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**HOUSE COMMITTEE ON URBAN AFFAIRS  
TEXAS HOUSE OF REPRESENTATIVES  
INTERIM REPORT 2008**

**A REPORT TO THE  
HOUSE OF REPRESENTATIVES  
81ST TEXAS LEGISLATURE**

**Kevin Bailey  
CHAIRMAN**

**COMMITTEE CLERK  
Jesse Sifuentes**

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Committee On Urban Affairs

January 13, 2009

Chairman Kevin Bailey

P.O. Box 2910  
Austin, Texas 78768-2910

The Honorable Tom Craddick  
Speaker, Texas House of Representatives  
Members of the Texas House of Representatives  
Texas State Capitol, Rm. 2W.13  
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on of the Eightieth Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Eighty-first Legislature.

Respectfully submitted,

Handwritten signature of Kevin Bailey in cursive script.

Kevin Bailey, Chair

Handwritten signature of Jim Murphy in cursive script.

Jim Murphy Vice-Chair

Handwritten signature of Trey Martinez-Fischer in cursive script.

Trey Martinez-Fischer

Handwritten signature of Ellen Cohen in cursive script.

Ellen Cohen

Handwritten signature of Jose Menendez in cursive script.

Jose Menendez

Handwritten signature of Barbara Mallory Caraway in cursive script.

Barbara Mallory Caraway

Thomas Latham

Jim Murphy  
Vice-Chairman

Members: [Jose Menendez, Trey Martinez-Fischer, Barbara Mallory Caraway, Ellen Cohen, Thomas Latham]

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**CHARGE**

**Assess the current senior housing market and available options for affordable senior housing.**

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## **BACKGROUND AND OVERVIEW**

Texas has a large and steadily growing population of elderly low fixed income citizens who are in need of safe, quality affordable housing. There is currently no specific "senior affordable housing" program within the state's housing agencies although there are senior multifamily developments that do receive funding allocations in competition with the general Low Income Housing Tax Credit applications.

Eligibility for low income housing through state administered senior housing developments is established by federal guidelines (both from the US Treasury and US Department of Housing and Urban Development) and is based primarily on age 62 and gross income, not to exceed 60% of the Average Mean Income (AMI) for a particular region within the state.

In addition to the multifamily affordable rental housing developments for seniors, the Texas Department of Housing and Community Affairs (TDHCA) as well as the Office of Rural Community Affairs (ORCA) administer programs for single family housing assistance that primarily provide renovations or improvements to existing homes owned by qualifying low income senior citizens. These programs provide assistance ranging from energy efficiency and weatherization to full scale renovation and accessibility enhancements that support continued independent living opportunities. These programs are typically administered through local government entities primarily funded through federal sources including Community Development Block Grant, HOME or US Department of Agriculture assistance programs.

With the exceptions noted above, the state currently has no overall plan or initiative that provides special or unique programs for low income senior citizens. This charge focuses on the current programs as well as the methodology necessary to ensure that the significant increases in the senior citizen population resulting from the coming of age "Baby Boomers" is an integral part in the state's initiatives to meet these demands for quality affordable housing throughout Texas.

The Urban Affairs' subcommittee on Housing charged TDHCA, TSAHC and ORCA to host a roundtable workgroup with interested stakeholders to provide recommendations to address the issue of low income housing for senior citizens.

## **FINDINGS**

The subcommittee on Housing specifically requested testimony from TDHCA, ORCA and the TSAHC. Each of these agencies was asked to provide an overview of their programs for low income senior citizens that provided affordable housing assistance or accommodations. The following discussion points and questions were posed for consideration to each agency:

- What data is available to identify the current need for seniors housing in Texas?

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- What programs exist that currently address this need?
  - How much funding do these programs utilize? What are their income targets?
  - What goals/benchmarks should the state consider creating to address this need?
  - How much funding would it take to reach each of these benchmarks?
  - What would be the sources of these funds?
  - Potential recommendations to the Committee?

### **Texas Department of Housing and Community Affairs (TDHCA)**

- 13 % of seniors in Texas live below the poverty line and 27% of elderly households in Texas spend more than 30% of their income on housing. Using adjusted 2000 Census data that equates to 525,000 senior households eligible for affordable housing benefits. TDHCA is not currently funded to perform special housing needs surveys beyond the overall programs utilized to determine regional needs based on US Census data. There is no data available on the expected growth in senior populations as a result of the "Baby Boomers" beginning in 2008.

- Tax credits are the primary source of funding for all multifamily affordable housing. There is no specific set aside for senior housing allocations in the annual Qualified Allocation Plan thus a senior application competes without distinction against other applications, either in each region's urban or rural allocation.

- TDHCA has financed the construction or rehabilitation of approximately 35,000 units of multifamily affordable housing for seniors. Nearly 20% of that total has been done in the past two years, due in large part to demand and marketability as well as greater local support.

- TDHCA has rehabilitated or reconstructed more than 1,900 single family homes in rural Texas through the HOME Program (approximately \$42 Million) for areas that do not otherwise receive HUD funding, the bulk of which are senior households.

- HUD also provides HOME funds directly to large metropolitan areas that can be used at local discretion to support senior housing renovation and repair but the state does not maintain data on the local initiatives. HUD furnished Section 8 Vouchers are another source of funding that is available through local housing authorities but again data is not maintained at the state level.

- Local housing finance corporations use state authorized private activity bonds and community development corporations work with local charitable organizations using a variety of resources to provide senior affordable housing opportunities outside the TDHCA activities.

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- Using current levels of funding and development rates for multifamily housing in relation to the projected census population increases of senior citizens the TDHCA calculates it would take approximately 80 years to meet the total demand for low income housing to support these elderly citizens.

### **Texas State Affordable Housing Corporation (TSAHC)**

The Texas State Affordable Housing Corporation has a portfolio of low income, private activity bond properties providing multifamily affordable housing. TSAHC's multifamily private activity bond program targets specific areas of housing needs in Texas. The target areas are set by the Board of Directors of TSAHC on a yearly basis. For the past three years, senior or elderly housing has been one of the four target areas. As of 2008, no developer has approached TSAHC with a senior-specific housing project.

While the TSAHC multifamily portfolio does not include senior-only housing, there are senior citizens living in the properties financed by TSAHC. However, gathering data on the age of the residents living in properties that are not senior-only housing is not currently required. A resident's income level is the primary requirement for residency in TSAHC's current multifamily portfolio.

### **Office of Rural Community Affairs (ORCA)**

The Office of Rural Community Affairs does not administer multifamily affordable housing programs for senior citizens. However, one of ORCA's primary responsibilities relates to the application and award of grants, particularly Community Development Block Grant funds that assist local rural government and agencies in reconstruction, preservation and energy and infrastructure enhancements of housing for low income families. While ORCA does not have a mechanism for tracking senior or special needs beneficiaries of these various programs, the demographics of rural Texas include a significant percentage of seniors. Given the scope of housing initiatives administered by ORCA it is reasonable to project that a significant amount of these programs benefit senior citizens and ORCA has committed to developing a system for tracking and reporting data on this category of housing recipients.

