforts to create or further a diverse community through the proposed housing	X	X	X
-Title VI LEP compliance	X		

A successful fair housing policy is therefore dependent in large part on leveraging resources of other agencies in order to create opportunity communities as well as opportunity housing. Therefore, DHCD will collaborate with the Office of Access and Opportunity to achieve the goal of promoting access in opportunity communities. Efforts in this arena should include, for instance, greater commitment to and coordination of the Commonwealth’s Smart Growth<sup>28</sup> principles. Smart Growth, as well as inclusionary zoning and Chapter 40B, are important tools for furthering fair housing by broadening housing opportunities for minorities and other disproportionately low income and/or disadvantaged groups in the housing market by increasing housing affordability (i.e., through infrastructure efficiency and housing density). Smart Growth promotes additional opportunity in addition to affordability by promoting housing for low income persons with access to public transit, jobs, schools, hospitals, and by decreasing proximity to health and safety hazards. DHCD may also productively utilize financial resources through its expenditure of discretionary funds to communities that further its mission as discussed below.

<sup>28</sup> A principle of land development that promotes compact design, mixed and fair land use, open space, environmental preservation, and transportation access. See M.G.L. c.40R.

DHCD recognizes that leveraging resources to further opportunities requires a balancing approach that does not per se exclude funding of projects in minority and/or low-income areas. Such an exclusion would not only potentially raise fair housing issues, but would limit opportunities in areas where there is a significant need for affordable housing; where there are significant community revitalization efforts that would be strengthened by affordable housing development/rehabilitation; or where such an exclusion would result in displacement of low income residents.

## **B. Discretionary Funding of Communities**

Selectively distributing state discretionary funds in a manner that rewards communities inclusive of persons protected under fair housing laws is crucial for two reasons: 1) it supports DHCD's fair housing mission, and 2) it is an efficient use of state resources because it aims to improve opportunities for residents of the Commonwealth and not primarily for residents of individual communities. DHCD must be careful, however, to strike a balance in community funding so as to avoid the potential discriminatory effect of under-funding communities with higher poverty and minority concentrations that are in critical need of community improvements.

As required by existing regulation, DHCD will condition new *and* continued discretionary funding (excepting in place contracts) to communities based upon their performance in contributing to affordable housing growth in a manner that is inclusive of persons protected under fair housing laws.

### **Discretionary Funding History**

Conditioning discretionary funding does not signify a new policy or practice in Massachusetts, as, in addition to the regulations at 760 CMR 47.00, there is also executive precedent. Namely, Executive Order 215, signed by Governor King on March 15, 1982, established that state agencies were not to award development-related<sup>29</sup> discretionary funds to cities or towns determined to be unreasonably restrictive of new housing growth. Executive Order 215 has not been revoked; however, it has not been implemented since the era of Governor Dukakis.

The key components of Executive Order 215 are:

- A determination of unreasonable restriction on housing growth is to be made upon the Secretary's evaluation of housing policies/practices
- Each state agency must cooperate with the Department in implementing the determination
- The community may then formulate a strategy to facilitate development of affordable housing, and may request assistance from the Department in formulating the strategy.

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<sup>29</sup> Including funding for economic development, open space and recreation, "urban systems" transportation improvements, conservation land, elderly housing, sewer collection and water systems, parking facilities, convention centers, federal block grant funds administered by the state (note: today federal HOME funds are also administered by the state), and state review of federal grant applications for development assistance. EO 215 was not applied to ongoing grants or existing project commitments.

- The strategy must be approved by the Secretary and the local boards and commissions responsible for its implementation
- The Secretary shall then notify all appropriate state funded agencies that the city or town is not unreasonably restrictive of new housing growth

Past implementation of Executive Order 215 focused primarily on whether the community would develop a plan to address housing growth and whether the community would support family public housing (with state funding). Currently state-aided family public housing represents only 31% of all state-aided public housing. State-aided family public housing is also more likely to be located in urban communities compared to state-aided elderly public housing. While an important contribution to fair housing efforts, this narrow focus of EO 215 limited its efficacy, and there is still a significant need for communities to develop family public housing, or other lower income family housing such as Project Based Section 8 and Low Income Housing Tax Credit housing. To the extent that DHCD is able to fund such developments, the greater the likelihood that communities will be able to meet proposed discretionary funding standards, and that DHCD will meet its affirmative duty to site low income housing in opportunity areas as discussed above.

Governor Patrick’s Executive Order 478, “Order Regarding Non-Discrimination, Diversity, Equal Opportunity, and Affirmative Action,” revoked Romney’s Executive Order 452. Executive Order 478 provides that “Equal opportunity and diversity shall be protected and affirmatively promoted in all state, state-assisted, and state-regulated programs, activities, and services.” Although Patrick’s Order maintains an employment focus, its language clearly is broad and comprehensive. Therefore, Executive Orders 215 and 478 should be interpreted and implemented as complementary orders that require the State to undertake affirmative action in its decision-making and funding processes.

Moreover, the Commonwealth’s ten Sustainable Development Principles corroborate such an interpretation through its inclusion of the fair housing principles “Advance Equity” and “Expand Housing Opportunities.” The former invokes action to “promote equitable sharing of the benefits and burdens of development” and the latter invokes action to “support the construction and rehabilitation of homes to meet the needs of people of all abilities, income levels, and household types. Build homes near jobs, transit, and where services are available. Foster the development of housing, particularly multifamily and smaller single-family homes, in a way that is compatible with a community’s character and vision and with providing new housing choices for people of all means.” The other eight Sustainable Development Principles also complement the goal of expanding housing related opportunities.<sup>30</sup>

### **Establishing Fair Housing Evaluation Standards**

To effectuate implementation of 760 CMR 47.00, Executive Order 478, and the Sustainable Development Principles, DHCD will adopt a statement of policy that provide fair housing evaluation standards for its discretionary funding. The Office of the Chief Counsel will be

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<sup>30</sup> Massachusetts Sustainable Development Principles also include the following: Concentrate Development and Mix Uses; Make Efficient Decisions; Protect Land and Ecosystems; Use Natural Resources Wisely; Provide Transportation Choice; Increase Job and Business Opportunities; Promote Clean Energy; Plan Regionally.

responsible for creating such policy, training staff at all state housing funding agencies, and overseeing its implementation.

