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# **AFFORDABLE HOUSING IN HEALTHY COMMUNITIES: INTEGRATING ENVIRONMENTAL JUSTICE INTO THE APPLICATION CRITERIA FOR AFFORDABLE HOUSING TAX CREDITS IN NEW MEXICO**

Vanessa Springer\*

## **ABSTRACT**

*In Bernalillo County, New Mexico, communities of color and people living below the poverty line are more likely to live in areas with high exposure to pollution and associated health risks. Similar trends are echoed throughout the country. These data trends and experiences form the basis for the environmental justice movement, or the movement for a clean and safe environment for all people regardless of race or class. As the science on disparate environmental impacts develops, so does the law, and regulations to control further disparate impacts in low-income communities and communities of color are being introduced and implemented in states and municipalities throughout the country.*

*However, affordable housing for low-income New Mexicans continues to be sited in areas with high environmental risk, particularly in urban areas, and environmental regulations that aim to control additional pollution do nothing to address this issue. This Comment advocates that the New Mexico Mortgage Finance Authority, which allocates tax credits to developers to incentivize affordable housing projects, considers environmental justice data as a factor when reviewing developers' applications for tax credits. This seemingly small change to the Mortgage Finance Authority's process would prioritize affordable housing developments in safer areas over those in areas with high environmental risks—a step towards more equitable access to housing in healthy communities.*

## **INTRODUCTION**

Approximately 14% of New Mexican households meet the U.S. Department of Housing and Urban Development's ("HUD") definition of extremely

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low-income,<sup>1</sup> meaning they earn less than 30% of New Mexico’s median household income of \$50,000 per year.<sup>2</sup> This amounts to less than \$15,000 in annual household income. An analysis of the discrepancies between households in need of rental housing and the number of available rental units indicates that New Mexico’s rental gap is concentrated at this income level, with a shortage of 32,000 units for extremely low-income households.<sup>3</sup> Additionally, 117,613 households are cost burdened, meaning they spend more than 30% of their household incomes on housing.<sup>4</sup> Another 100,858 households are severely cost burdened, meaning they spend more than 50% of their household incomes on housing.<sup>5</sup> According to the Metropolitan Housing and Communities Policy Center, Albuquerque alone needs at least 15,500 more affordable rental units in order to provide sufficient housing to its citizens with extremely low incomes, as well as 800 units for those experiencing homelessness.<sup>6</sup> The New Mexico Mortgage Finance Authority (“MFA”), charged with addressing New Mexico’s housing shortage, describes the circumstances statewide as an “Affordable Housing Crisis.”<sup>7</sup>

Meanwhile, and seemingly disconnected from this housing crisis, New Mexicans face another type of challenge—health risks stemming from environmental justice issues. In 2014, SouthWest Organizing Project filed a complaint with the U.S. Environmental Protection Agency (“EPA”) under Title VI of the Civil Rights Act of 1964.<sup>8</sup> The complaint alleged that discriminatory environmental policies and permitting by the City of Albuquerque and Bernalillo County had resulted in disproportionate environmental impacts on communities of color and low-income communities.<sup>9</sup> The EPA announced several years later that it would investigate the alleged discriminatory practices, but it has not released any investigative results or final determination.<sup>10</sup>

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1. N.M. Mortg. Fin. Auth., 2023 New Mexico Affordable Housing Needs Assessment 28 (2023), [https://housingnm.org/uploads/documents/2023\\_NM\\_Affordable\\_Housing\\_Needs\\_Assessment.pdf](https://housingnm.org/uploads/documents/2023_NM_Affordable_Housing_Needs_Assessment.pdf) [<https://perma.cc/JJP8-7BQ3>].

2. N.M. MORTG. FIN. AUTH., HOUSING IN NEW MEXICO: A CALL TO ACTION I-19 (2022), [https://housingnm.org/uploads/documents/New\\_Mexico\\_Housing\\_Strategy\\_Complete\\_Report\\_Sept\\_2022.pdf](https://housingnm.org/uploads/documents/New_Mexico_Housing_Strategy_Complete_Report_Sept_2022.pdf) [<https://perma.cc/T6JH-TEAR>].

3. *Id.* at I-2.

4. *Id.*

5. *Id.*

6. JOSH LEOPOLD, ET. AL., METRO. HOUS. AND CMTYS. POL’Y CTR., ALBUQUERQUE AFFORDABLE HOUSING AND HOMELESSNESS NEEDS ASSESSMENT vi (2020), [https://www.urban.org/sites/default/files/publication/102261/albuquerque-affordable-housing-and-homelessness-needs-assessment\\_2.pdf](https://www.urban.org/sites/default/files/publication/102261/albuquerque-affordable-housing-and-homelessness-needs-assessment_2.pdf) [<https://perma.cc/Z6LF-NEXS>].

7. *Addressing New Mexico’s Affordable Housing Crisis: MFA’s State Tax Credit Program Offers Hope and Incentives*, N.M. MORTG. FIN. AUTH. (Aug. 22, 2023), <https://housingnm.org/about-mfa/news/> (filter by “General News” and “2023”) [<https://perma.cc/X4G4-VZRT>].

8. *Burqueños Challenge Discriminatory Air Pollution Practices*, N.M. ENV’T L. CTR. (Sept. 15, 2014), <https://nmelc.org/2014/09/15/burquenos-challenge-discriminatory-air-pollution-practices/> [<https://perma.cc/822X-TE2G>].