## **COMMITTEE RECOMMENDATIONS**

As part of a comprehensive housing plan for the state (see Interim Charge # 3), a specific category should be created to address the long range needs of the growing senior population who qualify for low income affordable housing opportunities.

Charge TDHCA with conducting a region by region needs survey as a funded requirement for determining more precise data than the data based solely on US Census projections. This needs survey would include an analysis of all senior housing inventories in the same manner other needs surveys are conducted by the department. The results of

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this state wide survey should be made available for consideration by the 81R Urban Affairs Interim Committee.

Require any increases in state funding for affordable housing to include a set aside of funds, in the same manner as set asides for rural and persons with special needs, dedicated to senior housing initiatives beyond those already in place as described by this report.



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## **CHARGE**

**Study and evaluate the levels, methods and alternatives by which the state funds all affordable housing programs, focusing on administrative cost-effectiveness to determine greater returns on investment, savings and efficiency. Examine the current procedures and applications of the annual, integrated Low Income Housing Plan prepared by the Texas Department of Housing and Community Affairs, and prepare recommendations for the development of a comprehensive, long-range, statewide plan or model to address growing needs throughout the state.**

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## BACKGROUND AND OVERVIEW

Texas has 2 primary state agencies, the Texas Department of Housing and Community Affairs (TDHCA), and the Office of Rural Community Affairs (ORCA), and one state entity, Texas State Affordable Housing Corporation (TSAHC), which provide a wide range of affordable housing programs that include low income multifamily, single family home ownership, housing for senior citizens, persons with disabilities, preservation, reconstruction, housing infrastructure and enhancement initiatives. In addition there are a number of non profit, federal and local affordable housing related services and funding sources that address specific needs or opportunities for citizens in need of supportive or subsidized housing.

Additionally, the Texas US Department of Agriculture provides a substantial amount of housing related funds and programs in the state aimed at rural communities. These programs are independent of state initiatives.

### **Funding Mechanisms**

Funding for affordable housing programs is provided by a number of sources. The following comprise the majority of the funds administered by the state agencies:

***Low Income Housing Tax Credits (LIHTC)***: An annual allocation by the Internal Revenue Service is one of two primary funding mechanisms for multifamily affordable rental housing. On average over the past several years the state has received \$42 million dollars per year in tax credits which are allocated by the TDHCA through a Regional Allocation Formula and distributed to the 13 service regions of the state. These funds are awarded annually to developer applicants through a competitive scoring process each year under the Qualified Allocation Plan (QAP). The tax credits are used as the principal source of leveraged funds to finance the developments in both urban and rural communities.

Tax Credits are utilized for new construction, rehabilitation of older apartment complexes and in some cases for total reconstruction. The properties are then managed under a set of compliance policies for qualified low income individuals and families, senior citizens and persons with disabilities for a period of at least 15 years. During normal economic times the Tax Credit is the preferred funding mechanism due to the higher value of the credit for the lenders but is susceptible to market fluctuations which can limit or even reduce the number of projects each year.

***Private Activity Bonds (PAB)***: The state issues, through the Bond Revue Board, an allocation of private activity bonds to finance affordable housing. These bonds are issued for multifamily, single family and first time home buyer programs administered by the TDHCA and the TSAHC. Again, the bonds are the primary source of financing but the nature of the market often has a more significant impact on the valuation and in the case

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of multifamily developments often require a significant amount of "soft" or gap financing, most often through the local housing authority where the property is located.

Use of the PABs for first time home buyers is in the form of guaranteed low rate fixed mortgages and down payment/closing cost assistance for qualifying families. In addition to the general first time home buyer program administered by TDHCA, TSAHC administers two occupation specific programs for educators and firefighter and law enforcement individuals. Other than the occupation criteria, these programs are essentially identical to the larger scale assistance program administered by the TDHCA.

***Community Development Block Grant (CDBG):*** These funds are administered by both TDHCA and ORCA and are distributed in accordance with federal guidelines to be used at the local level for a variety of community development and enhancement programs including provisions for affordable housing. The end use is driven by the local authorities who are encouraged to leverage these funds as much as possible with other funding to support rehabilitation, reconstruction or new construction of single family and multifamily affordable housing opportunities.

***HOME Program:*** The HOME Program, established by Congress in 1990, provides multi-year housing strategies for participating jurisdictions (PJs) to strengthen public-private partnerships and provide more affordable housing via block grants. PJs are units of government as designated by the US Department of Housing and Urban Development (HUD). In general, many of the larger cities and counties in Texas are PJs in their own right. TDHCA receives a statewide block grant or HOME funds for areas of the state which have not received a separate PJ status from HUD. Under HUD guidelines, HOME funds are reserved for people at or below 80% of Average Median Family Income (AMFI) for an area. TDHCA awards contracts through an application process for specific amounts to various municipalities, non profit agencies, for profit and public housing agencies around the state to administer program activities for HOME eligible recipients.

HOME regulations allow for a variety of housing activities, all aimed at providing safe, affordable housing to low income families. TDHCA has allocated funds to grantees in four basic housing activities Homebuyer assistance, American Dream Down payment initiatives, Rental Housing Development Program, Owner Occupied Housing Assistance and Tenant Based Rental Assistance programs.

***Housing Trust Fund (HTF):*** The Housing Trust Fund is the **only** General Revenue provided by the state of Texas to support affordable housing programs. Until the HTF was increased to a biennium amount of \$ 10 million dollars during the 80R session, more money was spent each year on magazine, newspaper and other subscription material by state agencies than was invested in housing, directly from state funds. The Housing Trust Fund is separated into single family and multifamily programs. Funds are available to nonprofits, units of local government, public housing authorities' community housing development organizations (CHDOs), for profits, and income eligible individuals and families. Eligible activities include acquisition, rehabilitation and new construction of housing.

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The investment in the HTF by the legislature ranks Texas in the bottom 10 nationally in terms of state funding. Thanks to the careful and stringent administration of the Tax Credit funding sources by TDHCA, the LIHTC program is able to place more affordable housing units each year than any other state but, in spite of this achievement, Texas is only able to serve the overall needs of less than 1 % of eligible working families, seniors and persons with disabilities.

### **Master Plan**

Texas currently does not have a comprehensive master plan that identifies available resources, services, providers and housing needs data to ensure that a coordinated and collaborative program is in place to optimize the state's ability to meet the growing need for quality affordable housing.

Government Code 2306.0721 requires TDHCA to prepare a combined annual Low Income Housing Plan that provides information to the legislature and executive offices is by statute, limited to a year-to-year report on the status of affordable housing specific programs, with exceptions related to colonias. The very obvious limitation of the Low Income Housing Plan is the short range nature of the data provided. There is no requirement for a broader determination of long range goals, long range objectives, needs projections, or a comprehensive assessment of related services and resources.

While the state agencies and providers exercise due diligence to maximize available funding, there is no established mechanism to address redundancy, strategize leveraging or offer incentives for more collaborative approaches to increase availability.

