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August 28, 2015

A. Robert Kucab
Executive Director
North Carolina Housing Finance Agency
PO Box 28066
Raleigh, NC 27611-8066

Certified Mail, Return Receipt Requested
7015 0640 0007 8605 7345

Re: 2016 Qualified Action Plan criteria that discriminate against interstate commerce

Dear Mr. Kucab:

Our firm represents a rental property developer that has been a Principal of an Applicant for Federal Low-Income Housing Tax Credits under prior Qualified Action Plans ("QAP") promulgated by your agency on behalf of the North Carolina Federal Tax Reform Allocation Committee. Our client is domiciled outside North Carolina.

Since 2012, the selection criteria in your agency's QAPs governing the competition for these tax credits have included three that reflect an improper purpose to favor North Carolina-based businesses. In the 2015 QAP, these provisions are Sections IV.D.1(a) and (d) and IV.F.2.

The first of these three provisions is an absolute requirement that a Principal on an Applicant's project team "have successfully developed, operated and maintained in compliance one (1) North Carolina low-income tax credit project." By contrast, the 2011 QAP required a Principal to have so participated in either "one (1) North Carolina low-income housing tax credit project or six (6) separate low-income housing tax credit projects totaling in excess of 200 units." The second provision awards five points to an Applicant whose Principal either has been a Principal of a 9% housing low-income tax credit grantee in North Carolina seven times in NCHFA's previous seven annual grant cycles or "has her/his/its principal office in North Carolina." The third provision awards two points "if the general contractor listed in the full application has its principal office in North Carolina."

These provisions in the annual QAPs violate the dormant or negative commerce clause jurisprudence of the United States Supreme Court under the United States Constitution, to the injury of my client. This doctrine prohibits "economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). Discriminatory state tax schemes are frequently invalidated in dormant commerce clause decisions. *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 287 (2011) (listing examples). This includes regulation providing for the

discriminatory allocation of tax credits and exemptions. *W. Lynn Creamery v. Healy*, 512 U.S. 186, 211 (1994) (Scalia, J, concurring in the judgment) (listing examples); *see also, e.g., New Energy Co.*, 486 U.S. at 280 (invalidating ethanol tax credit allowed only to in-state producers).

Facially discriminatory regulation receives the "strictest scrutiny," and "a virtually per se rule of invalidity has been erected" where "simple economic protectionism" is the object. *New Energy Co.*, 486 U.S. at 275, 278-79 (internal quotations and citations omitted).

The granting of point credit for Principals and general contractors with North Carolina principal offices is a facially and blatantly discriminatory policy without any arguable justification. The alternative point-credit criterion predicated on seven years of continuous, prior participation in North Carolina housing tax-credit projects, although ostensibly related to experience, is so focused on North Carolina-based experience as to practically preclude competitors based outside North Carolina, even if they have extensive, national-scope, housing tax-credit project experience. This regulation also is discriminatory on its face, and although it may appear to have a justification, we believe that its design is predominantly protectionist and that relevant experience could be assured by other means that do not discriminate against interstate commerce.

The flat requirement of participation in at least one prior North Carolina housing tax-credit project also is suspect. As it is repeated in successive QAPs, it becomes a perpetual barrier to entry for any non-North Carolina developer, regardless of its relevant experience. Such a developer can enter the North Carolina market only by partnering with an incumbent, North Carolina Principal. The protectionist purpose of this requirement becomes especially clear by comparing the corresponding provisions in the 2009-11 QAPs, when substantial, out-of-state experience substituted for the experience of a single prior North Carolina project.

Our client believes that the combined effect of these provisions has been to close North Carolina housing tax-credit project development to out-of-state developers. For the purpose of testing this hypothesis, we request the following public records, pursuant to N.C. Gen. Stat. § 132-1, et seq.:

1. Any listing, summary or compilation of projects granted tax credits by NCHFA in any year during 2007-15 in which a Principal (manager or member of the owner entity) had its principal office outside North Carolina.

2. With respect to those projects identified in any document responsive to the foregoing request, any document (i.e. the least voluminous responsive version) identifying all Principals in each such project and their respective principal office locations.

3. Any NCHFA explanation, summary or analysis of any of the QAP provisions addressed above or revisions or prospective revisions thereto, including the purpose or effect thereof.

4. Any dormant commerce clause analysis prepared by or furnished to NCHFA with respect to any QAP provision, proposed or adopted.