9. *Id.*

10. *EPA Investigating Alleged Discrimination by Air Quality Board*, N.M. POL. REP. (Aug. 9, 2016), <https://nmpoliticalreport.com/featured/epa-investigating-alleged-discrimination-by-air-quality-board/> [<https://perma.cc/6DY7-CU3T>].

In 2022, residents of the Mountain View Neighborhood (“Mountain View”), one of the Albuquerque communities involved in the 2014 Title VI complaint, petitioned the Albuquerque-Bernalillo County Air Quality Control Board (“AQCB”) to adopt a new environmental justice rule that would address the disproportionate impact of air pollution on low-income communities and communities of color.<sup>11</sup> Mountain View, a majority Hispanic and low-income community, advocated for the rulemaking due to an increase of industrial air pollution sources in the once-rural neighborhood, including asphalt plants and a generating station.<sup>12</sup> The rule, as Mountain View proposed it, would have required applicants for air quality permits to complete a “health, environmental, and equity impact report”<sup>13</sup> and would require that the AQCB deny permit applications with environmental health risks above specific thresholds.<sup>14</sup> The AQCB approved a modified version of the proposed rule which does not authorize permit denials, but requires permit applicants to take additional steps to reduce emissions if facilities are within a mile of “Overburdened Areas.”<sup>15</sup> The adopted regulation defines overburdened areas as “the twenty percent of census block groups in Bernalillo County that experience the highest cumulative environmental and public health stressors.”<sup>16</sup> It requires that the City of Albuquerque Environmental Health Department create a map of overburdened areas in Bernalillo County, which “shall go into effect on July 1, 2025.”<sup>17</sup> This is the first environmental justice regulation of its type in New Mexico, at the state or municipal level, although the final regulation is not as stringent as the version that Mountain View had initially proposed.

At a national level, research dating back to the 1980s has demonstrated that low-income communities and communities of color are more likely to be situated near hazardous waste disposal sites and industrial air pollution sources.<sup>18</sup> President Biden has highlighted this issue as a top priority during his term, issuing two Executive Orders that mandate federal agencies incorporate environmental justice

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11. Mountain View Neighborhood Ass’n, Petition No. 2022-3 at 1 (Albuquerque-Bernalillo County Air Quality Control Board Nov. 1, 2022), <https://www.cabq.gov/airquality/air-quality-control-board> [<https://perma.cc/B2KZ-93BW>].

12. *South Valley Neighborhood Asking for Air Quality Rule*, ALBUQUERQUE J. (Sept. 28, 2023), [https://www.abqjournal.com/news/south-valley-neighborhood-asking-for-air-quality-rule/article\\_6ee72fea-2813-11ee-9d78-df47e330e3b8.html#tncms-source=login](https://www.abqjournal.com/news/south-valley-neighborhood-asking-for-air-quality-rule/article_6ee72fea-2813-11ee-9d78-df47e330e3b8.html#tncms-source=login) [<https://perma.cc/Z8JN-6QJM>].

13. Mountain View Neighborhood Ass’n, Petition No. 2022-3, Amended Exhibit A, Version 4, at 7 (Albuquerque-Bernalillo County Air Quality Control Board Oct. 6, 2023), <https://www.cabq.gov/airquality/air-quality-control-board> [<https://perma.cc/B2KZ-93BW>].

14. *Id.* at 17.

15. Mountain View Neighborhood Ass’n, Petition No. 2022-3, Final Order and Statement of Reasons for Adoption of Regulation Concerning Health Environment and Equity Impacts, at 8–9 (Albuquerque-Bernalillo County Air Quality Control Board Dec. 19, 2023), <https://www.cabq.gov/airquality/air-quality-control-board> [<https://perma.cc/B2KZ-93BW>].

16. N.M. STAT. ANN. § 20.11.41.7(D) (2024).

17. N.M. STAT. ANN. §§ 20.11.41.8(A), (B) (2024).

18. Benjamin F. Chavez et al., *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites*, COMM’N ON RACIAL JUST., UNITED CHURCH OF CHRIST (1987); see also Abdulrahman Jbaily et al., *Air Pollution Exposure Disparities Across U.S. Population and Income Groups*, NATURE, 601, 228–33 (2022).

into their missions.<sup>19</sup> The EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>20</sup> As part of fulfilling this mandate, in September 2022, the EPA published a report on developments in the research of cumulative impacts, a key metric for studying health inequities caused by pollution.<sup>21</sup> Cumulative impacts are comprised of “the totality of exposures to combinations of chemical and nonchemical stressors and their effects on health, well-being, and quality of life outcomes.”<sup>22</sup>

As the science on cumulative impacts develops, so does the law, and regulations to control cumulative impacts and move towards environmental justice are being introduced and implemented at the municipal,<sup>23</sup> state,<sup>24</sup> and federal<sup>25</sup> levels. These regulations aim to protect communities that are “disproportionately impacted and overburdened”<sup>26</sup> by pollution. While cumulative impacts laws are environmental regulations, they also regulate land use more strictly than environmental laws typically do because they effectively prohibit certain land uses that exceed permissible pollution levels. In a sense, they are a reactive measure; cumulative impact regulations will prevent the worsening of health risks in communities which are already overburdened by pollution, but they do nothing to address patterns which situate low income people and people of color in these communities. In addition to cumulative impacts laws which regulate pollution sources, siting of new affordable housing developments can help to break the cycle of environmental injustice by ensuring that low-income housing is available in areas with minimal environmental health risks. This Comment proposes a change to the Mortgage Finance Authority’s process for allocating tax credits, which incentivize developers to build affordable housing in New Mexico. By including an environmental justice metric in its evaluation of applications for tax credits, the MFA will incentivize developers to build affordable housing in areas with minimal

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19. Exec. Order No. 14,008, 86 Fed. Reg. 7619 (2021); Exec. Order No. 14,096, 88 Fed. Reg. 25251 (2023).