## **FINDINGS**

TDHCA, ORCA, and TSAHC provided an overview of the current requirements for a state housing plan to the Urban Affairs subcommittee on Housing. In general it was determined that the State Low Income Housing Plan, while a useful tool in assessing accomplishments, establishing goals and establishing objectives on an annual basis does not constitute a fully integrated assessment of needs, resources, services and funding over a long term basis. In order for Texas to begin to address an extended set of policies and programs that will enable the state to more effectively provide for the rapidly growing need a more comprehensive model and strategy must be developed.

### **Round Table Workgroup:**

The subcommittee charged TDHCA to host a roundtable workgroup with interested stakeholders to provide recommendations to address the issues relating to the development of a comprehensive model and strategy to address the funding mechanisms and the development of a long range collaborative plan for affordable housing. This work group was attended by over 35 agency personnel, housing providers and other interested parties. The work group considered the following criteria:

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### ***Overview***

An overview of the current resources, agencies, providers and programs being administered to provided housing and related services to low income individuals, families, seniors and persons with disabilities across the state.

### ***Matrix***

Using a matrix system (TAB1) the workgroup addressed the following:

Expansion of categories including persons with special needs and senior citizens. The consensus was to develop a more focused effort in order to ensure that policies and funding were developed to improve programmatic support for these categories of services.

- Limitations on the state's ability to determine accurate and flexible housing needs. Current limitations employing US Census data and federal guidelines is not considered an adequate measure for establishing allocation plans, changing population and economic circumstances. They are also not an adequate measure for regional or local government development objectives.
- Integration of other agency programs, particularly support services, to optimize resources. Examination of "best practices" from other state programs should be a major component in the development of a state wide strategy for Texas.
- The need to develop a dedicated funding source to increase the state's investment in affordable housing programs.
- The development of an effective incentive program to encourage the commitment by local government and private sector investment in affordable housing programs.
- The variances in regional or local perceptions and objectives of affordable housing and methodology to achieve an optimal use of resources to satisfy both the developmental goals of the local community and the growing need for more units of lower income housing.

### ***Conclusion***

Overall the workgroup determined that there was an undeniable need to develop a strategic plan for the state that would achieve a greater role in the overall economic and community development of Texas. In order to achieve that objective it is essential that the Legislature make a concerted effort to commit the funding resources and the legislative emphasis that will ensure successful development of the strategies and direction necessary to becoming a national leader in providing quality safe affordable housing opportunities to the citizens of Texas.

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## COMMITTEE RECOMMENDATIONS

TDHCA, as the principal state agency administering affordable housing programs, should be directed, and resourced, to establish an extensive state wide, region by region strategy for affordable housing. The great size and diverse needs of the state simply does not accommodate a "one size fits all" approach to the growing requirements in the state. At a minimum the strategy should include:

- On going needs studies, either performed by the TDHCA or through a contractual program, by region, that address the population, economic and community development requirements of both the urban, rural, smaller metropolitan communities, senior citizens and persons with special needs.
- A collaborative policy of interagency initiatives to maximize the provision of support services, including workforce and job training assistance, in-home care, and accessibility requirements and education initiatives that are provided for qualifying citizens to ensure optimal utilization of committed resources.
- Examination and possible adoption of "best practices" from other states and agencies.
- Strategies to incentivize local government, private sector and non profit participation in the provision of affordable housing programs as a part of the economic and community development objectives throughout the state.

Development of a dedicated funding source for affordable housing programs in Texas. Biannual appropriations to the Housing Trust Fund are simply inadequate to meet the growing demands and it is imperative that the Legislature establish a reliable source of financing beyond the current commitments that will ensure a sustainable method of finance. Affordable housing programs of every sort are a critical element in the overall economic development of the state and must be given the funding priorities equal to other essential services such as education, transportation, and healthcare.

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**CHARGE**

**Monitor current methodology involving departmental rules, procedures and policies governing state and federal compliance in the evaluation and ranking of all multifamily affordable housing applications for the allocation of funds during the annual awards cycles.**

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## **BACKGROUND AND OVERVIEW**

The Texas Department of Housing and Community Affairs (TDHCA) administers an annual program utilizing 9% Low Income Housing Tax Credits as the funding mechanism to provide multifamily housing developments in 13 Service Regions in the state. The methodology involves allocation of Internal Revenue Service provided tax credits to secure long term financing for rental properties in both urban and rural regions of Texas through a competitive application process. The Qualified Allocation Plan (QAP) provides TDHCA as well as the applicants, the annual "rules" by which the application is submitted, evaluated and ranked in determining final award of the tax credits. The QAP is compiled by TDHCA and combines federal guidelines applicable to Housing and Urban Development as well as IRS standards, state statutory requirements and TDHCA rule making authority provisions. Each year the TDHCA prepares the QAP through a process of departmental staffing, public comment, governing board adoption and approval by the Governor prior to the next annual round of the awards process.

Since the 77th Legislature there have been numerous revisions to the statutory requirements for the QAP. The most significant amendments and additions were made as a result of Senate Bill 264 in the 78th session. As a result of this legislation the Department was required to add a significant number of scoring criteria that were designed to ensure the long term financial feasibility of these multimillion dollar investments, provide for local community participation and representation, prioritize the need to provide adequate availability of affordable housing opportunities for individuals and families of the lowest qualifying income levels, encourage state elected officials involvement in the allocation of housing resources within their districts and in general to remove or minimize the opportunity for exploitation or abuse of the award process.

Additionally the provisions of SB264 were developed to compel greater compliance with the standards, services, long term sustainability and maintenance of these properties in order to ensure tenants as well as local communities that state sanctioned affordable housing developments would not become either too concentrated nor problematic properties. All of these legislative criteria were required to be included in the Qualified Allocation Plan in addition to the existing federal and state rules which combined were used to determine the numerical ranking of each application.

TDHCA, following the effective date of the changes created by SB264 on September 1, 2003, encountered numerous problems in developing a revised QAP that included the new legislative criteria. The first 2004 QAP was submitted to and approved by the Governor but was then challenged in an Attorney General Opinion request by the Chairman of the House Urban Affairs Committee, primarily on the grounds of improper interpretation and incorporation of the new criteria for Chapter 2306.6710 of the Government Code. The AG Opinion (GA0208) determined that the TDHCA had not adequately expressed the statutory requirements of SB264 relative to the QAP and the department was compelled to prepare an extensive revision. Because the QAP is an annual document applicable to the following year's application round this resulted in a



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great deal of confusion and cost both to the state and the numerous applicants who were affected by the substantial changes resulting from the opinion.

Again in the 2005 draft QAP that was presented to the Governor, the Chairman of Urban Affairs raised significant concerns with the department's plan and the document was rejected and required significant modification resulting in additional costs to the state as well as conflicting standards for the next application cycle.