I enclose for your consideration a 2013 Montana trial court opinion invalidating preferences for in-state businesses in that State's QAP. The purpose of this correspondence is to give notice in advance of your agency's adoption of the 2016 QAP that my client intends to litigate the validity of such provisions if they recur in substance or form. We hope that by giving this notice, NCHFA will have an opportunity to conform the QAP to the requirements of law and that the cost and burden of litigation can be avoided.

We would appreciate notification whether the 2016 QAP will omit these provisions. Also, we would be happy to communicate further on this subject if that would be beneficial in any way.

Very truly yours,

ERWIN, BISHOP, CAPITANO & MOSS, P.A.

J. Daniel Bishop

Enclosure

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

FT. HARRISON VETERANS RESIDENCE, Limited Partnership, Petitioner, v. MONTANA BOARD OF HOUSING, Respondent, CENTER STREET LP, SWEET GRASS APARTMENTS LP, SOROPTIMIST VILLAGE LP, FARMHOUSE PARTNERS-HAGGERTY LP, and PARKVIEW VILLAGE LLP, Intervenors.	Cause No.: DDV-2012-356 **ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

Respondent Montana Board of Housing (MBOH) has moved to dismiss, or for summary judgment on, Petitioner Fort Harrison Veterans Residence's (FHVR) petition and supplemental petition. FHVR has also moved for summary judgment. Gregory G. Gould represents MBOH. Michael Green and D. Wiley Barker represent FHVR. Intervenors Center Street LP, Sweet Grass Apartments LP, Soroptimist Village LP, Farmhouse Partners-Haggerty LP, and Parkview Village LLP

(Intervenors) support MBOH's motions and oppose FHVR's motion. Oliver Goe represents Intervenors.

The parties have briefed the motions and the Court heard oral argument on February 6, 2013. The motions are ripe for decision.

For the following reasons, the Court concludes that FHVR's motion for summary judgment should be granted in part as follows.

FACTUAL AND PROCEDURAL BACKGROUND

The federal government has a program by which developers of housing for low-income individuals may receive tax credits to assist in obtaining funding for these developments. 26 U.S.C. § 42 (2011). By receiving these tax credits, developers can more easily obtain funding for their projects and the supply of housing for low-income persons will be increased.

MBOH is the designated Montana state agency for the allocation of these low-income housing tax credits (LIHTCs) to developers. (Brensdal[1] 2nd Aff., Ex. V (Exec. Or. No. 2-87 (May 1, 1987)) (Jan. 24, 2013).) Each year the MBOH develops a qualified allocation plan (QAP) specifying the application process and criteria to be used in the allocation of these tax credits. For example, for 2013 MBOH has $2.59 million in tax credits to be allocated. Because the tax credits are valid for ten years, this represents $25.9 million in financial assistance towards developing housing for low-income Montanans over the next ten years.

FHVR applied for tax credits under MBOH's 2012 QAP, but was not successful in its application. FHVR then brought the present action to challenge MBOH's 2012 QAP on various grounds.

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[1] Bruce Brensdal is the executive director of MBOH and has been since 2000. He reviews staff scoring of the applications.

After FHVR filed this lawsuit, MBOH began the administrative process of developing the 2013 QAP. In response to FHVR's lawsuit, MBOH built into its 2013 QAP a set-aside provision that, if FHVR should be successful in its lawsuit and be deemed to have been wrongly denied LIHTCs for 2012, FHVR could be awarded LIHTCs from MBOH's 2013 allocation. MBOH suggests such a set-aside would provide the remedy for FHVR without having to undo the 2012 allocation.

MBOH finalized and the governor approved the 2013 QAP, setting a deadline of January 18, 2013 for 2013 LIHTCs applications. FHVR did not apply for 2013 tax credits. Instead, FHVR filed a supplemental petition alleging that the 2013 QAP was also defective, indeed so much so that FHVR could not file a valid application under it.

MBOH initially moved to dismiss FHVR's petition for lack of jurisdiction. Subsequently, the Court converted this motion to dismiss into a motion for summary judgment. FHVR has now moved for summary judgment as well. FHVR also moved for a preliminary injunction, seeking to prevent MBOH from allocating 2013 LIHTCs under its allegedly defective 2013 QAP, until the Court can rule on the underlying merits of FHVR's petition and supplemental petition. The Court partially granted FHVR's motion, preliminarily enjoining MBOH from allocating all of the 2013 LIHTCs and requiring MBOH to retain enough of these tax credits to be allocated to FHVR should FHVR prevail on the merits of its petition and supplemental petition.