20. *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> [<https://perma.cc/EC28-RLNX>].

21. EPA, CUMULATIVE IMPACTS RESEARCH: RECOMMENDATIONS FOR EPA’S OFFICE OF RESEARCH AND DEVELOPMENT (2022), <https://www.epa.gov/system/files/documents/2023-05/CUMULATIVE%20IMPACTS%20RESEARCH-FINAL%20REPORT-EPA%20600-R-22-014A%20%2812%29.PDF> [<https://perma.cc/622D-LCHS>].

22. *Id.* at 4.

23. *See, e.g.*, Newark, N.J., § 41:20-1 to 20-7.

24. *See, e.g.*, Michael S. Warren, *Landmark Law to Protect N.J.’s Poorest Communities from Pollution Signed by Murphy*, NJ.COM (Sept. 18, 2020, 4:28 PM), <https://www.nj.com/news/2020/09/landmark-law-to-protect-njs-poorest-communities-from-pollution-signed-by-murphy.html> [<https://perma.cc/492R-S74Z>]; Michael B. Gerrard and Edward McTiernan, *New York Adopts Nation’s Strongest Environmental Justice Law*, N.Y. L. J. (May 9, 2023, 10:12 AM), <https://www.law.com/newyorklawjournal/2023/05/09/new-york-adopts-nations-strongest-environmental-justice-law/> [<https://perma.cc/KL6S-A6XW>].

25. *See, e.g.*, *Tlaib Introduces Bill to Fight Air Pollution with Cumulative Impact Requirement*, CONGRESSWOMAN RASHIDA TLAI B (July 12, 2023), <https://tlaib.house.gov/posts/tlaib-introduces-bill-to-fight-air-pollution-with-cumulative-impact-requirement> [<https://perma.cc/28KE-3CMQ>].

26. EPA, *supra* note 21 at 18.

environmental health risks, increasing opportunities for low-income residents to live in safer, healthier neighborhoods.

## BACKGROUND

This section will describe Albuquerque's history of racially restrictive property deeds and neighborhood covenants, as well as more current patterns in the distribution of minority and low-income populations and environmental health risks. Next, it will introduce the Mortgage Finance Authority Act and its role in allocating federal and state affordable housing tax credits to housing developers.

### A. Housing and Environmental Justice Issues Across Residents of Bernalillo County, New Mexico and at the National Scale.

Before diving into New Mexico's Mortgage Finance Authority and its role in increasing affordable housing in the state, it is important to understand the historical context that has fostered racial and socioeconomic inequities, including current environmental justice issues faced by some Albuquerque residents. To that end, this Part will first describe Albuquerque's history of racially restrictive covenants and other discriminatory housing practices, which caused racial segregation throughout the city. Then it will describe Albuquerque's current patterns of concentrated low-income communities and communities of color in certain parts of the city, often with the highest exposure to environmental pollution and associated health risks.

#### *i. Albuquerque's history of racially restrictive property deeds and covenants.*

Albuquerque, like many cities throughout the country, has a history of racial and ethnic segregation. Between the 1920s and 1940s, it was commonplace for real estate contracts for Albuquerque properties to contain clauses or covenants stating that homes could not be sold or occupied by "any person of Oriental or African descent" or "any person that has 1/8 or more of the blood (of individuals) commonly known as Negro or Oriental."<sup>27</sup> A covenant in one Northwest Albuquerque neighborhood excluded "Negros (and) Mexicans or so-called Spanish occupants."<sup>28</sup> The Federal Housing Authority (FHA) supplied real estate boards, homeowner associations, and FHA valuers in Albuquerque with its 1936 underwriting manual, which advocated for racially restrictive covenants and other discriminatory practices.<sup>29</sup> The manual encouraged that deed restrictions be employed across large areas to better insulate neighborhoods from "adverse influences," including "the

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27. Larry Barker, *Albuquerque's Dirty Little Secret*, KRQE NEWS 13 (Nov. 10, 2020, 10:28 PM), <https://www.krqe.com/news/larry-barker/albuquerque-dirty-little-secret/> [https://perma.cc/6ZB6-4CNS].

28. *Id.*

29. Stephon L. Scott, "Whites Only" Real Estate Restrictive Covenants: Albuquerque, New Mexico, 1940-1948, 15 (2007) (unpublished manuscript) (on file with author); FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT (1936).

infiltration of business and industrial uses, lower-class occupancy, and inharmonious racial groups.”<sup>30</sup>

A study of archival maps and records revealed that in 1948, at least 55 percent of Albuquerque subdivisions had formed racially restrictive covenants, and although the remaining subdivisions could not be verified, the study concluded it was reasonable to infer that they too contained similar restrictions.<sup>31</sup> These racially restrictive covenants excluded Mexican-Americans, African-Americans, Asian-Americans, and other racial and ethnic groups, and restricted Albuquerque neighborhoods to “Whites only.”<sup>32</sup> In 1948, the United States Supreme Court held that the Fourteenth Amendment barred any state action that enforced racially restrictive covenants.<sup>33</sup> However, neighborhoods continued to create racially restrictive covenants through the following decade.<sup>34</sup>

Although racial covenants are no longer legal, county clerks cannot remove discriminatory language from existing deeds and other filed documentation.<sup>35</sup> As such, racially restrictive language remains on many deeds in Albuquerque, as it does on deeds across the state and the U.S.<sup>36</sup>