Although it is not clear whether they were fully implemented, previous Affirmative Action Regulations by the Executive Office of Environmental Affairs were created to carry out the objectives of Executive Order 74. No longer in effect, those Affirmative Action Regulations, 301 CMR 50.00, nevertheless provide a useful framework for imposing standards on communities that do not meet fair housing objectives. Under the Affirmative Action Regulations applicants for state or federal funding were required to develop a community profile to identify overconcentration or under-concentration of minorities and female heads of households within its jurisdiction. Applicants were also required to identify housing needs and problems in the jurisdiction.

Pursuant to the regulations, if the community profile revealed an existence of overconcentration or under-concentration of minorities, the applicant was required to develop a fair housing program to eliminate barriers to equal access. The recommended elements for a fair housing program, included:

- A fair housing policy or ordinance;
- A fair housing director;
- A fair housing committee or human rights commission;
- An outreach program;
- Site selection and land use and development programs to increase housing opportunities of minorities;
- An analysis of mortgage data that may negatively impact housing;
- The creation of diverse neighborhoods;
- Support of regional goals;
- Evaluation and possible revision of zoning practices; and
- Elimination of preferential treatment for local residents, including residency requirements

Although the now defunct Affirmative Action regulations provide a good starting point for imposing standards on communities that do not meet fair housing objectives, in determining whether applicants should be denied funding, a more comprehensive approach must be adopted that is not limited simply to the overconcentration or under-concentration of minorities. Although race remains a paramount issue, the manner in which communities accommodate other classes of persons protected under fair housing laws, particularly families with children and persons with disabilities, must also receive careful attention. The extent to which communities hinder affordable housing growth should simultaneously be examined, not only from the standpoint of promoting affordable housing, but also from a fair housing standpoint as many protected classes of persons are disproportionately lower income and in need of affordable housing.

DHCD will reward communities with new and continued state discretionary funding that promote affordable housing and create fair housing opportunities by:



- a) Not restricting or impeding multi-family and affordable growth (including rental housing) through exclusionary zoning and land use, challenges to Chapter 40B developments, and other practices;
- b) Providing for a diversity of housing types, including housing for families with children;
- c) Providing for housing that increases access and integration for persons with disabilities;
- d) Creating or making efforts to obtain housing affordable to a range of incomes;
- e) Being open to and affirmatively providing opportunities for persons who are not currently residents of the community;
- f) Using discretionary and other funds to improve community and housing related amenities, such as jobs, transportation, and community services, that attract affordable housing and diverse households to the community;
- g) Promoting civic engagement in planning for affordable housing and in providing fair housing related education and resources to municipal employees and residents.
- h) Not engaging in practices that violate fair housing laws. DHCD will work with the Massachusetts Commission Against Discrimination and the Massachusetts Office of the Attorney General to make this determination.

Provided below, in Table 5, is an overview as well as a more specific schematic tool for evaluating communities under the combined rubric of Executive Orders 215 and 478 and our regulations. Such an evaluation system could also be incorporated into the current rubric of the Commonwealth Capital scoring system for state discretionary grants.

**Table 5: Fair Housing Evaluation Criteria for Discretionary Grants**

<b>Community Practice for Evaluation</b>	<b>Race/Nat'l Origin</b>	<b>Familial Status</b>	<b>Disability</b>
-Zoning/land use bylaws	X	X	X
-Multi-family permitting denials	X	X	X
-Diversity of housing (building) types	X	X	X
-Diversity of subsidized housing for range of income levels and family sizes (applications to subsidizing agencies considered)	X	X	X
-Availability of subsidized family housing (vs. age restricted housing)		X	
-Existence and implementation of an affordable housing plan	X	X	X
-Existence of an affordable housing partnership or other entity	X	X	X

**Community Practice for Evaluation    Race/Nat'l Origin    Familial Status    Disability**

-Discrimination complaints filed/ discriminatory advertising	X	X	X
-Use of CDBG and CPA funds	X	X	X
-Diversity of residents in the municipality	X	X	X
-Use of local residency selection preferences	X	X	X
-Extent of affirmative fair marketing efforts	X	X	X
-Diversity of residents in subsidized housing located in the municipality	X	X	X
-Fair housing civic engagement/outreach (FH training for community housing and planning employees; FH outreach to the community; FH commission or resource for allegations of discrimination)	X	X	X
-Application for and use of transportation/ environmental/community development/ other discretionary funds/community services to improve amenities that benefit and attract affordable housing of diverse types that serve a variety of incomes and protected classes, and that create areas of opportunity	X	X	X
-Participation in regional planning and development activities	X	X	X
-Efforts to increase accessibility, Visitability, and Universal Design			X
-Other efforts to create an open community (i.e., LEP services; FH related counseling)	X	X	X
-Title VI LEP compliance	X		
-De-leading initiatives			X

With respect to the “weight” that the above evaluation points will carry in evaluating the withholding of discretionary funds, further vetting with internal staff as well as with the Fair Housing Advisory Panel is needed. The Commonwealth Capital scoring system that DHCD has previously employed may offer some practical guidance. The determination of evaluation factors will also influence the responsive strategies that DHCD would require communities to take in order to receive future discretionary funds.

Therefore, further consideration and vetting is needed to determine: 1) what the threshold should be for withholding discretionary funds; and 2) under what circumstances should the discretionary funds be restored (even more specifically, under what circumstances should a community’s response strategy/plan be insufficient and specified action, such as amending zoning bylaws, be required)?

Should DHCD opt for a strict scoring system, the nature of the community should be factored into the scoring: communities with different land size, population size, infrastructure, environmental protections, access to development subsidies, and employment and transportation opportunities will likely engender different expectations for contribution to affordable housing growth. However, there must be further discussion as to the evaluation criteria that will apply regardless of individual community characteristics, such as efforts towards community diversity and the existence of exclusionary zoning practices.

It is clear that diversity of the resident population is a necessary fair housing criterion for evaluating all communities. Although a low minority population for example by itself should not necessarily trigger withholding of discretionary funds, it is a strong indicator that the community needs to adopt and implement a responsive strategy (such as more aggressive affirmative fair marketing, lowering of local preference, etc.) in order to continue to receive discretionary funds. U.S. Census data is a useful tool in evaluating minority presence in communities and will be even more useful upon the release of 2010 data. Results from DHCD’s Data Collection efforts, as well as results from new federal Low Income Tax Credit program requirements, will also afford a snapshot of demographics of state subsidized (or federally subsidized and administered by the state) housing units, enabling communities to demonstrate (or not) that although their overall resident population is not diverse, they are making strides towards diversity through their subsidized housing.