Additional facts are recited in the following discussions.

STANDARD OF REVIEW

The standards for deciding a motion for summary judgment are well established. Mont. R. Civ. P. 56(c)(3), amended by the Montana Supreme Court

effective October 1, 2011, provides: "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

> Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. Once the moving party has met its burden, the non-moving party must present substantial evidence essential to one or more elements of the case to raise a genuine issue of material fact. Conclusory statements are insufficient to raise a genuine issue of material fact.

Styren Farms, Inc. v. Roos, 2011 MT 299, ¶ 10, 363 Mont. 41, 265 P.3d 1230 (citations omitted).

ANALYSIS

A. Mootness

MBOH initially moved to dismiss FHVR's petition based on mootness. MBOH argued that because all the 2012 LIHTCs had already been allocated to the successful applicants with whom MBOH had entered contracts, there was no way the Court could render effective relief to FHVR and, therefore, FHVR's petition was moot, citing *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, 364 Mont. 390, 276 P.3d 867.

This argument has itself been mooted by MBOH's setting aside tax credits from the 2013 pool of LIHTCs to award to FHVR should it ultimately prevail on its petition. The Court does, therefore, have an effective remedy to award FHVR from this set-aside of the 2013 LIHTCs.

MBOH's motion to dismiss based on mootness should therefore be denied.

i. MBOH shall properly score and apply the energy and clean factor.

ii. MBOH shall disregard the Montana presence factor as violative of the dormant commerce clause.

iii. MBOH shall otherwise re-score FHVR's application in keeping with the discussion herein. If as a result of this re-scoring, MBOH concludes FHVR should have received LIHTCs for its 2012 application, MBOH may award FHVR such tax credits from its 2013 allotment.

2. MBOH's motion for summary judgment is DENIED.

DATED this 24 day of April 2013.

JAMES P. REYNOLDS
District Court Judge

c: Michael Green/D. Wiley Barker
Gregory G. Gould/Candace Payne
Oliver H. Goe/G. Andrew Adamek

JPR/d

MBOH, on the other hand, argues that if all the applications had been correctly scored, assuming *arguendo* that there were errors, FHVR's application would have still ranked near the bottom of the 2012 applications and FHVR still would not have been awarded LIHTCs. According to Executive Director Brensdal, FHVR would have ranked, after a corrected scoring, nine out of eleven competing applicants. (Brensdal Aff., ¶ 35 (Oct. 29, 2012).)

These conflicting scoring outcomes raise genuine issues of material fact beyond the scope of this Court's authority or competence to resolve on summary judgment motions. The Court will, therefore, reverse MBOH's denial of LIHTCs to FHVR and remand this matter to MBOH for reconsideration of FHVR's application, pursuant to the discussion herein.

To be clear, the Court directs that MBOH review FHVR's and the other applications under the standards set forth herein. The goal of this review is not to deprive the applicants previously awarded LIHTCs of their awards. It is to determine whether, under the revised scoring, FHVR should have received LIHTCs for 2012. If so, such an award may be made from the set-aside under the 2013 QAP.

IT IS HEREBY ORDERED that:

1. FHVR's motion for summary judgment is GRANTED in part as follows:

   a. MBOH's allocation of 2012 LIHTCs is VACATED as to the denial of FHVR's application.

   b. This matter is REMANDED to MBOH for re-scoring FHVR's application as follows:

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LIHTCs. With the corrections conceded by MBOH, Parkview's score after re-scoring would be the same as FHVR's original score. (Brensdal Aff., ¶ 34.)

E. Remedy

As noted above, MBOH concedes there were errors in its scoring of the applications. Specifically, MBOH concedes that Staff's decision to award all the applicants the full points under the energy and green factor was in error. MBOH also concedes that the Montana presence factor was confusing and poorly written. MBOH likewise concedes that it mis-scored another application, awarding it more points than it should have received.

In addition, the Court concludes that the Montana presence factor is both confusing and in violation of the dormant commerce clause. The Court further concludes there was substantial confusion and uncertainty with regard to the project location and special needs targeting factors.

All told these factors — energy and green (10 points), project location (3 points), Montana presence (4 points), and targeted population (10 points) — account for 27 points out of a total 108 points the applications could have been awarded, a substantial percentage of the total, particularly when the gap between the highest score and FHVR was only six points. The cumulative effect of these errors leads the Court to conclude that MBOH's decision to not award FHVR any LIHTCs should be reversed.