*ii. Racial inequities, poverty, and environmental health risks in Albuquerque and nationwide.*

The legacy of racial segregation in Albuquerque persists to this day. There are five census tracts in Albuquerque which HUD has identified as “racially or ethnically concentrated areas of poverty,” indicating “historically and current concentrations of poverty and racial segregation.”<sup>37</sup> The City of Albuquerque states in its 2022 draft *Affirmatively Furthering Fair Housing Report* (“AFFH Report”) that, although Albuquerque has become less racially segregated over time, as of 2010, the southwest quadrant of Albuquerque is still composed of neighborhoods with predominantly Hispanic and Latino residents.<sup>38</sup> In fact, as of 2020, all census tracts where 71.5% or more of the population is Hispanic or Latino are in the southern part of Albuquerque, mainly clustered in the southwest.<sup>39</sup> Census tracts with the highest percentage of Hispanic or Latino residents had low median household incomes and lower median home values.<sup>40</sup> Census tracts where 71.5% or more of the

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30. FED. HOUS. ADMIN., *supra* note 29 at Part II 228–229.

31. Scott, *supra* note 29 at 15.

32. *Id.* at 16–17.

33. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

34. Barker, *supra* note 27.

35. CITY OF ALBUQUERQUE, AFFIRMATIVELY FURTHERING FAIR HOUSING REPORT: DRAFT 39 (2022), <https://www.cabq.gov/health-housing-homelessness/documents/city-of-albuquerque-affirmatively-furthering-fair-housing-report-draft-for-public-comment-12082022.pdf> [<https://perma.cc/U6S8-F73N>].

36. *Id.*

37. OFF. OF EQUITY & INCLUSION, CITY OF ALBUQUERQUE, CITY OF ALBUQUERQUE HOUSING AND ENTREPRENEURSHIP PART I: NEEDS ASSESSMENT REPORT 61 (2022), [https://www.cabq.gov/office-of-equity-inclusion/documents/221107\\_abq-housing\\_needs-assessment\\_final.pdf](https://www.cabq.gov/office-of-equity-inclusion/documents/221107_abq-housing_needs-assessment_final.pdf) [<https://perma.cc/AS9Y-TN2V>].

38. CITY OF ALBUQUERQUE, *supra* note 35 at 39.

39. *Id.* at 16.

40. *Id.* at 40.

population is Hispanic or Latino also tend to have the highest percentage (over 43%) of households living below the poverty level.<sup>41</sup>

Environmental data demonstrate that low-income and non-white communities suffer disproportionately from environmental pollution and its associated health risks. Albuquerque's AFFH Report evaluated how Albuquerque residents are impacted by environmental health risks, including wastewater discharge, hazardous waste, Superfund<sup>42</sup> site proximity, and air pollutants.<sup>43</sup> The AFFH Report showed that the areas of highest toxicity, with the most cumulative health risks, are "along the major transit corridors and in some of the City's central downtown neighborhoods," and "tend to have the highest concentration of poverty and Hispanic or Latino populations."<sup>44</sup> Conversely, areas like northeast Albuquerque, with a larger white population and less poverty, have minimal exposure to environmental health risks.<sup>45</sup>

In 2012, the Joint Center for Political and Economic Studies published its report *Place Matters for Health in Bernalillo County*, which analyzes "social, economic, and environmental conditions in Bernalillo County and documents their relationship to the health status of the county's residents."<sup>46</sup> This report illuminated environmental justice issues in Bernalillo County concerning racial and demographic characteristics that were linked with exposure to environmental health risks.<sup>47</sup> It revealed that the communities in Bernalillo County with high levels of environmental pollution, including exposure to Superfund sites, industrial zones, and hazardous air pollutants, were significantly more likely to have low-income, Hispanic, and recent immigrant populations.<sup>48</sup> The communities with the lowest levels of environmental health risks, on the other hand, had higher incomes and majority white populations.<sup>49</sup>

The report separated the intensity of environmental health risks to individuals across Bernalillo County into five categories from lowest to highest risk.<sup>50</sup> It revealed that those within the category of highest risk had a life expectancy averaging 5.2 years shorter than those in the category with the lowest environmental

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41. *Id.* at 16, 24.

42. In 1990, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act, referred to as Superfund, to address sites that have been contaminated by improper disposal or management of hazardous waste. Superfund sites are sites the EPA has identified as contaminated areas, which can include manufacturing plants, landfills, and other sources of hazardous waste. *What is Superfund?*, EPA (Oct. 30, 2023), <https://www.epa.gov/superfund/what-superfund> [<https://perma.cc/BX53-CVR4>].

43. CITY OF ALBUQUERQUE, *supra* note 35 at 51.

44. *Id.*

45. *Id.*

46. JOINT CTR. FOR POL. & ECON. STUD., *PLACE MATTERS FOR HEALTH IN BERNALILLO COUNTY: ENSURING OPPORTUNITIES FOR GOOD HEALTH FOR ALL* (2012), <https://jointcenter.org/wp-content/uploads/2012/09/PLACE-MATTERS-for-Health-in-Bernalillo-County.pdf> [<https://perma.cc/F5P2-Y4WN>].

47. *Id.* at 16.

48. *Id.* at 16–19.

49. *Id.* at 16–17.