### **Considering Zoning Practices**

Zoning practice is also a necessary fair housing, as well as an affordable housing, criteria for evaluating communities. Previous implementation of Executive Order 215 did not include a strong focus on zoning practices that have the effect of excluding multi-family housing. The exclusion of multi-family housing not only has the effect of excluding families with children and minority groups to the extent their households disproportionately include children, but it also tends to impede housing that is affordable and therefore in demand by protected classes of persons that are disproportionately lower income including minority groups and persons with disabilities. Chapter 40B is an extremely important tool in this regard, and while it provides the crucial underpinning to enabling the development of affordable multifamily housing, its narrow focus on zoning limits its efficacy.

Currently, the Attorney General's Civil Rights Division does review proposed new and amended zoning bylaws; however, such review is limited to whether the zoning language on its face violates civil rights laws and does not address potential discriminatory effects of the zoning. There is an opportunity then for DHCD to evaluate zoning bylaws from a more policy oriented perspective that considers the potential for discriminatory effects.

### **Considering Local Preference**

In addition to zoning barriers, community diversity is directly affected by marketing and local preference practices. DHCD released in February 2008, an Affirmative Fair Housing Marketing Plan guidance document. Said Guidelines apply across DHCD and the quasi-public housing programs. However, DHCD has not yet significantly modified its local preference policies.

Local Housing Authorities are permitted to have a 100% local preference, although they are subject to affirmative action requirements by regulations. In contrast, HUD requires public housing authorities to obtain its approval before implementing local preferences.

Currently DHCD's local selection preference policy for non-public housing developments provides for a 70% local preference ceiling, and requires local preference practices to be modified where they would have a potential discriminatory effect on persons protected under fair housing laws. Specifically, DHCD currently provides through its Affirmative Fair Housing Marketing Plan Guidelines that communities may alter local preference pools to include minority applicants where they would not reflect minority representation in the metropolitan statistical area without such alteration. An alternative practice posed in said Guidelines is to lower the local preference percentage. Communities must also justify the local need for the local preference based upon local affordable housing demand (i.e., through use of census data on income levels) and supply (i.e., the SHI) in comparison to the regional area.

Community justification of local preferences and other selection practices is necessary because DHCD should not be subsidizing or otherwise aiding (i.e. through the Subsidized Housing Inventory) community officials that adopt local preferences because they wish to limit additional entry of protected groups, such as families with children, "urban" families and immigrants, or because they anticipate members of the community will. It is clear that community opposition to affordable housing because of the residents it may attract is not a legitimate defense to a discrimination claim. For example, in *United States v. Yonkers Board of Education*, the court stated: "The Supreme Court has long held, in a variety of circumstances, that a governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens."<sup>31</sup>

Nevertheless, local preference policies that have the discriminatory effect/disparate impact of excluding persons protected under civil rights laws require further scrutiny than a non-

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<sup>31</sup> 624 F. Supp. 1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988).

discriminatory justification. Pursuant to *Langlois v. Abington Housing Authority*,<sup>32</sup> a justified local preference action must be based on a demonstration of local conditions and need, and it must be the least discriminatory action. Although some courts have held that some showing of intent must accompany a showing of discriminatory effect to render liability when a facially neutral policy is challenged, such intent may be shown indirectly (i.e., inferred from knowing disregard of discriminatory effects as opposed to purposeful action) and is typically subject to a less burdensome standard under the Fair Housing Act than under a constitutional claim.

Moreover, as in *Langlois*, if the discriminatory effect is accompanied by a failure to affirmatively further fair housing, a showing of intent is not required.<sup>33</sup> As interpreted by HUD and caselaw, agencies and jurisdictions (including states) receiving HUD funding are required to affirmatively further fair housing, as HUD is, pursuant to the Fair Housing Act and the Housing and Community Development Act of 1974. Therefore, in view of its duty, the state through DHCD must ensure that it is not aiding or enabling practices that have a discriminatory effect of excluding minorities and other protected classes through its approval of restrictive local preferences, its provision of subsidies, or its calculation of subsidized housing (where a 10% Chapter 40B threshold may serve to impede further housing development).

### ***Lowering Local Preference 70% Threshold versus Race Balancing of Local Preference Pool***

With respect to approval of local preferences, it is not clear that DHCD's current policy of allowing up to a 70% local preference represents sufficient action to prevent discriminatory effects or to affirmatively further fair housing. The applicant pool balancing approach discussed above was intended to mitigate discriminatory effects and to further fair housing; however, we do not have the data necessary to evaluate whether the pool balancing approach is successfully addressing the problem. In addition, DHCD's applicant pool balancing policy raises the following concerns:

- 1) it does not address other protected classes (some of which cannot be addressed in the same fashion because applicant information, such as sexual orientation, religion, some disabilities, is not known and it may be improper or invasive to inquire) and it conflates minority groups; and,
- 2) it is based upon a comparison of the statistical presence of minorities in the local preference pool to the statistical presence of minorities in the regional area, where the statistical presence of minorities in the non-local pool, or in the particular income range of the regional area, or in the state may be greater.

DHCD has modified its local preference policies thus far through its Affirmative Fair Housing Marketing Plan Guidelines. DHCD will continue to consider amendments to its local preference policies to accommodate additional protected classes. DHCD also will commission a study of the impact of local preference policies on minority groups, and will amend the policies, if necessary, to address issues raised by the data. Finally, DHCD will re-evaluate current

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<sup>32</sup> See *supra* note 15.

<sup>33</sup> *Id.*

affirmative action language in its public housing regulations as part of a general review and revision of the public housing regulations.

### **C. Promoting Access through Diversity of Housing Types: Housing for Families with Children and Persons with Disabilities**

As discussed above, affirmative furtherance of fair housing requires consideration, not only of policies that broaden opportunities through affordable housing siting and resident selection criteria, but also through creation and support of housing types that suit diverse needs highlighted below. The following discussion is not categorized under either of the preceding sections because it includes principles that should be incorporated into decision-making, both for the funding of projects and the use of discretionary funds to communities, as discussed above.

#### **Housing that Provides Access to Larger Families**

The current trend in affordable housing development is to subsidize and create housing predominantly containing less than three bedrooms. Such development does not provide adequate access to affordable housing for families with children, particularly larger families with children.