The difficulties encountered in the adoption of the requirements of Chapter 2306.6710 (b) (1) centered on a number of issues. SB264 amended the chapter to require the prioritization of scoring in the following descending order:

- (A) financial feasibility of the development based on the supporting financial data required in the application that will include a project underwriting pro forma from the permanent or construction lender;
- (B) quantifiable community participation with respect to the development, evaluated on the basis of written statements from any neighborhood organizations on record with the state or county in which the development is to be located and whose boundaries contain the proposed development site;
- (C) the income levels of tenants of the development;
- (D) the size and quality of the units;
- (E) the commitment of development funding by local political subdivisions;
- (F) the level of community support for the application, evaluated on the basis of written statements from the state representative or the state senator that represents the district containing the proposed development site;
- (G) the rent levels of the units;
- (H) the cost of the development by square foot;
- (I) the services to be provided to tenants of the development; and
- (J) whether, at the time the complete application is submitted or at any time within the two-year period preceding the date of submission, the proposed development site is located in an area declared to be a disaster under Section 418.014; **(NOTE: this subsection was added as part of SB1908 80R and is not an issue of consideration in this charge.)**

***Financial Feasibility:*** Financial feasibility was determined to be the most important element of any application for tax credits and has in general not been found to be problematic as a statutory element. The strict underwriting criteria developed through the TDHCA rule making authority, while at times a matter of public comment and disagreement has generally proven to be both effective and accepted as a vital and necessary provision.

***Quantifiable Community Participation:*** The QCP has been the single most controversial and misapplied provision of the amended statutes. This criterion was created and intended to ensure that local communities, affected entities and citizens were included as part of the overall process of placing a state administered multifamily housing development in any particular location. Prior to this criteria there was no requirement for

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an applicant to even notify neighborhood organizations, school district authorities or other impacted local entities as to purpose, intention or potential impact on the immediate community. While there were provisions for local elected support or opposition, the local neighborhoods and concerned citizens had virtually no participation in the awards process.

QCP was **not** designed nor intended to provide unreasonable or prejudicial opposition to the state's ability to provide quality affordable housing for low income working individuals or families. The intent of the criteria was and remains to ensure that an applicant made good faith efforts to create an inclusive approach to the development and to promote a "good corporate neighbor" image of affordable housing.

TDHCA has struggled to effectively define and administer the statutory and legislative intentions of the QCP provision. Issues have included a reasonable definition of boundaries, specific determination of a neighborhood organization, official status of a community organization and an equitable process for applications which are in a location where there are no legitimately recognized neighborhood associations. Additionally the number two priority ranking of the QCP in statute has created occasion where applicants have attempted to exploit loopholes in the interpretation by unofficially "assisting" in the creation of a qualifying neighborhood organization in order to gain a significant competitive advantage. These unintended consequences of the QCP amendment are of sufficient concern to warrant modification and clarification by the legislature.

***Letters of Support or Opposition from State Senator or State Representative:*** The other significant measure of community support is the provision for letters of support or opposition from the State Senator or State Representative in whose district the property is to be located 2306.6710 (b) (1) (F). Prior to this amendment the only score for letters of support or opposition were those provided by a local elected member of municipal or county government. While the intention of allowing the local councilperson or commissioner a role in the application process was valid, there were increasing cases of exploitation and abuse by some applicants in an effort to gain a competitive edge in the award criteria. The intention of the amendment was to provide state legislators rather than local elected officials a determinative involvement regarding a state administered project in their district. Local government participation would be represented through local planning, zoning or platting procedures which were then and remain an integral threshold criteria for the application.

During the 80th Session there was an effort to remove this amendment entirely, based in part on some legislative member's desire to distance themselves from a participatory role in the application process. Whether from a desire to reinstate greater local control, a concern over the timeliness or technical issues relative to an application or from a reluctance to be placed in an adversarial circumstance, a majority of the Senate supported this change as did a small number of House members. A compromise that was adopted changed the original requirement from "written statements from the state representative and state senator" to "written statements from the state representative **or** state senator". This reduces the burden on the applicant without eliminating the ability for a

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representative or senator to express a position if desired and without diminishing the intended purpose of compelling an applicant to exercise due diligence in securing support for or addressing legitimate issues of concern regarding a proposed development.

***Development Funding by Local Political Subdivisions:*** The commitment of development funding by local political subdivisions has been problematic since the adoption in 2003 based on the definition of the funding in terms of "gap or soft" money in the form of HOME or other capital or as an expression of commitment such as infrastructure costs. The intention of these criteria is to encourage local participation in a development that is designed and intended to enhance local development and resources and to leverage funds to optimize production of affordable housing.

***Rent Levels and Income Levels:*** Rent levels and income levels have also proven to be a factor in the ranking of an application particularly in the past 2 years as certain operational costs and expenses such as utilities, insurance and maintenance have risen rapidly while by federal guidelines the rent and income levels of tenants are fixed essentially for the life cycle of the development as a tax credit property. While these remain viable elements in the determination of annual allocation the impact on an otherwise strong application must be considered. This is equally true of the criteria involving costs per square foot of construction as well as the numbers and types of tenant services an application proposes to provide. Each are essential in ensuring the highest quality of affordable housing opportunities and should be preserved without diminishing the overall validity and ranking of any application over another.

## **FINDINGS**

The Urban Affairs Sub Committee on Housing held a public hearing on this Charge on June 5, 2008 at the Capitol. Invited testimony from the Texas Department of Housing and Community Affairs provided an over view of the problems and issues that had historically presented in the annual development of the Qualified Allocation Plan since the effective date of SB264. Public comment was also heard outlining the concerns and suggestions of several affordable housing providers who participate in the tax credit awards process each cycle.

This testimony reflected the issues outlined in detail in the BACKGROUND portion of this report. Additionally there was member generated discussion concerning related issues not specifically addressed in the Charge, in particular concern over the types of developments and the merits and limitation of new, versus rehabilitative and reconstruction projects.

Following the formal hearing the Subcommittee requested that TDHCA develop a list of specific issues and host a roundtable workgroup initiative to discuss in detail options and to formulate recommendations that would provide clarification of legislative mandates, allow TDHCA greater flexibility in QAP rule making authority and establish a more equitable valuation of the statutory criteria used to evaluate and rank applications.

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## **Roundtable Workgroups**

The subcommittee charged the TDHCA to host a roundtable workgroup with interested stakeholders to provide recommendations to address the issues relating to the scoring criteria and ranking of applications under the QAP process. This work group met on September 3, 2008 in E1.010 and was attended by over 35 agency personnel, housing providers and other interested parties. The work group considered the following criteria:

***1. Rents and income limits as separate scoring items and targets as to who scores more points.***

Discussion:

- Why should these be separate?
- Impact of combining or using just Rent Level or just Income level.

Recommendation: Combine these two criteria and elevate their priority level to ensure maximum consideration of the income ranges served by the LIHTC program.

***2) Qualified Community participation in relation to who the entity is on record with, the geographic boundaries, proof of valid neighborhood organization, inclusion of master planned communities, business organizations, and/or persons living near each other.***

Discussion:

- Refine definition of "neighborhood organization to include any organization on record with the city or municipal government in addition to current statute. Clarification of neighborhood group to include a public housing authority residence council for the purpose of participation only in an application process on existing PHA site.
- Clarify determination of the boundaries of "impacted neighborhood.

Recommendation: Expand statutory definition of neighborhood organizations to include those on record with city or municipal government in addition to county and state and the limited inclusion of a public housing residence council. Refine statutory definition of "impacted neighborhood" to establish a clearly determined parameter using either elementary school attendance zones or a quantifiable measure of distance (one linear mile) that is commensurate with existing statutes on boundaries.