50. *Id.* at 18–19.



risk.<sup>51</sup> Clearly, environmental pollution and health risks vary widely depending on where a person in Bernalillo County lives, and these disparities have real impacts on human health and life expectancy.<sup>52</sup>

There have been numerous studies demonstrating similar patterns at the national level. Research dating back to the 1980s has demonstrated the link between low-income and minority communities and locations facing the highest rates of environmental pollution.<sup>53</sup> In 1987, a national-scale research effort revealed that communities of color were more likely than white communities to be situated near hazardous waste disposal sites.<sup>54</sup> Five years later, the EPA's Science Advisory Board published its own report.<sup>55</sup> The EPA's report evaluated health data, socioeconomic data, and environmental health risks in order to evaluate whether certain communities suffered disproportionate risks.<sup>56</sup> Its research demonstrated numerous health disparities, including that African American children were significantly more likely to have harmful amounts of lead in their blood than white children.<sup>57</sup> The report described several studies that indicated African Americans were exposed to higher levels of air pollution than white people, and that Hispanic people experience the highest exposure rates nationally for all but one major pollutant.<sup>58</sup> More recent research exemplifies similar findings, including that low-income communities are more likely to be in proximity to sources of air pollution than middle- and upper-class communities.<sup>59</sup>

#### **B. The New Mexico Mortgage Finance Authority Allocates State and Federal Tax Credits to Affordable Housing Developers.**

The Mortgage Finance Authority Act established the state's Mortgage Finance Authority in response to the shortage of housing affordable to low and moderate income households, which is especially concentrated in urban areas.<sup>60</sup> In the Mortgage Finance Authority Act's declaration of purpose, the legislature described this housing shortage as detrimental to the health and welfare of New Mexican residents because it caused "overcrowding and congestion" and exacerbated "slum conditions."<sup>61</sup> The MFA is a quasi-governmental organization whose purpose is to fund and oversee housing programs for nonprofits, private entities, and government agencies, with the goal of improving the supply of affordable housing across New Mexico.<sup>62</sup>

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51. *Id.*

52. *Id.* at 19.

53. Chavez et al., *supra* note 18; *see also* Jbaily, *supra* note 18 at 228–33.

54. Chavez et al., *supra* note 18.

55. EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES I (1992), <https://nepis.epa.gov/Exec/QueryPURL.cgi?Dockey=40000JLA.txt> [<https://perma.cc/N3C2-32XH>].

56. *Id.* at 4–15.

57. *Id.* at 9.

58. *Id.* at 11.

59. Jbaily, *supra* note 18 at 228–33.

60. N.M. STAT. ANN. § 58-18-2 (1995).

61. *Id.* § 58-18-2(A).

62. *Id.* § 58-18-2(F).

The Mortgage Finance Authority Act grants the MFA authority to adopt, revise, and repeal rules and regulations related to its duties, subject to approval from an oversight committee.<sup>63</sup> The oversight committee is composed of four members appointed by the president pro tempore of the senate and four members appointed by the speaker of the house of representatives.<sup>64</sup> The MFA is comprised of seven voting members, including the lieutenant governor, the state treasurer, the attorney general, and four others appointed by the governor.<sup>65</sup>

Section 14 of the Constitution of the State of New Mexico<sup>66</sup> authorizes and prescribes how the state, counties, and municipalities may donate or pay costs towards affordable housing projects without violating the Anti-Donation Clause.<sup>67</sup> It requires that New Mexico's legislature enact enabling legislation to define affordable housing and designate the state's "housing authority" to approve allocations of housing assistance.<sup>68</sup> The Affordable Housing Act implements these provisions of the state Constitution.<sup>69</sup> The Act lays out general eligibility requirements for governmental<sup>70</sup> and non-governmental entities<sup>71</sup> to award and receive assistance for affordable housing development projects, but it provides that the MFA will promulgate rules to establish more specific eligibility requirements and procedures for allocating funds.<sup>72</sup> It defines affordable housing as "residential housing primarily for persons or households of low or moderate income."<sup>73</sup>

The MFA manages various programs and funding mechanisms to support affordable housing in New Mexico, including two tax credits for developers that build affordable housing for low- and moderate-income residents: the Low Income Housing Tax Credit ("LIHTC") and the New Mexico Affordable Housing Tax Credit ("state tax credit"). The purpose of these credits is to incentivize developers to build long-lasting affordable housing in New Mexico.<sup>74</sup> The following subsections will briefly describe the tax credits and the MFA's role in their allocation.

*i. The IRS provides federal funding to the MFA to allocate as Low Income Housing Tax Credits.*

The federal Tax Reform Act of 1986<sup>75</sup> created the LIHTC as a method of providing federal tax savings to businesses that invest in affordable housing

63. *Id.* § 58-18-8(A).

64. *Id.* § 58-18-5(W).

65. *Id.* § 58-18-4.

66. N.M. CONST. art. IX, § 14(E).

67. The Anti-Donation Clause states that "[n]either the state nor any county, school district or municipality" shall "lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation." *Id.* art. IX, § 14.

68. *Id.* art. IX, § 14(F)(6).

69. N.M. STAT. ANN. § 6-27-2 (2015); NM CONST. art. IX, § 14(E)-(F).

70. N.M. STAT. ANN. § 6-27-5 to 6-27-7 (2015).

71. *Id.* § 6-27-4 (2015).

72. *See id.* § 6-27-4(B); *see also* § 6-27-6(B), § 6-27-8.

73. *Id.* § 6-27-3(A).

74. *LIHTC Program Overview*, N.M. MORTG. FIN. AUTH., <https://housingnm.org/developers/lihtc> [<https://perma.cc/8MXJ-C654>].