The parties disagree strenuously over how these factors, if correctly scored, would have affected FHVR's application vis-à-vis the other applications. FHVR asserts that had its application been correctly scored, it would have been one of the top scoring applications and it would have received the LIHTCs in 2012.

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FHVR argues that neither of these requirements is found within the QAP and that the QAP is silent on whether specific units must be identified or what the contents of the service agreement must be.

In response, MBOH argues that FHVR only targeted 29 of its 40 units and did not commit to targeting the remaining 11 units to disabled or any other specific category. MBOH claims that to receive 100 percent of the 10 points available under this factor, an applicant would have to target 100 percent of its units to one or more of the special needs group. Because FHVR only targeted 72.5 percent (29 of 40) units, it was only entitled to 70 percent of the available points or 7, which is what it received. MBOH states that FHVR received points for targeting 29 of its units as family or large family units. FHVR goes on to state that six units would be made fully accessible and that at least 40 percent of the units would house disabled veterans. MBOH argues that it was not possible to determine if the accessible and disabled units would be different from those targeted as family or large family.

The Court concludes that this factor of the QAP is not clearly expressed. It is stated in terms of awarding points for percentages, but apparently requires the applicant to identify individual units. It is not clear whether a unit may be counted in more than one category. It may be that this is a circumstance where an inquiry by Staff to clarify the application would have been appropriate. No record exists of any such inquiry being made.

7. Other Errors. MBOH concedes that it mis-scored one of the other applications, Parkview Apartments, awarding it 10 points instead of 8 on the targeted needs factor. (Brensdal Aff., ¶ 21.) Parkview Apartments received five more points than FHVR on the original Staff scoring; MBOH awarded Parkview its requested

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explicit in-state preference is what the dormant commerce clause is intended to prevent.

FHVR's objection to the Montana presence factor as violative of the dormant commerce clause should be upheld.

6. Special Needs Targeting. FHVR objects that its application was not scored correctly on the QAP's factor concerned with targeting special housing needs:

> A project will receive one (1) point for each 10% of the units targeting the following identified needs:
>
> - Units targeted specifically for individuals with children (Family units 2 bedrooms).
> - Large family units (3 and 4 bedroom).
> - Handicapped units exceeding minimum fair housing requirements.
> - Units targeted specifically for elderly.
> - Units targeted specifically [for] persons of disability (must include written agreements with serve provider or advocate for the target group.)

(2012 QAP, at 23.)

FHVR argues its application was mis-scored on this factor in a couple of different ways. First, FHVR asserts that it was wrongly penalized by Staff for identifying the percentage of units allocated to each group, instead of stating the number of units allocated to each group. FHVR notes that the QAP factor itself is expressed in terms of percentages. FHVR says that Staff improperly discounted units that might be targeted at more than one group. Bair testified in her deposition that double counting units in this manner was not permitted. (Bair depo., at 83-84.)

Second, FHVR says it was penalized because the services agreement it presented did not require the service provider to provide services to disabled residents.

CSX Transp., Inc. v. Ala. Dept. of Revenue, 562 U.S. __, 131 S. Ct. 1101, 1109 (2011).

Based on these standards, the Court concludes that MBOH's QAP's demonstration of Montana presence factor runs afoul of the dormant commerce clause. The factor reads as follows: "In order to assist in providing a better quality product consistent with the purposes of the MBOH and federal law, a development will be awarded points if a member of its development team is Montana based." (2012 QAP, at 23.)

Staff explained their application of this factor to include consideration of whether a business was located, organized or registered in Montana. In her affidavit, Bair, manager of the program overseeing the awarding of the LIHTCs, explained her interpretation of the Montana presence factor:

> This provision is interpreted and applied by the Board staff in scoring to mean that the listed team members have a physical presence of some kind in the state of Montana, such as owning an affordable housing project in Montana, being licensed in Montana (e.g., a licensed contractor), or having an office in Montana. . . . This provision has not been interpreted or applied by the Board to require that applicants, developers or team members be Montana businesses, entities or residents.

(Bair Aff., ¶ 18 (July 27, 2012).)

The Court perceives an inconsistency within this description of the Montana presence factor. On the one hand, Bair says points are awarded if an applicant has a physical presence within the state and on the other hand, she states that the factor does not require applicants be Montana businesses or residents.