***3) No neighborhood group available.***

Discussion:

Generally agreed that an application should receive equal scoring value when it is determined that there is no legitimate neighborhood organization within the established boundaries of the property.

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Recommendation: Resubmission of legislation filed in 80R to address issue of no neighborhood organization.

**4) *Local political subdivision points.***

Discussion: Concerns were raised that local elected officials did not have scoring input to an application.

Recommendation: Consideration be given to addressing the role of local elected officials in conjunction with the overall local commitment and support issue seen at item 11 below.

**5) *Threshold items as compared with scoring items.***

Discussion: Threshold items are those components of an application that are offered by the applicant essentially as amenities in terms of tenant services or accommodations or are components of construction standards. Points are currently awarded via the QAP process as a separate part of the application and are included in the compliance standards that are part of the TDHCA follow-on oversight and enforcement programs once the property is developed

Recommendation: No specific recommendation for change.

**6) *Cap limitations established per application and individual applicant per year.***

Discussion:

- Current statutes restrict the amount of any single application for tax credits to no more than \$ 2 million dollars in any application round (Chapter 2306.6711 (b) of the Government Code). This restriction is designed to ensure an equal distribution of credits amongst competing applications in any service round. This cap was established in the 78R session and does not allow for adjustment due to increased construction and building costs all of which have increased significantly in the interim.
- Raising the cap would allow greater flexibility in the awards process and ensure that quality and sustainability of properties is not diminished due to inadequate financing.

Recommendation: Consider legislation that would increase current cap to a maximum of \$ 3 million and permit TDHCA rule making authority the flexibility to provide for consumer index based cost increases in the annual QAP process.

**7) *Participation by developer/applicant with homeowner groups.***

Discussion:

- Current statutes concerning the participation of recognized neighborhood groups in the evaluation process created circumstances where an applicant was faced

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- with no impacted neighborhood organization or an organization in opposition to the proposed property, would collaborate to create a qualifying organization for the purpose of garnering support and the associated scoring.
- While proscribed from such overt activity by rule, the resolution of providing for circumstances where there is legitimately no recognized organization, coupled with a clarification of the boundaries and definition of an impacted neighborhood will eliminate the necessity for an applicant to engage in creating a loop hole to the process.

Recommendation: Supports recommendations in items 2 and 3 above for statutory clarification.

**8) *Size and unit mix of developments.***

Discussion:

- The specific housing needs of the local communities vary significantly among service regions. The ultimate goal of the state's affordable housing programs is to place as many units of safe quality housing as possible in each development and to maximize the available funding to meet this goal. However, because of the differences in local objectives and development plans, TDHCA has often requested, and legislation has been previously considered, that would create a bonus or priority for certain types of mixed use and mixed income (defined as low income affordable and market rate) using housing tax credits as the financing source.
- The objectives of mixed use are in most circumstances laudable, especially in the interests of inner-city re-development. However, there is serious concern that the use of limited tax credits for low income affordable housing opportunities, in order to underwrite properties that include non-qualifying or market rate opportunities would reduce the overall numbers of low income units available for use.
- Recognizing the potential of mixed use applications in certain circumstances should be a consideration available under rule making authority of the TDHCA. Creating a statutory priority conversely would restrict the ability of the department to work with local housing authorities and interests on a case by case basis and could have unintended consequences on a state wide basis.

Recommendation: Consider legislation that would expand the rule making authority of TDHCA to provide QAP consideration of applications that propose mixed/use, mixed income housing opportunities within any service region based on parameters established by TDHCA.

**9) *Level of finish out for points.***

Discussion: The statute does not currently dictate “finish out” of units, other than having a scoring item for size and quality of units in 2306.6710. That is sufficient and allows the

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QAP to tailor specific size and quality features from year to year in response to public comment.

Recommendation: No change to statute recommended.

***10) Size and type of contribution in local dollars or as a percentage.***

Discussion Statute does not currently direct the size or type of contribution for local dollars under the development funding by local political subdivisions language in 2306.6710. In the work group for the interim charge, comments were made suggesting that the purpose of the points was more to focus on local support than specifically to require leveraging. As that comment noted, the draft 2306 changes reflect that points should be either for funds or support by the local community. This change will help promote developments, that need funds, request them independently of the scoring structure; and those that don't need them, do not use up valuable limited resources chasing these points. If, alternatively or in addition, there is a desire for an emphasis on leveraging – versus local involvement - it was recommended that it read as “the commitment of development or operating funds from private or public resources” which will allow greater flexibility while still promoting the concept of leveraging.

Recommendation: Consider legislative clarification to existing statutes.

***11). Application process that locks in developments for amendment and amendment process.***

Discussion: Currently statutes specify TDHCA procedure for the amendment of applications. There is little departmental/board rule making flexibility in the actual process. Statutory requirement for an amendment process should allow latitude for rule making authority to TDHCA.

Recommendation: Consider legislative action to allow greater flexibility in the rule making authority of TDHCA to develop and implement an effective application amendment process.

***12). Need to increase non-profit participation.***

Discussion: Texas is federally required to ensure that at least 10% of the credit ceiling each year is allocated to nonprofits. Historically, nonprofits applied in significant numbers and were competitive enough so that they were not encouraged and were evaluated based on score with no regard to their nonprofit status. However, the number of eligible nonprofits has decreased significantly and, if this trend continues, the Department may be at risk of violating the federal requirement. Therefore, to promote nonprofit submissions, again changes are proposed at 2306.111, adding that the nonprofit set-aside be evaluated outside of the regional allocation formula, like the at-risk set-aside and suggesting the removal of state non-profit set-aside requirements.

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Recommendation: Legislative action should be considered to allow TDHCA sufficient rule making authority to adopt measures to ensure compliance with federal requirements in circumstances where sufficient non profit participation is in jeopardy.

***13) Overall valuation of statutory scoring priorities.***

Discussion:

Several options are viable for consideration. Again, retaining financial feasibility as the overriding criteria by a significant degree, rule making authority would be granted that allows the department to create either:

- 1) a tiered scale that would award 50 % value for financial feasibility, 30% of valuation evenly divided between the following 6 statutory priorities and 20% of valuation evenly divided between the remaining 5 statutory priorities.
- 2) a scoring system that awards 50% of valuation to financial feasibility and the remaining 50% equally divided among the remaining 11 statutory priorities with that appropriate negative scoring provided for applications that fail to achieve any element of the established valuations.
- 3) a combination of tiered and rule making authority that allows greater flexibility in the annual development of the QAP while retaining the statutory intent.

**COMMITTEE RECOMMENDATIONS**

That legislative revision to existing statutes concerning prioritization and valuation in descending order be considered to address the individual recommendations listed above. Major objective of legislative revisions and clarification should focus on expanding TDHCA rule making authority to allow greater flexibility in development of the annual QAP without eliminating those criteria considered essential to ensuring legislative intent as created by existing statute. With the exception of clarification and revision no additional statutory requirements for the QAP are recommended.

Sub Committee Chairman Menendez has requested the TDHCA assist in the development of draft legislation for consideration to address the issues included in this report.