75. *Low-Income Housing Tax Credit (LIHTC)*, HOUS. & URB. DEV., <https://www.huduser.gov/portal/datasets/lihtc.html> [<https://perma.cc/87D9-P2VG>].

developments.<sup>76</sup> The Internal Revenue Service (“IRS”) allocates federal funding to state housing finance agencies annually, which they then allocate to developers of affordable housing projects.<sup>77</sup> The Internal Revenue Code (“Code”) requires that each state’s housing authority—the MFA, in New Mexico—develops and maintains a Qualified Allocation Plan (“QAP”) detailing how it will allocate the federal funds to affordable housing projects.<sup>78</sup> The Code outlines ten criteria that, at a minimum, each housing authority must include in its QAP and consider when making allocation decisions.<sup>79</sup> Once the housing authority allocates the tax credit to a developer, the developer sells the credits to investors in exchange for equity financing to support the affordable housing project.<sup>80</sup> Alternatively, a development company can use the tax credits for its own taxes if it does not need financing from investors.<sup>81</sup>

The LIHTC is a true tax credit because it provides a dollar-for-dollar reduction in federal taxes, rather than a reduction in taxable income amount.<sup>82</sup> The Code prescribes that the amount of credit an agency can award a developer is the total non-depreciable cost of developing the affordable housing units (meaning if the building includes units that are not affordable, the amount would be the cost of developing only the affordable housing units as opposed to the full building cost), multiplied by an applicable percentage depending on the development type, and allocated across ten years.<sup>83</sup> For new buildings that are not federally subsidized, this amounts to a minimum credit rate of 9% of the total cost of affordable unit development awarded yearly for ten years.<sup>84</sup> The minimum credit rate for new or existing buildings which are federally subsidized (financed by tax-exempt bonds) is 4%.<sup>85</sup> The 4% tax credits are non-competitive, “as of right” credits for projects where at least 50% of total development costs are covered using bonds.<sup>86</sup> The 9% tax credits are competitive.<sup>87</sup>

The LIHTC has funded 1.5 million low-income housing units across the United States; this constitutes the majority of new affordable housing since the passage of the Tax Reform Act of 1986.<sup>88</sup> The IRS allocates tax expenditure amounts for the 9% LIHTC based on a state’s population size.<sup>89</sup> In 2023, states received

76. N.M. MORTG. FIN. AUTH., *supra* note 74.

77. HOUS. & URB. DEV., *supra* note 75.

78. 26 U.S.C. § 42(m)(1)(A)(i), (B) (2020).

79. *Id.* § 42(m)(1)(C).

80. Mihir Desai, Dhammika Dharmapala & Monica Singhal, *Tax Incentives for Affordable Housing: The Low Income Housing Tax Credit*, 24 TAX POL’Y & ECON. 181, 184 (2010).

81. *Id.* at 186.

82. N.M. MORTG. FIN. AUTH., STATE OF NEW MEXICO HOUSING TAX CREDIT PROGRAM: QUALIFIED ALLOCATION PLAN 1 (2022), [https://housingnm.org/uploads/documents/2023\\_QAP.pdf](https://housingnm.org/uploads/documents/2023_QAP.pdf) [<https://perma.cc/6PUH-J7X2>].

83. 26 U.S.C. § 42(a)–(c) (2020).

84. *Id.* § 42(b)(1)–(2); N.M. MORTG. FIN. AUTH., *supra* note 74.

85. 26 U.S.C. § 42(b)(3) (2020); *4 Percent Low Income Housing Tax Credits*, N.M. MORTG. FIN. AUTH., <https://housingnm.org/developers/lihtc/4-pct-program> [<https://perma.cc/PJ9C-YGWK>].

86. N.M. MORTG. FIN. AUTH., *supra* note 85.

87. *Id.*

88. Desai et al., *supra* note 80 at 181; *see also* N.M. MORTG. FIN. AUTH., *supra* note 74.

89. N.M. MORTG. FIN. AUTH., *supra* note 74.

federal funding in the amount of \$2.75 per resident.<sup>90</sup> At that time, New Mexico had an estimated population of 2,115,877, so the IRS authorized the MFA to allocate \$5,818,662 in 9% tax credits to developers through the LIHTC program.<sup>91</sup>

- ii. *Under the Affordable Housing Tax Credit Act, the MFA allocates state funds to affordable housing developers through state tax credits.*

The Affordable Housing Tax Credit Act establishes state funds for a second type of tax credit, called the New Mexico Affordable Housing Tax Credit, and authorizes the Mortgage Finance Authority to issue these credits.<sup>92</sup> The MFA allocates between \$4 million and \$5 million in state tax credits per year,<sup>93</sup> and a single developer can earn up to one million dollars or 25% of the MFA's yearly budget for state tax credits, whichever is less.<sup>94</sup> The MFA's Affordable Housing Tax Credit Program Rules, approved by the MFA Board of Directors, govern the overall program structure and goals.<sup>95</sup> However, the MFA has also published a Notice of Funding Availability which contains the specific requirements for state tax credit applications.<sup>96</sup>

To receive state tax credits, the developers must record a Land Use Restriction Agreement guaranteeing that the housing will remain affordable for a minimum of five years for single-family housing or ten years for multifamily housing.<sup>97</sup> Developers then award the tax credits to individuals or businesses to offset state income taxes, gross receipts taxes, or compensating taxes in exchange for donations of land, services, or financial support to the housing project.<sup>98</sup> The tax credit is worth 50% of the value of the donor's contribution to the project.<sup>99</sup>

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90. *Id.*

91. *Id.*

92. N.M. STAT. ANN. § 7-9I-3(A) (2010).

93. *Apply for State Tax Credits for Your Development*, N.M. MORTG. FIN. AUTH., <https://housingnm.org/developers/state-tax-credits/developers-apply> [<https://perma.cc/8TBB-LJQ5>].