MBOH can certainly inquire as to relevant experience of an applicant. The Montana presence factor, however, goes too far to reward applicants who have a physical presence, being licensed or having an office in Montana. This type of

people associated with a given applicant's project. It is not explained where the fourth point is to come from. It is also not clearly explained that only one point may be awarded for each of the bulleted groups. FHVR notes that it did identify four people with Montana connections under one of the bulleted groups. Yet it did not receive the four points available for this factor.

MBOH concedes that this factor and its criteria were poorly explained. Staff departed from the QAP and applied its own arbitrary interpretation to these criteria. MBOH was not advised that Staff had used these modified criteria. FHVR's objection that MBOH acted arbitrarily and capriciously contrary to the terms of the QAP on Montana presence should be granted.

FHVR also argues that the QAP violates the dormant commerce clause by requiring a Montana presence. FHVR asserts the use of tax credits to discriminate against any applicant because it is based outside of Montana is unconstitutional, citing *Maryland v. Louisiana*, 451 U.S. 725 (1981).

The U.S. Supreme Court recently discussed its dormant commerce clause jurisprudence:

> Similarly, our dormant Commerce Clause cases have often held that tax exemptions given to local businesses discriminate against interstate actors. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-269, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984) (holding that a state excise tax on alcohol "discriminate[d]" against interstate businesses because of exemptions granted to local producers); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 588-589, 117 S. Ct. 1590, 137 L. Ed. 2d 852 (1997) (invalidating as "discriminatory" a state property tax that exempted organizations operating for the benefit of residents, but not organizations aimed at nonresidents). And even our decision in *ACF Industries*, on which the Eleventh Circuit relied in dismissing CSX's suit, made clear that tax exemptions "could be a variant of tax discrimination." 510 U.S., at 343, 114 S.Ct. 843, 127 L.Ed. 2d 165.

Staff awarded only two points to FHVR on this factor. Staff made this award because of the relative distance of FHVR's project from grocery stores and schools and the lack of readily identifiable transportation in this area. "Shopping" encompasses grocery shopping. "Schools" and "transportation" are expressly listed within this factor. The overall concept of services being available to tenants encompasses the analysis applied by Staff and MBOH.

Nevertheless, FHVR pointed out in Bair's deposition that another project received 3 points on this factor despite being also relatively isolated from schools and shopping. (See Petr.'s Submission Additional materials, Ex. A, Bair depo., at 94:19 – 98:22 (Sept. 21, 2013).) Obviously, it is important that MBOH apply the standards equally to all applicants. It is not clear from the record if Staff applied this factor equally.

5. Demonstration of Montana Presence. FHVR challenges this factor on two distinct grounds. FHVR asserts that it was penalized, i.e., not awarded the full allotment of points available under the demonstration of Montana presence factor. Although FHVR identified four persons with Montana connections involved in its project, it received only two of the four possible points. Staff determined that only certain kinds of connections could justify awarding these points. Staff's determination on this point is not supported by the QAP criteria. Staff conceded these criteria were confusing and written poorly. (Bair depo., at 74:15-16, 77:24-78:1.) MBOH agrees that it is not clear how the points would be awarded: "This QAP provision is not clear with respect to how an applicant earns the fourth of four points. (Respt.'s Combined Reply Br. S.J. Merits, at 15.)

The QAP allows the awarding of four total points under this factor. According to Staff, one point is to be awarded for each of three bulleted groups of

nullify these criteria because several applicants missed those points.. Instead of awarding the points as set forth in the QAP, Staff decided that all applicants should have received better scores, but did not interpret the energy and green criteria the way Staff thought it should have been interpreted. As a result, Staff awarded all applicants the maximum total points for these criteria, in effect negating these as selection criteria contrary to the terms of the QAP.

Staff did not inform MBOH of Staff's decision to treat these criteria in this manner. MBOH therefore did not take actions to correct Staff's decision on these criteria. MBOH concedes Staff's decision to award all ten points under this criterion to all applicants was contrary to the QAP:

> FHVR has pointed out correctly that Board staff unilaterally negated the Energy and Green criteria by awarding all applicants the full 10 points regardless of the actual scores earned by their respective applications. The Board agrees that . . . staff was not authorized to disregard the actual scores under the QAP criteria.

(Respt.'s Combined Reply Br. S.J. Merits, at 9.)