As such, DHCD and the quasi-public state agencies must condition funding to developments and to communities on the inclusion of larger units when there are disproportionately low affordable housing opportunities in the community for larger families. For example, the Tax Credit QAP has a current threshold requirement that 75% of the units in a project have two bedrooms. DHCD is reviewing options for modifying the QAP threshold to increase inclusion of three or more bedrooms. Other programs will adopt similar requirements, or at least include preferences for developments that create greater diversity of housing types in communities. While in some cases this may lead to the creation of developments with fewer units in order to accommodate larger unit sizes, it need not occur in every case depending on the ability of DHCD and/or other agencies to provide deeper or layered subsidies for the development.

In determining the provision of discretionary funds, DHCD and other agencies must consider the proportion of elderly housing compared to family housing in the community. The comparable need for affordable elderly housing, community attempts to apply or support the application for subsidies for family housing, as well as community attempts to impede family housing should factor in to such consideration.

DHCD will also revise the Subsidized Housing Inventory Guidelines to require an appropriate balance in the development of age-restricted housing in relation to unrestricted (family) housing in each community. SHI eligibility criteria are significant because through such criteria, the state is enabling communities to achieve a 10% subsidized housing threshold that they may use to deny zoning for the development of affordable and multi-family housing under Chapter 40B.

### *Housing that Provides Access to Persons with Disabilities*

Persons with disabilities face many obstacles to affordable housing opportunities, including potential exclusion due to local residency preferences (discussed above), limited opportunities for integrated housing, and inadequate accessibility and visitability. DHCD Community Based Housing (CBH) and Facilities Consolidation Fund (FCF) programs are crucial subsidy sources that target affordable housing opportunities for persons with disabilities outside of institutional settings who are otherwise at risk for institutionalization.<sup>34</sup> In an effort to broaden integrated housing opportunities for the households served by these programs, DHCD supported language in the recent housing bond bill to include for-profit developers as eligible projects sponsors. However, other statutory changes necessary for attracting for-profit developers were not included in the bill; DHCD will work towards getting the statutes amended in the coming session.

The CBH program currently applies to non-DMR (Department of Mental Retardation) and non-DMH (Department of Mental Health) clients, as the FCF program applies to DMR and DMH clients. FCF developments, as well as HUD multifamily subsidized housing for populations with disabilities, do not tend to be integrated developments. Therefore, expanded integration opportunities through CBH or similar programs are needed for persons with mental retardation and mental health disabilities for whom group home settings are otherwise unnecessary. Such opportunities must also reach a diverse range of low income persons.

In addition to the need for more integrated housing opportunities is the need for more accessible housing. Accessibility laws that apply to new construction and substantial rehabilitation projects have been crucial in expanding opportunities for persons with disabilities. Unfortunately, as there are several federal laws in addition to the state law that set different and sometimes conflicting accessibility standards, builders, sponsors, and their subsidizing agencies face increased risks for liability due to noncompliance. CHAPA has organized an Accessible Housing Committee to look at these issues, and DHCD is a participating member. The focus of the Committee is to maximize consistency amongst state and federal accessibility requirements through regulatory and/or policy changes. The completion of this project, anticipated to be in late Spring 2009, will permit all state housing funding agencies to scope and enforce accessibility requirements in a clear, uniform and consistent basis. Part of this enforcement includes requiring project sponsors to provide certifications that the design plans comply with all applicable accessibility laws. DHCD also will consider its ability to appropriately review design plans for projects funded by the housing development division.

The availability of accessible units is also particularly challenging in the public housing context, where much of the housing stock is older and therefore not subject to numerous accessibility requirements. This is particularly challenging when household disability onset occurs after the resident has been living in a unit and there is not a comparable and available unit for a household to transfer to. Due to DHCD and local housing authority obligations to provide reasonable modifications under the various state and federal fair housing laws, as well as its desire to best

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<sup>34</sup> Such as accessible features or a location near medical services.

serve persons with disabilities and aging populations, DHCD will reserve funding in its budget for housing authorities to make reasonable modifications of existing housing units.

### **Promoting Visitability and Universal Design**

Improved compliance with accessibility laws however is not sufficient to broaden housing opportunities for persons with disabilities, as lower standards for accessibility exist for small projects and townhouses. However, DHCD has the authority to establish policies that extend and/or improve the coverage of accessibility laws. This issue will be addressed in the work of the CHAPA Accessible Housing Committee and the Committee's report will inform DHCD's response. Advocates on the Fair Housing Advisory Panel raised the concern that limitations on accessibility impact not only where persons with disabilities can live, but also where they can visit (hence limiting their integration and participation in the community), and therefore promote the concept of "visitability." The concept of "universal design" was also advocated by some members of the Panel. Universal Design generally incorporates the concept that barriers to access (such as zero step entrances) should be removed in all new construction, as it will serve both current persons with disabilities and the aging population. The 2008 LIHTC QAP specifically included Universal Design and Visitability as criteria for increased scoring points. The 2009 LIHTC QAP additionally incorporates features of Universal Design into fundamental project characteristic requirements. DHCD also promotes Universal Design through its CBH program.

The Panel dedicated a meeting primarily to discussing universal design and visitability, and from that meeting it became apparent that there are different concepts of universal design and visitability as well as methods for promoting them. One Panel member recommended providing certifications to projects that incorporate principles of universal design or visitability, similar to what is done with Energy Star, as a promotional tool. Another Panel member recommended making visitability a threshold subsidy requirement, noting that the Ohio Finance Agency had made visitability a requirement in its QAP for all newly constructed units receiving tax credits. DHCD must anticipate and formulate a response strategy to potential objections from the development community if it is to impose universal design and visitability, particularly in view of the already high housing and development costs that distinguish Massachusetts from many other states.

It is necessary for a focus group to convene, including panel members, the Housing Development division and representatives from the other state housing funding agencies, to further discuss the most practicable method for promoting visitability and universal design. The following issues require further discussion:

- How should we define visitability and universal design?
- What actions should DHCD take to further universal design and visitability (i.e., program requirement versus funding priority or component of project application scoring)?
- How should such actions be prioritized? Should specific actions vary by project location, project size, project type (i.e. townhouses), project costs, project subsidy level and subsidy type, program type, etc.?
- How should such actions be balanced with other fair housing goals?
- How might universal design and visitability impact development costs, and how should DHCD respond to this concern?



- What are other jurisdictions doing to promote universal design and visitability? Would such actions have the same feasibility and success in Massachusetts?