94. N.M. MORTG. FIN. AUTH., NEW MEXICO AFFORDABLE HOUSING TAX CREDIT PROGRAM RULES F(7) (2021), [https://housingnm.org/uploads/documents/State\\_Tax\\_Credit\\_Program\\_Rules\\_Approved\\_by\\_Board\\_07-21-2021\\_\(1\).pdf](https://housingnm.org/uploads/documents/State_Tax_Credit_Program_Rules_Approved_by_Board_07-21-2021_(1).pdf) [<https://perma.cc/J6H2-UJTS>].

95. *Id.*

96. N.M. MORTG. FIN. AUTH., NEW MEXICO AFFORDABLE HOUSING TAX CREDIT PROGRAM NOTICE OF FUNDING AVAILABILITY (2021), [https://housingnm.org/uploads/documents/New\\_Mexico\\_Affordable\\_Housing\\_Tax\\_Credit\\_Program\\_N\\_OFA\\_2023.pdf](https://housingnm.org/uploads/documents/New_Mexico_Affordable_Housing_Tax_Credit_Program_N_OFA_2023.pdf) [<https://perma.cc/U9M3-TFUS>].

97. N.M. MORTG. FIN. AUTH., NEW MEXICO AFFORDABLE HOUSING TAX CREDIT PROGRAM RULES F(8)–(15) (2021), [https://housingnm.org/uploads/documents/State\\_Tax\\_Credit\\_Program\\_Rules\\_Approved\\_by\\_Board\\_07-21-2021\\_\(1\).pdf](https://housingnm.org/uploads/documents/State_Tax_Credit_Program_Rules_Approved_by_Board_07-21-2021_(1).pdf) [<https://perma.cc/J6H2-UJTS>].

98. N.M. MORTG. FIN. AUTH., NEW MEXICO AFFORDABLE HOUSING TAX CREDIT PROGRAM RULES F(4) (2021), [https://housingnm.org/uploads/documents/State\\_Tax\\_Credit\\_Program\\_Rules\\_Approved\\_by\\_Board\\_07-21-2021\\_\(1\).pdf](https://housingnm.org/uploads/documents/State_Tax_Credit_Program_Rules_Approved_by_Board_07-21-2021_(1).pdf) [<https://perma.cc/J6H2-UJTS>].

99. N.M. STAT. ANN. § 7-9I-3(A) (2010).

## ANALYSIS

There is no single solution to the housing and environmental justice crises New Mexico faces, but the issues are inherently intertwined because of their place-based nature and interrelated causes. While environmental regulations can be used to mitigate additional environmental harms to communities already overburdened by environmental health risks, the current housing shortage, zoning laws, and high cost of development can result in affordable housing being more frequently located and built in communities with higher exposure to environmental pollution. A simple change to the Mortgage Finance Authority's process of administering state and federal tax credits for affordable housing developments can help to alleviate this pattern. The MFA can add environmental justice metrics to the project selection criteria it uses to assess developers' applications for tax credits. This change would incorporate environmental justice as a priority of the MFA, incentivize developers to build new affordable housing projects in areas with less environmental health risks, and ensure that New Mexicans have access to affordable housing in safer communities.

### A. The MFA Can Use EPA's EJScreen Tool and Environmental Justice Indexes to Evaluate Potential Environmental Justice Concerns Related to Siting of Affordable Housing.

The EPA has developed a publicly available environmental justice mapping and screening tool called EJScreen, which provides a national dataset to evaluate and visualize environmental, demographic, and socioeconomic criteria.<sup>100</sup> Among EJScreen's various tools are the EJ Indexes, which combine an environmental indicator with a demographic index consisting of the low-income population and the population of people of color within a Census block group.<sup>101</sup> This produces a single environmental justice index for that specific environmental indicator, which will be higher in Census block groups where there are higher populations of low income people or people of color and a higher exposure to the environmental indicator.<sup>102</sup> The Census Bureau defines Census block groups, which are geographically divided areas containing between 600 and 3,000 individuals.<sup>103</sup> The Census block group is the smallest unit for which the Census Bureau shares demographic and socioeconomic data with the public.<sup>104</sup>

The EPA uses Census Bureau data for EJScreen's socioeconomic and demographic indicators.<sup>105</sup> The indicator for people of color consists of the percent

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100. *What is EJScreen?*, EPA, (June 26, 2023), <https://www.epa.gov/ejscreen/what-ejscreen> [<https://perma.cc/CAJ2-3NQP>].

101. *EJ and Supplemental Indexes in EJScreen*, EPA, (June 26, 2023), <https://www.epa.gov/ejscreen/ej-and-supplemental-indexes-ejscreen> [<https://perma.cc/6BUR-FMAQ>].

102. *Id.*

103. *How to Interpret EJScreen Data*, EPA, (June 26, 2023), <https://www.epa.gov/ejscreen/how-interpret-ejscreen-data> [<https://perma.cc/4G39-6WW6>].