Staff's and, therefore, MBOH's decision on this point was arbitrary and capricious and not in keeping with the terms of the QAP.

4. Project Location. FHVR also asserts that Staff added additional criteria into the QAP for project location. According to Staff, FHVR was penalized, i.e., did not receive the full allotment of points for project location, because of its distance to grocery stores and entertainment and the types of road in its vicinity.

The QAP criteria on project location provides "Developments located in a given area where amenities and/or services will be available to tenants (schools, medical services, shopping, transportation). (0-3 points)" (2012 QAP, at 20.)

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2. Staff Contact with Applicants. FHVR claims that Staff solicited additional information from some, but not all applicants, after the applications had been submitted. Staff contacted some applicants based on its own discretion to get "clarifications" if the applicants submitted incomplete applications. (Petr.'s Submission Additional materials, Ex. A, Bair depo., at 29-31 (Sept. 21, 2012).) FHVR argues that not all applicants were afforded this same opportunity to submit supplemental materials and that Staff contacts with the applicants were not properly recorded. FHVR asserts it was not contacted by Staff in this regard.

The process by which Staff contacted some applicants for supplemental information is supported by the QAP:

> MBOH, or its staff, may query an applicant or other persons regarding any concerns related to tax credit application, the management, construction or operation. Questionable or illegal housing practices or management, insufficient or inadequate response by the applicant, general partners, or management company as a whole or in part may be grounds for non-consideration.

(Respt.'s Br. Supp. Mot. Dismiss Pursuant Mont. R. Civ. P. 123(b), Ex. C., 2012 QAP, at 26 (June 21, 2012).)

Further, while FHVR claims it was not contacted by MBOH or its Staff, the record shows that FHVR did have communication with Staff outside the routine application process. (Bair Aff., ¶¶ 8, 9 (July 27, 2012); Petr.'s Submission Additional materials, Ex. A, Bair depo. (Sept. 21, 2012).) FHVR's objection based on Staff contact should be denied.

3. Energy and Green Factor. Staff effectively removed one of the factors, the energy and green criteria, from consideration by awarding all applicants the full ten points regardless of the merits of their applications. Staff decided to

approved by the governor. MBOH and its Staff applies the QAP criteria to determine which applicants receive LIHTCs.

In this connection, the Court concludes that MBOH and its Staff acted arbitrarily in the application of some of the criteria. Indeed, MBOH concedes as much with respect to certain of these criteria.

1. Influence of Staff Scoring on MBOH's Allocation Decision.

FHVR argues that Staff's scoring of the applications, if not technically binding, was heavily persuasive on MBOH's allocation decision. MBOH argues that it, and not its Staff, makes the decision on the allocation of LIHTCs among the applications.

While that may be true, it is also true that Staff scoring of the applications played a vital role in MBOH's decision. MBOH members were not provided the complete applications; they are provided only with Staff scoring summaries and a brief financial summary of each application. For 2012, MBOH awarded LIHTCs only to those applicants who received the highest scores from Staff. Mary Bair is the manager of the program overseeing the awarding of the LIHTCs and performed the scoring of the applications and made recommendations to MBOH on the award of these tax credits. As Bair testified, for 2012[2] MBOH did not go outside the scoring to award LIHTCs[3].

The Court concludes that the errors in Staff scoring as discussed below significantly affected MBOH's decision in the allocation of the 2012 LIHTCs.

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[2] According to Bair, MBOH has awarded LIHTCs contrary to Staff scoring recommendations only 3 or 4 times over the past ten years. (Bair depo., at 65:16-18.)

[3] Had MBOH considered other factors, it was required to provide a written explanation of its reasons for doing so. QAP, at 25 (citing section 42(m)(1)(A)(iv) of the Internal Revenue Code). No such written explanation was generated.

> decisions, especially where it implicates substantial agency expertise.
>
> This standard of review is different than the standard we apply in a contested case under the Montana Administrative Procedures Act, §§ 2-4-701 to -711, MCA.

Winchell v. Mont. Dept. of Nat. Resources & Conserv., 1999 MT 11, ¶¶ 11-12, 293 Mont. 89, 972 P.2d 1132 (citations omitted).

> We review an agency decision not classified as a contested case under the Montana Administrative Procedure Act to determine whether the decision was "arbitrary, capricious, unlawful, or not supported by substantial evidence." In reviewing an agency decision to determine if it survives the arbitrary and capricious standard, we consider whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." While our review of agency decisions is generally narrow, we will not "automatically defer to the agency 'without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision.'"