## **V. Broadening Access for Persons of Limited English Proficiency**

Broadening access for persons with limited English proficiency (LEP) is a general fair housing principle that must permeate all policies and decision-making of the state funding agencies. In addition to the mandate to affirmatively further fair housing, Title VI of the Civil Rights Act of 1964 also imposes legal obligations on the Commonwealth with respect to LEP. Title VI prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. The definition of “Program or activity” includes “a department, agency, special purpose district, or other instrumentality of a State or of a local government...or the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended”. It is important to note that DHCD as a whole and entities of local governments are covered by Title VI. Title VI also applies to organizations, corporations, partnerships, and sole proprietorships primarily in the business of providing housing. Title VI compliance by such entities and communities should therefore serve as an evaluation criteria for DHCD funding.

HUD has issued final guidance interpreting responsibilities under Title VI with respect to housing that applies to:

- State and local governments;
- Public housing agencies;
- Assisted housing providers, fair housing assistance programs; and
- Other entities receiving funds directly or indirectly from HUD.

Subrecipients and state grant recipients are also covered when federal funds are passed to them through the grantee.

The HUD posits a four-part test for evaluating compliance:

- 1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee;
- 2) The frequency with which LEP persons come in contact with the program;
- 3) The nature and importance of the program, activity, or service provided by the program, or the greater the possible consequences of the contact to the LEP persons (i.e., could the denial or delay of access to services or information have serious or even life-threatening implications for the LEP individual); and
- 4) The resources available to the grantee/recipient and costs.

HUD guidance also specifies the following as a “safe harbor” for written translations:

- Written translations of vital documents for each LEP language group that constitutes 5% or 1,000, whichever is less, of the population of persons eligible to be served or likely to

be affected or encountered. Translation of other documents, if needed, can be provided orally.

- If fewer than 50 persons in a language group that reaches the 5% trigger, the recipient may provide written notice in the primary language of the LEP language group of the right to receive competent oral interpretation of those written materials, free of cost.

Written or “vital documents” could include:

- Consent and complaint forms;
- Intake forms with the potential for important consequences;
- Written notices of rights, denial, loss, or decreases in benefits or services, and other hearings;
- Notice of eviction;
- Notices advising LEP persons of free language assistance;
- Notices of public hearings, especially those that meet Community Planning and Development’s citizen participation requirements;
- Leases and tenant rules; and/or
- Applications to participate in a recipient’s program or activity or to receive recipient benefits or services.

Each department of DHCD will review Title VI obligations and determine how it applies to them, and then provide an LEP response to the Office of the Chief Counsel for review. Such consideration should also apply to non-federal programs, as DHCD is overall a covered entity and has a duty to affirmatively further fair housing. As necessary, DHCD will issue new guidance and/or regulations relating to its programs in order to effectuate the LEP responsive plans. DHCD will create a listing of resources, including interpreters, for LEP persons that need access to and understanding of all DHCD programs. DHCD also will provide technical assistance to local housing authorities, nonprofit agencies engaged in carrying out DHCD programs, and municipalities on LEP resources and compliance.

## **VI. Affirmative Fair Housing Initiatives**

In addition to incorporating a fair housing agenda into DHCD funding of project locations, project types, and communities, a DHCD fair housing program must include initiatives to ensure that households seeking housing are aware of fair housing rights and opportunities to live in a diverse range of communities. Although the fiscal reality may be that DHCD has limited state funds to devote to fair housing initiatives, it may utilize federal resources<sup>35</sup> and contractual partners to achieve many of its desired goals.

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<sup>35</sup> HUD issued a February 9, 2007 memorandum on “Affirmatively Furthering Fair Housing in the Community Development Block Program,” provides that CDBG funds may be used for initiatives to affirmatively further fair housing, including “making all persons aware of the range of opportunities available, enforcement, education, outreach, avoiding undue concentrations of assisted persons in areas with many low and moderate income persons, and other appropriate activities, including testing, selected by the grantee to affirmatively further fair housing.” HUD also provides fair housing assistance grants outside of the CDBG program.

DHCD consulted the Fair Housing Advisory Panel on potential DHCD fair housing education and outreach initiatives. Members of the Panel that represented fair housing advocacy groups funded by HUD, the Fair Housing Center of Greater Boston and the Massachusetts Fair Housing Center, expressed concerns about being able to conduct testing and enforcement if DHCD were to compete for HUD funding.

Such members also expressed that DHCD should focus its efforts on entities that it finances rather than other groups already targeted by the fair housing agencies. However, further discussion highlighted that:

- 1) the aforementioned centers do not cover the entire state, notably southeastern Massachusetts where there are many immigrants and minorities in the New Bedford region; and
- 2) they do not currently have the capacity to sufficiently provide outreach in other languages.

Overall, the Panel expressed that funding of testing activities should be secondary to education and outreach. The need for funding of mobility counseling was highlighted, as HUD is no longer designating specific funds for such an activity. In view of suggestions made by members of the Panel, the following proposals are focused by 1) identified gaps in fair housing outreach; 2) DHCD financed entities; and 3) mobility counseling.

#### **A. Persons with Limited English Proficiency (LEP)**

A top priority for DHCD is to broaden fair housing awareness and access in compliance with HUD Title VI requirements pertaining to persons of Limited English Proficiency (LEP) duty to affirmatively further fair housing as discussed above. An important action step, in addition to internal evaluation and external guidance, is to translate important documents and information on DHCD's website. Such documents should include public housing application, lease, and related documents, key resources such as heating assistance, as well as documents describing how to obtain housing assistance.

Additionally, to the extent that a document of DHCD or its programs is not translated but is an important document (i.e., a notice to applicants and residents of their rights and responsibilities), there should at least be a sentence in applicable languages indicating that it is an important document. In addition to supporting DHCD's fair housing policies and mission, offering such translated documents will assist organizations and communities in broadening access for housing consumers.

Although each DHCD division will shoulder the costs for translating vital documents for its programs, the Community Services division has indicated it has set aside \$25,000 of its annual CDBG budget for fair housing related activities which should be used to translate additional materials. DHCD intends to use the funding available for materials that are useful to nonprofit providers and municipalities, such as housing search guides and other fair housing related materials.