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**CHARGE**

**Examine the policies and procedures by which local tax appraisers value rent restricted affordable housing properties, and authorize legislatively established tax exemptions. Evaluate application and interpretation of existing statutes by local appraisal districts to affordable housing properties throughout the life cycle of developments. Make recommendations for statutory changes. (Joint Interim Charge with the House Committee on Local Government Ways and Means)**

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## **BACKGROUND AND OVERVIEW**

Texas' largest source of safe quality affordable housing for low income working families and individuals, as well as senior citizens and persons with disabilities are provided by either tax credit, state issued private activity bond or a combination thereof, and are financed multifamily rental properties. Currently Texas has over 1800 such properties administered by the Texas Department of Housing and Community Affairs (TDHCA) and the Texas State Housing Corporation (TSAHC). These properties represent over 260,000 individual housing units worth over \$3.4 billion dollars of combined investments by the state.

These multifamily properties are developed, owned and operated by a combination of providers including nonprofit, for profit, faith based and local housing authorities. While the operations and partnerships involve a number of programmatic allowances, provisions and conditions, all are administered under the broad guidelines of federal programs relative to affordable housing provisions of the Cranston Gonzalez National Affordable Housing Act (42 U.S.C.).

These properties, while financially underwritten by the government at the time of construction, reconstruction or rehabilitation as an affordable housing property, are operated and maintained throughout the life cycle of the financial underwriting (typically a 15 year period) without further subsidization. Due to federally imposed restrictions on rent levels, utility allowances and long term sustainability requirements, these properties are operated on a very sharply defined financial basis. Operated like any other commercially financed property, these units have associated obligations to lenders and mortgage holders in addition to the tenant services and other financial considerations that must be satisfied annually.

Unlike market rate or non-restricted use/income properties, it is not permissible for owners/managers of low income multifamily properties to raise rents or impose new or higher utility or services costs to tenants. In consideration of these restrictions and as a result of the participation in the national affordable housing programs, these properties typically qualify for property tax exemptions at the local level, either in part or full value of the development.

Without this annual exemption, it would be extremely difficult, if not impossible for the majority of these properties to meet the debt service and other financial obligations that are incurred. Forfeiture or foreclosure resulting from either inability to pay taxes or debt service places state investments at risk as well as reduces the already insufficient quantities of affordable housing available for eligible citizens.

The Texas Constitution, Tax Code and Local Government Code all provide for property tax exemptions for affordable housing properties under the common criteria of providing for the public good. Each property must, as a condition of exemption, establish and

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maintain the elements necessary to qualify for continuation of the exemptions, whether partial or full value is used and are subject to penalties if it is determined that qualifying standards are not being maintained.

In recent years, as property taxes have assumed an ever larger role in the generation of state and local revenue, tax exempt status for affordable housing properties have become increasingly problematic and subject to challenge at the individual county appraiser level. This has led to numerous court challenges which not only further imperil the financial status of the affordable housing provider but have resulted in the loss of an undetermined number of affordable housing units as a result of financial failures.

During the past three legislative sessions, numerous attempts have been made without success to address the growing problems faced by affordable housing providers regarding both the qualifications for and the appraisal practices utilized by the individual county appraisers. The increasing number of local denials, court challenges and most significantly the statewide implications of the loss of significant numbers of affordable housing properties due to tax appraisal and exemption issues have made this subject a matter of great concern.

## **FINDINGS**

The Urban Affairs and Local Government Ways and Means Committees held a joint hearing on this charge on August 20, 2008 and public testimony was heard from a number of affordable housing providers, lobby interests and the Bexar County Appraisal office.

### **Affordable housing providers and interest groups:**

The affordable housing providers and interest groups testimony focused on the following:

- Inconsistency among the state's tax appraisers in the application of valuation methodology, eligibility criteria for exemptions, imposition of non applicable or arbitrary conditions and compliance standards and the increasing necessity to validate status on an annual basis.
- Impact of the federally imposed rent restrictions and utility allowance limitations that differentiate affordable housing properties from commercial market developments and the problems encountered by appraisers in determining appropriate valuations based on income and cost methodology.
- Lack of clearly defined legislation that establishes consistent guidelines for the property valuation procedures, tax exempt qualifications and qualification compliance measures that are uniformly applied and administered at the state level for affordable housing properties developed and maintained under state programs and policies.

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### **Bexar County Appraiser's Office**

Testimony by the Bexar Appraiser's office, while presented to address the position and methodology utilized by at least one local appraiser also provided evidence that would tend to lend credence to the concerns of affordable housing providers regarding consistency and standardization of methodology and qualifications. Testimony cited:

- Misleading testimony concerning the number of denials issued by the Bexar Appraiser in 2008. Reported as 23 total by the spokesperson, later information provided by the appraiser's office on request of Rep. Menendez revealed that at least 66 letters of denial had been sent to Bexar County affordable housing providers.
- Challenges by the appraiser of "4 or 5" properties for alleged failure to comply with a non-statutory condition or provision of "payment in lieu of taxes" as being grounds for denial of tax-exempt status. Challenged by the committee, the Bexar Appraiser spokesperson admitted that there was no statutory basis for this interpretation but rather a consideration made at the local level.

### **COMMITTEE RECOMMENDATIONS**

The joint committee adopted no specific recommendations beyond continued examination of the issue and possible further consideration during 81st session of the legislature.

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## **CHARGE**

**Monitor the report issued by the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room, the independent panel review of certain criminal convictions prompted by the conclusions of this report, and the implementation by the City of Houston of any reforms recommended in this report. Also monitor other urban crime laboratories and their compliance with state laws regulating their functions. (Joint Interim Charge with the House Committee on Law Enforcement)**

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## BACKGROUND AND OVERVIEW

### **History of Crime Lab Investigation**

In November 2002 allegations surfaced that the forensic work performed by the Houston Police Department Crime Laboratory had been faulty and unreliable. This faulty and unreliable work was entered as evidence in cases that convicted men of crimes that they did not commit such as rape and murder and called into question the integrity of the judicial system in Houston. The problems that lead to this shoddy work mainly involved poor documentation, misrepresentation of lab results, analytical and interpretive errors, and flawed laboratory practices. In 2003 as a response to these discoveries the House Committee on General Investigation and Ethics lead an investigation into the Crime Lab.

### **Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room**

In April 2005 the City of Houston commissioned an independent investigation of its Crime Lab under the direction Michael Bromwich. In June 2007 Mr. Bromwich released the Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room. The investigation focused on three central elements:

***Historical Operations of the Crime Lab:*** In order to find the root causes of the crime lab's inefficiencies, the investigation reviewed the historical practices of the laboratory prior to their accreditation. Major problems found through the independent investigation primarily involved the serology and DNA sections of the lab but also extended to the controlled substances division. Firearms, trace evidence, toxicology, and questioned documents received positive, though not perfect, reviews. According to the report the primary causes for the Crime Lab's failures were:

- Lack of support, resources, and funding for the crime lab by the City of Houston and Houston PD.
- Ineffective management within the Crime Lab.
- Lack of adequate quality control and quality assurance.
- Isolation of the DNA/Serology Section.