Clark Fork Coalition v. Mont. Dept. of Envtl. Quality, 2008 MT 407, ¶ 21, 347 Mont. 197, 197 P.3d 482 (citations omitted).

MBOH concedes that this Court has jurisdiction under the foregoing standards to review its decision allocating LIHTCs. MBOH's motion to dismiss for lack of jurisdiction based on lack of judicial review should also be denied.

C. Did MBOH Act Arbitrarily, Capriciously or Unlawfully?

Applying the foregoing standards to the facts at hand, the Court must determine whether MBOH acted arbitrarily, capriciously or unlawfully. FHVR points to several examples, which it alleges are such arbitrary, capricious, or unlawful acts.

It must be kept in mind that the QAP sets forth the criteria for selection of applicants to which LIHTCs are to be awarded. This is a requirement of federal law governing the LIHTC program. MBOH develops the QAP, which is then

situation in *Dupuis* is more similar to a contested hearing than the situation here. However, the Supreme Court, upon review, determined that there was no contested case for purposes of MAPA review as there was no statute granting such a contested case hearing.

There is likewise no property interest in an award of LIHTCs that would require a due process hearing. *Barrington Cove L.P. v. R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 5-6 (1st Cir. 2001); *DeHarder Inv. Corp. v. Ind. Hous. Fin. Auth.*, 909 F. Supp. 606, 613-14 (S.D. Ind. 1995). The process by which MBOH awards LIHTCs pursuant to its QAP does not qualify as a contested hearing as between FHVR and MBOH or between FHVR and another applicant.

Nor is the decision challenged by FHVR a rule-making procedure for purposes of review under MAPA. Mont. Code Ann. § 2-4-102(11)(a). The allocation of LIHTCs is not a rule-making process. It is a decision based upon rules already made.

This conclusion does not, however, deprive the Court of jurisdiction to review MBOH's process and decision in this matter. This Court has jurisdiction to review the proceedings and decisions of administrative agency to determine if the agency has stayed within statutory bounds and not acted arbitrarily, capriciously or unlawfully. *Johansen v. Mont. Dept. of Nat. Resources & Conserv.*, 1998 MT 51, 26, 288 Mont. 39, 955 P.2d 653.

> Upon a de novo review of a proceeding in a case that is not "contested," our standard of review is limited to whether the agency erred in law or whether its decision is wholly unsupported by the evidence or clearly arbitrary or capricious. In such a proceeding, we only inquire insofar as to ascertain if the agency has stayed within its statutory bounds and has not acted arbitrarily, capriciously, or unlawfully. We afford great deference to agency

B. Lack of Judicial Review

MBOH also moved to dismiss FHVR's petition on the basis that the Court has no jurisdiction under the Montana Administrative Procedure Act (MAPA) to review its decision to allocate the LIHTCs. MBOH argues that its decision to allocate the LIHTCs is neither a rule-making procedure nor a contested case proceeding of which the Court has jurisdiction to review under MAPA.

The Court agrees with MBOH that its decision to award the LIHTCs is neither a rule-making procedure nor is it a contested case proceeding.

There is no statute requiring LIHTCs to be made after an opportunity for a hearing. Only the legislature can provide for judicial review of contested case agency decisions under MAPA and it has not done so with respect to the agency decision at issue herein. *Nye v. Dept. of Livestock*, 196 Mont. 222, 639 P.2d 498 (1982). "When the Legislature intends to provide contested case proceedings it enacts a statute stating that there is a right to a hearing." *Roos v. Bd. of Trustees*, 2004 MT 48, ¶ 10, 320 Mont. 128, 86 P.3d 39.

In *Dupuis v. Bd. of Trustees, Ronan Sch. Dist. No. 30,* 2006 MT 3, 330 Mont. 232, 128 P.3d 1010, a school board heard a dispute over whether the local schools should continue to use Native American symbols and mascots in the middle school gym. When the Board, after a hearing, declined to order the removal of the objectionable materials, the protestors appealed to the County Superintendent of Schools and then to the State Superintendent. The protestors relied on an administrative rule identical to the one FHVR relies on in the present case: "The administrative rules define a 'contested case' as 'any proceeding in which a determination of legal rights, duties or privileges of a party is required by law to be made after an opportunity for hearing.' Rule 10.6.102(1), ARM." *Id.*, ¶ 10. The