After the funding of document translation, a subsequent phase of a DHCD fair housing initiative for LEP persons will be to identify resources and collaborate with agencies such as MCAD as well as counseling and fair housing organizations for a fair housing education and outreach pilot program; the program will target underserved LEP groups in other languages, particularly in Spanish and Portuguese in the underserved southeastern Massachusetts area.

## **B. Housing Consumer Education Centers**

The nine Housing Consumer Education Centers (HCECs) located regionally across Massachusetts are funded through DHCD. The HCECs provide counseling, information, and assistance to housing consumers on a wide variety of issues, including fair housing and housing search assistance. DHCD conducted a survey of the HCECs to determine variability in services provided across the regions. Based on the survey it appears that fair housing assistance is primarily provided in the form of brief counseling and referrals. The surveys revealed that there is variation in the nature and amount of fair housing training provided to HCEC staff to be able to respond to fair housing issues, particularly in the south shore region and on issues of state fair housing law and enforcement. As a result, DHCD organized a fair housing training, conducted by MCAD, for HCEC staff in July 2008. Development of a fair housing and assistance resource guide, available in other languages, has also been discussed as a potential use of available HCEC funds. Additionally, DHCD intends to organize training for the rental assistance staff at the nine regional non-profit agencies that administer vouchers through funding provided by DHCD's Rental Assistance Division.

## **C. Project Sponsors and Developers**

The Fair Housing Advisory Panel suggestion that DCHD provide fair housing training to all entities that it finances on an ongoing basis is an understandable recommendation. However, such a recommendation may not be feasible for implementation given: 1) the large number of entities including project sponsors/owners and developers receiving DHCD funds, as well as the management companies that act on behalf of owners; and 2) limited capacity within the Office of the Chief Counsel to organize and provide a significant number of trainings and materials without additional staffing and resources. However, DHCD can leverage the value and impact of fair housing trainings already provided by other organizations by requiring attendance of its sponsors and developers. DHCD also will seek out opportunities to participate, directly, in forums that provide an opportunity for training on the agency's fair housing policies and programs.

## **D. Municipalities**

Likewise, DHCD does not have the financial resources to initiate a significant fair housing training program for municipalities. However, DHCD has started to, and will continue to, incorporate fair housing topics in the community training workshops that it carries out on a routine basis through its Community Assistance Unit. For example, the Fair Housing Center of Greater Boston is conducting a fair housing session for the Community Planning Training Collaborative (CPTC), sponsored in part by DHCD. CPTC trainings are provided in the fall and spring on a variety of community planning topics, and fair housing was added as a topic in 2007.

In addition, by including participation in fair housing training as an evaluation criterion for discretionary grants, DHCD will encourage municipalities to take advantage of fair housing training opportunities. DHCD also will consider creating a fair housing training certification

program. Municipal certification of attendance at fair housing training events, whether the training is provided by DHCD or another organization, will serve the following purposes: 1) reward communities by enabling the certification to improve their state discretionary funding scoring; and 2) serve as a required remedy and condition for continued receipt of state discretionary funding.

In addition to training opportunities, DHCD will also continue to provide financial and staff support to municipalities to assist in the development and implementation of comprehensive housing plans. Said plans should address the needs of diverse populations including minorities, persons with disabilities, and families with children.

#### **E. Housing Authorities and Administering Agencies of Rental Assistance**

Local housing authorities, as well as agencies that administer state and federal rental assistance, also need to be trained on fair housing laws. Several organizations such as the Fair Housing Center of Greater Boston and the Massachusetts Fair Housing Center have already provided training for housing authorities. DHCD will partner with fair housing organizations by requiring attendance at such training events and by participating, directly, in industry forums that permit DHCD to address fair housing policies and compliance.

#### **Housing Search Assistance: Furthering Mobility to Low Poverty and High Opportunity Areas**

Although a DHCD fair housing education and outreach program as proposed primarily furthers rather than generates education efforts in the state, DHCD can and will take the initiative to ensure housing search assistance is provided to recipients of mobile rental assistance (predominantly extremely low income) to encourage their mobility to areas that are not concentrated poverty and low in opportunity. HUD recognizes housing search assistance aimed at mobility to opportunity areas as an activity that affirmatively furthers fair housing. Notably, HUD's memorandum<sup>36</sup> on the use of CDBG funds for fair housing activities provides: "making all persons aware of the housing options available," and "avoiding undue concentrations of assisted persons in many areas with low and moderate income persons" are appropriate activities.

The U.S. Department of Housing and Urban Development began studying the benefits of housing mobility to lower poverty areas through the Moving to Opportunity (MTO) project in Baltimore, Boston, Chicago, Los Angeles, and New York in the fall of 1994. The MTO project was undertaken in response to studies indicating an increase in the concentration of poverty<sup>37</sup> and the persistence of segregation by race and income in metropolitan areas across the United

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<sup>36</sup> See supra note 35.

<sup>37</sup> Katz, Lawrence F. et al. *Moving to Opportunity in Boston: Early Results of a Randomized Mobility Experiment*, October 8, 2000. Between 1970 and 1990, the percentage of poor persons in metropolitan areas living in census tracts with a poverty rate of 40 percent or more increased from 12% to 18% between 1970 and 1990 (citing Jargowsky, Paul A., "Take the Money and run: Economic Segregation in U.S. Metropolitan Areas," *American Sociological Review*, LXI (1996)).

States, as well as the negative effects of concentrated poverty on children even when controlling for family income and background characteristics.<sup>38</sup> The MTO project was designed to measure the impact of Section 8 voucher residence in non-segregated and non-poverty concentrated areas on outcome measures such as health and safety.<sup>39</sup> Public housing residents were used as a comparison group.