***Serology Incarceration Cases:*** The investigation reviewed 850 serology cases that were handled by the Crime Lab between 1980 and 1992 in order to determine which convicted inmates' cases were detrimentally compromised by the lab's shoddy work and thus eligible for DNA testing. The investigation discovered that in many of those cases the lab failed to perform genetic marker testing such as ABO typing and enzyme testing, tests that would have strengthened the validity of the evidence. If the tests were performed

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properly and consistently it would have helped the prosecution's conviction efforts or would have helped exonerate innocent suspects. Based on their findings Bromwich made the following recommendations:

- Determine if evidence currently exists and can be located in cases in which evidence tested positive for blood or semen but without ABO typing, ABO testing was performed but no comparison to known reference samples was made, DNA analysis performed contemporaneously by an outside lab failed to include the suspect and cases containing major issues with reliability.
- The District Attorney's office and HPD should notify the prisoners whose cases fall into one of the mention categories.
- If evidence can be located the prisoner should be notified of the existence of the evidence and that DNA testing can be performed at no cost to the prisoner.
- Harris County and the City of Houston should appoint a special master to review the complete investigative, prosecutorial, appellate, and post-conviction habeas record of the major serology cases identified.

***Review of the current operations of the Crime Lab and Property Room and recommendations:*** The independent investigation was broadened to review the Houston Crime Lab's progress after accreditation by ASCLD/LAB in 2006. They reviewed all the current functions of the Crime Lab which include:

- Management of the Current Crime Lab has improved due to Chief Harold Hurr's priority of rebuilding the Crime Lab and the hiring of the new lab director Irma Rios. Mr. Bromwich made the following recommendations:
  - Funding of the Crime Lab should at least stay at current levels and adjusted for inflation.
  - The current QA/QC manager should be provided a quality staff person.
  - A new information system should be implemented.
- Current work performed in the Crime Lab and Mr. Bromwich made the following recommendations:
  - Biology Section should retain a qualified outside consultant for technical reviews. The case manager should focus on establishing the priority cases and managing case assignments and create training program focused on statistics training.
  - In the Controlled Substances Section the manager is spread too thin and should be given help.
  - Firearms Section should fill the two vacant positions.
  - HPD should take advantage of their underutilized Question Documents Section which performs high quality work.

They also reviewed the Property Room and made the following recommendations:

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- HPD should develop standard evidence procedures specifically for all types of forensic evidence and require that evidence be submitted to one central location, rather than several units.
  - A new evidence tracking system should be implemented that includes complete seamless integration with all of the existing evidence tracking systems and the software vendor and HPD should be held accountable for the creation.

### **HPD Crime Lab Cheating Accusations and Subsequent shutdown in late January of 2008**

Despite the improvements cited in the Bromwich Report the Crime Lab found itself in controversy again. In January 2008 the Crime Lab was accused of cheating on the proficiency exam portion of the ASCLD accreditation process. Vanessa Nelson, the DNA Section Chief, was accused of giving answers on how to handle a semen search and shortly after the accusations she resigned. As a consequence of her resignation the DNA Section of the Crime Lab was forced to close until they could hire her replacement because the DNA Section cannot operate without a leader. After this was discovered it was revealed that in September 2007 Ms. Nelson reported to Internal Affairs that "Since August 21, the section has reported a sample switch, lost evidence, lost paperwork and two incidences of contamination." Other employees also told Internal Affairs that there were attempts to misrepresent the chain of custody after some evidence was lost. These allegations were alarming considering the tremendous progress the Crime Lab had made.

## **FINDINGS**

### **Irma Rios:**

On August 20, 2008, the Houston Police Department (HPD) Crime Lab Director Irma Rios, testified before the House Committees on Urban Affairs and Law Enforcement. In her testimony she informed the committees of the current status of the Crime Lab, the status of the Independent Investigator's recommendations, various aspects of the Crime Lab's Quality Assurance Program, the commitment from the City of Houston, and HPD's plan for the future of the Crime Lab.

### ***Report and Recommendations***

In September 2004, HPD Chief of Police Harold Hurt announced that HPD would seek an independent review of the Crime Lab and Property Room. Mr. Michael Bromwich, Former Inspector General of the U.S. Department of Justice headed the investigative team. For two and a half years the Crime Lab was under audit. Over 3,500 cases were reviewed (the review period was 15 years prior to the DNA/Serology Section closure in 2002). There was an extensive report released in June 2007, and a summary of the recommendations was put on the website in August 2007 (*those reports can be viewed at: <http://www.hpdlabinvestigation.org>*). According to Ms. Rios over 135 recommendations were made by the Bromwich investigation and currently about 90% of them were either



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implemented, or in the process of being implemented. Of these recommendations, the HPD chose not to implement the following four:

- There was a decision made not to appoint a special master to review the 180 serology cases but instead appoint Christopher Downing and Robert Wycoff to review the cases.
- They decided to use range DNA to input and type rather than specify target DNA as recommended. The report also recommended that HPD modify the outer limit to six to nine months for collection of a reference sample. HPD was following the DPS' recommendation of an outer limit of 5 years for a comparison of reference.
- The firearms microscopes were not relocated from open air spaces to cubicles to maximize space. HPD had an architect find an alternative solution. The architect designed a facility that is about 1 million square feet - it will house the Crime Lab, the Command Center as well as other investigative units.
- The recommendation of a transfer of the distance determination from the firearms section to the trace section was not followed because Ms. Rios reasoned that since they had very few cases, it did not make sense to do the transfer of that particular discipline.

#### ***Crime Lab Accreditation and Quality Assurance Program***

According to legislation, crime labs were required to be accredited by September 2005. The HPD Crime Lab was accredited in May 2005 in all areas except DNA as it was not operating at that time. By 2006 the DNA section received provisional accreditation and by June 2007 all areas were accredited that were operating. This made it the largest accredited lab in the nation.

Since then they have maintained consultants for the Crime Lab including in the Trace evidence and DNA Sections, as well as the Firearms Section. Therefore, they have individuals with decades of experience assisting them as they bring in a fairly young team as well as some of the more experienced managers. The inexperience of the new staff members appears to be their only limitation at this time.

#### ***Commitment from the City of Houston***

The City of Houston has increased the budget for the Crime Lab by 25%, helping to alleviate its budget shortfalls and has allowed the Crime Lab to create an additional twelve positions for FY09. They have also received quite a few grants as they build capacity in the different areas of the lab. In addition they have a commitment from the District Attorney's office of 2 million dollars towards the purchase of new DNA processing equipment.

#### ***Processing Evidence and Eliminating Backlogs***

HPD Crime Lab's caseload has increased 30% over previous years in firearms and controlled substances - they receive about 2,000 narcotics cases per month. HPD has

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undertaken a number of different initiatives that have also increased their caseload. If the caseload remains at the same rate or increases, the Crime Lab will need additional positions in the next 10 years.

HPD continually looks at better ways to process evidence. The goal is to eliminate backlogs and expand DNA testing. Typically DNA testing is used for violent offenses such as rape and murder. They plan to expand the testing to property crimes in the near future.