According to the 2000 report, in the Boston MTO project, fewer families elected to use vouchers when restricted to low poverty areas and accompanied by housing counseling (48%) than those who elected to use Section 8 Vouchers without such conditions (62%). However, the report concluded that the low poverty area restriction appeared to be the greater cause of the lower participation rate in the latter group than the housing counseling. The major positive findings of the MTO project in Boston, according to the 2000 report, indicate that households receiving vouchers that moved, in comparison to households in public housing, were less likely to live in higher poverty areas and experienced positive effects such as increased safety, improved health among household heads, and reduced behavioral problems among boys. Voucher holders restricted to low poverty areas that moved were most likely to remain in suburban, low-poverty (poverty rate below 10%) neighborhoods and have fewer specified health and crime related injuries among their children.<sup>40</sup>

In Massachusetts, minority households have also benefited from the use of Section 8 vouchers in lower minority concentrated areas through the Community Choice Voucher Program (CCVP), a federally funded initiative currently administered by the Metropolitan Boston Housing Partnership (MBHP) to assist minority families in Boston that wish to relocate to more diverse communities.<sup>41</sup> MBHP data reveals that by the end of 2004, 17% of the 89 families originally receiving Skinner vouchers leased in qualified areas (neighborhoods with less than 41% minority residents), while 61% (n=70) of the 114 families leased under the CCVP program as of March 3, 2002 were leased in qualifying areas.<sup>42</sup> By the end of the third quarter of the 2006 fiscal year, 72

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<sup>38</sup> Id. (citing Cutler, David M. and Edward L. Glaeser, “Are Ghettos Good or Bad?” *Quarterly Journal of Economics*, CXII (1997)); Brooks-Gunn, Jeanne, Greg J. Duncan, Pamela K. Klebanov, and Naoimi Sealand, “Do Neighborhoods influence Child Adolescent Development?” *American Journal of Sociology*, XCIX (1993)).

<sup>39</sup> Id. Since 1994, the project has been operating in Boston, Baltimore, Chicago, Los Angeles, and New York. The project is comprised of families with children, who are eligible based on their residence in public housing or project-based Section 8 in poverty areas, and designated to either a Control group, a Section 8 Comparison group, or an Experimental group. The Control group did not receive tenant based rental assistance vouchers, while the Comparison group did. The Experimental group received rental vouchers restricted to low poverty areas, and in addition, received housing counseling on finding a home in a new neighborhood.

<sup>40</sup> Id.

<sup>41</sup> As a result of the NAACP v. HUD Consent Decree (June 23, 1989), 100 Section 8 “Skinner Vouchers” were allocated to MBHP and 400 were allocated to the Boston Housing Authority (BHA) for the purpose of assisting low-income minority families with children with locating housing in predominantly white areas. The BHA contracted with Metrolist/Boston Fair Housing Commission to provide housing search and related services to 385 eligible families, through its Housing Choice Counseling Program (HCCP). By the conclusion of the HCCP in 2005, the Commission had assisted 380 families with leasing housing in predominantly White areas, which included 14 Boston neighborhoods and over 40 cities and towns.

<sup>42</sup> Data provided by the Metropolitan Boston Housing Partnership October 18, 2006.

families (including 13 original Skinner voucher participants) were housed in qualifying locations in twenty-eight different neighborhoods.<sup>43</sup>

Thus, minority families participating in MBHP's CCVP program have success in moving to diverse neighborhoods, likely due to the extensive support services MBHP provides. MBHP currently assists its clients by conducting housing search or relocation workshops, providing referrals to support services and assisting in security deposits, holding fees and realtor fees. CCVP also conducts outreach to property owners. However, MBHP has identified several obstacles to achieving further success, including decreased Section 8 payment standards, community support, and transportation. It notes that many families hesitate to move away from their support networks, and attempts to alleviate this problem by providing families with personalized resources on schools, local community centers, and MBTA information. Section 8 payment standards are a formidable obstacle: many families moved to Dorchester and Roxbury in search of more reasonable rents as three and four bedroom apartments were less affordable in the majority of the CCVP communities.

The reality of economic obstacles to mobility should not serve as a deterrent for counseling and housing search assistance. As discussed above, mobility counseling has assisted families in moving to areas of lower poverty and higher opportunity, particularly where families are made aware of services and benefits of the community. Moreover, such cost impediments may be mitigated where DHCD and its quasi public partners are successful in promoting and subsidizing housing in low poverty/high opportunity areas that is: 1) affordable and accessible to very and extremely low income households; 2) affordable and accessible to low and moderate income levels, but as rental housing will widen opportunities for recipients of rental assistance vouchers. Housing search assistance for recipients of rental assistance will serve to make households sufficiently aware of such opportunities. DHCD also will evaluate continually its state voucher programs, as well as the federal voucher program it administers, and take action to ensure that the voucher payment standards are sufficient by market area.

As mentioned above, MBHP provides a current model of mobility counseling provided in Massachusetts, although it is limited to the Metro Boston Area. MBHP is also one of the eight regional agencies that administer Section 8 and state assisted vouchers for DHCD. DHCD surveyed the HCECs of said regional agencies (who report providing housing search assistance) to determine the extent to which HCECs provide adequate information on low poverty and opportunity areas. Although the HCECs varied in the detail provided in their responses, they generally revealed insufficient methods to promote affordable housing in opportunity areas; such methods consisted of providing listings of available housing under various subsidy programs, as well as information on social services and resources, in various areas. It generally did not appear from the responses that significantly more assistance was provided (excepting MBHP) to encourage and identify opportunities for mobility beyond providing listings.

Although the HCECs are limited in the assistance they can provide based upon current funding and staffing, they are affiliated with the regional administering agencies of Section 8 assistance

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<sup>43</sup> Id.

that are regulated by HUD. HUD Section 8 regulations provide that as part of the briefing of families issued mobile vouchers, the issuing housing authority must comply with the following: “if the family is currently living in a high poverty census tract in the PHA’s jurisdiction, the briefing must also explain the advantages of moving to an area that does not have a high concentration of poor families.”<sup>44</sup> Therefore, the regional agencies and the HCECs (to the extent that the regional administering agencies cooperate with the HCECs to provide housing search assistance) should have information identifying the advantages of opportunity areas for consumers.

DHCD also considers that its state rental assistance programs, although not subject to the HUD regulations, should be subject to the same fair housing principle of mitigating concentrations of poverty and promoting opportunity. The public housing relocation lawsuits in Lowell and Fall River also provide the lesson that without information on opportunity areas, families tend to move to poverty concentrated areas where public and other subsidized housing also tends to be concentrated.

To fulfill its duty to affirmatively further fair housing, DHCD will take action to mitigate concentrations of poverty, particularly of minority households, through its rental assistance as well as public housing programs. DHCD will issue a public notice, or otherwise incorporate through amended regulations, the requirement that housing authorities and administering agencies provide the following to households who are issued vouchers and/or required to relocate from public housing:

- a) Current information regarding local, state, and federal housing programs and social services or benefits;
- b) A directory of area organizations that provide counseling, referrals, and/or assistance;
- c) Current information on available, suitable housing affordable to the household, including housing located outside of minority concentrated areas, as well as housing that the housing authority/agency identifies as not located in poverty concentrated areas;
- d) Current information on public transportation, schools, social services, and other opportunities beneficial to the household, including opportunities the housing authority/agency identifies as not located in poverty concentrated areas;
- e) Information on federal and state fair housing laws and the process for filing a housing discrimination complaint with the Massachusetts Commission Against Discrimination (MCAD) or the U.S. Department of Housing and Urban Development (HUD), as well as appropriate referrals for assistance in filing the complaint or pursuing other legal action;
- f) Notice that if the family includes a person with a disability, the family may request a current listing of accessible units from the housing authority/agency and may request that the housing authority/agency make reasonable accommodations for the person with a disability;
- g) Appropriate translation or interpretation services for persons who are unable to read and understand information provided (e.g., due to lack of literacy, limited English proficiency, or disability); and
- h) Other information as required by 24 CFR § 982.301 where tenants are provided Section 8 vouchers.

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<sup>44</sup> 24 C.F.R. § 982.301.



This information need not create an additional program cost to the regional agencies and DHCD will work with the agencies to identify cost effective means of generating this information. In particular, the expansion of the Mass Access Registry to cover all assisted housing is almost complete. In addition to the expansion of the housing covered by the Registry, CHAPA's consultant is enhancing the database to increase the amount of information available to the consumer, as well as the ease of use. When completed next quarter, the Registry will revolutionize the ability of regional agencies to provide mobility counseling.

## **VII. Implementation**

Full implementation of the policies and actions described herein will take significant efforts over several years. To start, DHCD will establish a 24-month workplan. Year 1 (commencing September 2008) will focus on (1) raising awareness of fair housing issues and obligations within the housing and community development industry; (2) finalizing and implementing the fair housing evaluation criteria for discretionary grants; (3) incorporating "community of opportunity" criteria into state housing funding programs; (4) completing the work of the CHAPA Accessibility Committee and incorporating its findings and recommendations into DHCD policy and programs; and (5) development of LEP program responses for all state housing funding.

In the meantime, as it has for the past year and a half, DHCD will continue to respond to and address fair housing compliance issues as they arise, and will leverage all opportunities to increase awareness of, compliance with and support for fair housing in our Commonwealth.

## **VIII. Conclusion**

The above discussion proposes fair housing actions and initiatives that transverse all divisions of DHCD. Moreover, their full effectiveness requires cooperation and collaboration outside of DHCD, including from other state housing funding agencies, housing authorities, and fair housing organizations. The private actors – nonprofit and for-profit alike -- in the housing and community development industry also must be committed partners. Such efforts will yield significant benefits for the people of the Commonwealth and will serve as a national example of progressive fair housing and affordable housing policies.

## **IX. Appendix: Key Supporting Fair Housing Case Law**

### **Duty to Affirmatively Further Fair Housing:**

*Langlois v. Abington Housing Authority*<sup>45</sup>--in this 2002 case, the Massachusetts federal district court found that the local housing authorities' failure to consider the discriminatory effect of its application procedures and local residency selection preferences on minorities violated its duty to affirmatively further fair housing. The court's decision includes a clear and instructive discussion of the obligation to further fair housing and the legal standards relevant to discerning whether the obligation has been met.

*NAACP v. Secretary of Housing and Urban Development*<sup>46</sup>-- the duty to affirmatively further fair housing was enforced by the federal First Circuit Court of Appeals in a class action against HUD. The Court found in 1987 that HUD failed to affirmatively further fair housing by failing to ensure that federal funds for the city of Boston were used in a non-discriminatory manner.

*Thompson v. HUD*<sup>47</sup>--a federal district court in Maryland held that HUD violated the Fair Housing Act by failing to take adequate action to disestablish the vestiges of past discrimination in city's public housing policies. The court found that HUD had failed to affirmatively further fair housing through regionalizing public housing outside poor urban areas. See also, *e.g.*, *Shannon v. HUD*; *United States v. Yonkers Board of Education*, 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *Young v. Pierce*, 628 F. Supp. 1037, 1046 (E.D.Tex., 1985).

### **Project Siting:**

*Shannon v. HUD*<sup>48</sup>—the federal Third Circuit Court of Appeals held that the duty to affirmatively further fair housing under the Fair Housing Act requires HUD to consider the "same institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts"). See also *Young v. Pierce*, 628 F. Supp. 1037, 1046 (E.D.Tex., 1985); *Garrett v. City of Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974); *Blackshear Residents Org. v. Housing Auth.. of City of Austin*, 347 F. Supp. 1138, 1145-49 (W.D. Tex. 1972).

*United States v. Yonkers Board of Education*<sup>49</sup>, --the federal Second Circuit Court of Appeals held that the city's practice of confining subsidized housing projects to areas of high minority concentration was inferably intentional racial segregation and held to have violated the Fair

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<sup>45</sup> 234 F. Supp. 2d 33 (D. Mass. 2002).

<sup>46</sup> 817 F.2d 149 (1st Cir.1987).

<sup>47</sup> 348 F. Supp. 2d 398 (D. Md. 2005).

<sup>48</sup> 436 F.2d 809 (3d Cir. 1970).

<sup>49</sup> 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

Housing Act and the equal protection clause). See also *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973).

Exclusionary Zoning:

*Huntington Branch, NAACP v. Town of Huntington*<sup>50</sup>--the federal Second Circuit Court of Appeals held that municipal justifications for restricting multi-family zoning to a minority urban renewal area based on concerns such as traffic and safety were not sufficient bona fide and legitimate justifications, nor did the municipality establish that less discriminatory alternatives were not available to achieve its goals.

*Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp.*<sup>51</sup>--the Supreme Court of New Jersey held, based on the New Jersey Constitution:

- 1) that a developing municipality may not, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for various categories of persons who need and want it;
- 2) that ordinance permitting only single-family detached dwellings and which was so restrictive in its minimum lot area, lot frontage and building size requirements as to preclude single-family housing for even moderate income families was contrary to the general welfare;
- 3) that release from consequences of tax system by limiting permissible types of housing to those having the fewest school children or those providing sufficient value to pay their own way could not be accomplished by restricting types of housing through the zoning process; and
- 4) that ecological or environmental reasons were not a sufficient excuse for limiting housing to single-family dwellings on large lots.

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<sup>50</sup> 844 F.2d 926 (2d Cir.) aff'd per curiam, 488 U.S. 15 (1988).

<sup>51</sup> 67 N.J. 151, 336 A.2d 713 (1975).