In order to begin examining how to eliminate backlog problems, HPD had looked to the London Crime Lab and used its practices as a base model for the new Crime Lab operations. Ms. Rios chose the London Crime Lab as a model because of their experience in DNA testing since the mid 1980's. The London Crime Lab has eliminated its backlogs by using automation and assembly lines (as opposed to processing a case from start to finish). The HPD is currently in discussions with the London Crime Lab for a diagnostic review. HPD hopes that London's Crime Lab will give them a roadmap to increase the sample output and improve the quality, less manual handling by using robotics, and increase redundancy to ensure accurate results. It was also stated that HPD plans to have two assembly lines for DNA testing - one for property crimes, one for violent offenses and then a priority case team for urgent testing needs.

Currently the turnaround time for case processing is 6 to 9 months (sometimes a year on the larger homicide cases) due to the backlog at the lab (since the DNA Section was closed for a 6 months), although Ms. Rios's goal is to have processing limited to 30 days from start to finish.

#### ***DNA Lab Closure***

Ms. Rios also discussed the six month closure of the DNA Lab because of the loss of a manager. It was closed, as stated in the background and overview portion of this report, after accusations of incorrect administration of the proficiency exam of the accreditation. This led to the resignation of the Technical Manager of the DNA Section. An Internal Affairs Investigation was launched in August 2007 and it was determined that there was no issue over the quality assurance, but rather a question of sound judgment. After the resignation of the Technical Manager, the lab was forced to close as it did not have adequate supervision under Quality Assurance standards. Although the DNA Lab was closed, the Lab kept its accreditation, and the DNA Section was re-opened in June 2008 when a new Technical Manager was hired.

#### ***Property Room Update***

In the report there were some recommendations made regarding the need for a new Record Management System. The Property Room has started to implement a new Evidence Management System that addresses the chain of custody concerns. It utilizes a barcode database system in order to track evidence and chain of custody. There is also a Laboratory Information Management System that HPD is currently assessing vendors for software. They have a fairly large grant to help them implement the Lab Information Management System software - target date for its completion is the end of 2008.

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There is a new Property Room in the process of being built and is expected to be completed by December 2008. There had been issues in the past with evidence that turned up missing. The new property room being built will have additional safety and security features. There is already an increase in security in the current Property Room, as well as enhanced procedures in place.

**Robert "Bob" Wicoff and Christopher Downing**

On August 20, 2008, Robert "Bob" Wycoff and Christopher Downing, both co-counsel on the HPD Crime Lab Review Panel (Serology Section), testified before the House Committees on Urban Affairs and Law Enforcement. In their testimony they informed the committees of the following:

***Background and Purpose***

In June 2007, the Independent Investigator, Michael Bromwich, came out with his final report regarding the HPD Crime Lab. In the report the Bromwich Commission identified 180 serology cases (spanning from the early '80s up until the early '90s) which had serious or major problems in the testing that was conducted by the HPD Crime Lab Review Panel. The District Court Judges of Harris County appointed Mr. Wycoff and Mr. Downing (both are criminal defense attorneys in Houston) late last year (October 2007) to conduct a review of these old cases. Their goal was to determine if the scientific problems that were found in the Crime Lab's work then translated into problems with criminal convictions that resulted.

***Processing the Cases***

Since October 2007, Mr. Wycoff and Mr. Downing have been reviewing these cases, all of which are murders and sexual assaults. They are attempting to move the cases through a process, the first being categorized into 1 of 2 steps. Either suggest that new DNA testing be done to see if new DNA testing would let them know if an innocent person was convicted, or simply closing the case out if it is apparent to them that notwithstanding problems with the lab there was no way it could have compromised the conviction. The attorneys speculated that closing the case out was the course of action for about 90% of the cases - many of which resulted in heavy sentences and involved guilty pleas. Research into the cases that originated in the '80s showed that most of the individuals involved were still in prison. These cases by-and-large were not compromised by any of the lab's mistakes. They have filed 10 DNA motions on these cases, but unfortunately many of these cases no longer have any evidence left to test. So, there is no way they will ever know if the lab mistakes resulted in a compromised conviction. There was 1 DNA motion that was filed that re-testing was conducted and they are awaiting the results.

They started with 180 cases - there were names that were removed from this list because people had already been executed, or the inmates did not want to pursue an investigation. This process started through teleconferencing with all the inmates affected and asked them if they wanted to pursue this investigation. That left about 156 cases.

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They are about 40-50% through the case review process. Undergraduate and law student volunteers, along with paid interns, have assisted in the review this summer. Also the District Attorney's office in Harris County has increased their cooperation. In addition, they meet once a month with Judge Bacon (retired) who has been appointed to oversee their progress.

They are currently preparing exhaustive memorandums on each of these remaining cases which are in various states of completion. These memorandums will include basic facts about the case, summary of the lab problems as reported by Bromwich, and their conclusion as to whether or not those problems resulted in a case that should be re-tested or closed.

To clarify, as they undertook this effort, they started with nothing but the inmate's name. From there they had to accumulate all the data that was associated with the trial (from the court records, offense report, appellate records, transcripts, etc.), conduct a review of what happened in the case, and express, in layman's terms, what the lab error was. Then decide if the error played a role in the outcome of the case. Did it compromise the verdict and if the evidence was known to the parties in the beginning would it have made a difference. There is a presumption that a lab error favors the defense. They found in some cases it was not. The Bromwich report mentioned that many probative findings were not reported. In some cases this failure to report findings would have solidified a case against a defendant. They are at a loss as to why they would not report these findings. In some cases they are unable to determine the role the information would have played in the verdict. If that is the case they go back to the inmate and ask if they are claiming innocence. If they do, a test will be conducted on evidence that is available.

They plan to make a sanitized version of all the memorandums available for public consumption. They are targeted to complete the review by August 2009.

### ***Lessons Learned***

- To some level prosecuting a person is not a "team sport". There has to be a certain degree of individuality on the part of the Judge, Defense, Prosecutor and the Police Department. Some of those disciplines have acted as team players when they should be critical of each other.
- There is an inevitable "case hardening" (the assumption of validity of evidence/testing) that can occur in any party when you see the same "players" over and over again. Scrutiny is a key component of the criminal justice system - the results should have been questioned more. Had it been an environment where the work product had been scrutinized more closely - this problem would have been caught earlier.
- A key piece of evidence are the Lab Bench Notes. They are hand written notes created by a Lab Technician as they perform testing - no one ever saw them, they were never asked for, they were never produced. Had they been produced - questions may have arisen that would have stopped this problem earlier. They

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have started amongst the Harris County District Judges to request these Lab Bench Notes as part of their discovery orders - it should be a part of standard procedure.

- The Defense and Prosecution are not always trained to ask the right questions when faced with forensic/DNA evidence.

### **COMMITTEE RECOMMENDATIONS**

The Committee is optimistic that the progress made to the Houston Crime Lab will continue. The Committee acknowledges that the Houston Police Department has made tremendous progress towards making it a world class lab. However, the Committee will continue to monitor the Crime Lab and encourages the City of Houston to consider moving the Crime Lab to a regional administrator in order to deter any unforeseen future deviations from today's progress towards a fair and unbiased judicial system.