104. *Id.*

105. *Overview of Socioeconomic Indicators in EJScreen*, EPA, (January 30, 2023), <https://www.epa.gov/ejscreen/overview-socioeconomic-indicators-ejscreen> [<https://perma.cc/F3NB-MFQ5>].

of individuals within the Census block group who identified their race as “other than white alone” or “Hispanic or Latino,” meaning all individuals besides those that identified as “white alone.”<sup>106</sup> The low income indicator is the percent of individuals within the Census block group who are in households with a household income less than or equal to twice the federal poverty level.<sup>107</sup> The demographic index incorporated into each EJ Index is the average of the indicators for low income people and people of color.<sup>108</sup> EJScreen Version 2.2, the current version of the program, pulls its socioeconomic and demographic data from the Census Bureau’s American Community Survey 2017–2021 5-Year Estimates.<sup>109</sup>

EJScreen contains data on 13 environmental indicators, each of which can be used to calculate an EJ Index.<sup>110</sup> These indicators include wastewater discharge; underground storage tanks and leaking underground storage tanks; hazardous waste proximity; risk management plan facility<sup>111</sup> proximity; Superfund<sup>112</sup> proximity; lead paint; traffic proximity and volume; and five indicators for air quality impacts, including air toxics cancer risk.<sup>113</sup> The data for these indicators comes mainly from the EPA’s own databases, and the EPA collected and calculated the data between 2017 and 2022, depending on the indicator.<sup>114</sup>

Each EJ Index is a percentile, which is a relative comparison between the Census block group and a larger population—EJScreen users can choose to calculate the EJ Index as a comparison with either the state population or the national population.<sup>115</sup> An EJ Index calculated as a national percentile would indicate what percent of the national population has an equal or lower value, meaning a lower exposure to the environmental indicator relative to the population of low income people and people of color.<sup>116</sup> The EPA recommends that a government agency using EJScreen establish a filter or threshold level for any EJ Index, at or above which indicates an area of environmental justice concern or an area in need of further review.<sup>117</sup> For example, the EPA uses the 80th percentile as its filter, meaning that if any single EJ Index is at or above the 80th percentile nationally, the EPA considers it a candidate for further review.<sup>118</sup> However, the EPA suggests that it may be beneficial for specific regions to tailor their threshold levels to different uses, needs, or populations.<sup>119</sup>

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106. *Id.*

107. *Id.*

108. *Id.*

109. EPA, EJSREEN TECHNICAL DOCUMENTATION FOR VERSION 2.2 4 (2023), <https://www.epa.gov/system/files/documents/2023-06/ejscreen-tech-doc-version-2-2.pdf> [<https://perma.cc/93QX-3ZEU>].

110. *Overview of Environmental Indicators in EJScreen*, EPA (July 25, 2023), [epa.gov/ejscreen/overview-environmental-indicators-ejscreen](https://www.epa.gov/ejscreen/overview-environmental-indicators-ejscreen) [<https://perma.cc/B7JB-58Z3>].

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. EPA, *supra* note 103.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

The EJScreen tool and EJ Indexes can be used to screen for environmental justice concerns in numerous contexts. The EPA uses EJScreen to evaluate human health risks and environment justice concerns when implementing regulatory changes.<sup>120</sup> It also uses EJScreen to inform outreach efforts, as part of environmental permit review processes, and to prioritize enforcement of environmental laws and permits.<sup>121</sup> State agencies also use the EPA's EJScreen, and several states and municipalities have built—or are in the process of building—their own tools based on EJScreen methodologies to better map cumulative environmental impacts on vulnerable communities.<sup>122</sup> Although state and municipal equivalents to EJScreen can make use of higher resolution data that local agencies have collected, there are often tradeoffs in functionality and consistency of data.<sup>123</sup>

New Mexico has no equivalent to the EJScreen, and state agencies like the New Mexico Environment Department use EJScreen for multiple purposes, including screening for communities that may need more focused outreach regarding environmental permitting actions.<sup>124</sup> The EPA's EJScreen is easy to use and the EPA offers a User Guide, video tutorials, trainings, and “office hours” to help members of the public using the tool.<sup>125</sup> Developers who apply for tax credits from the MFA could feasibly—in a short time and without environmental expertise—look up the value for each EJ Index at a proposed project location, and report those values with supporting documentation from EJScreen in their tax credit application as described in detail below.

#### **B. The MFA Should Include the Environmental Justice Indexes as Application Criteria for its LIHTC Program.**

The Internal Revenue Code requires that housing credit agencies like the MFA develop and maintain a Qualified Allocation Plan, which describes how the LIHTC amounts will be allocated to affordable housing projects.<sup>126</sup> The Code specifies ten criteria that every state's QAP must consider, including the project location, public housing waiting lists, and the energy efficiency of the project.<sup>127</sup> However, the Code does not specify thresholds for applicants to meet these criteria, nor how these criteria are to be weighed against each other. For example, it gives no

120. EPA, TECHNICAL GUIDANCE FOR ASSESSING ENVIRONMENTAL JUSTICE IN REGULATORY ANALYSIS 42–43 (2016), [https://www.epa.gov/sites/default/files/2016-06/documents/ejtg\\_5\\_6\\_16\\_v5.1.pdf](https://www.epa.gov/sites/default/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf) [<https://perma.cc/2JDP-6RAK>].

121. EPA, EJSCREEN FACT SHEET 1 (2016), [https://www.epa.gov/sites/default/files/2016-07/documents/ejscreen\\_fact\\_sheet.pdf](https://www.epa.gov/sites/default/files/2016-07/documents/ejscreen_fact_sheet.pdf) [<https://perma.cc/MV2C-NARK>].

122. Charles Lee, *A Game Changer in the Making? Lessons from States Advancing Environmental Justice through Mapping and Cumulative Impact Strategies*, 50 ENV'T. L. REP. 10203, 10205–10207 (2020).

123. *Id.* at 10206.

124. *See, e.g.*, N.M. ENV'T DEP'T, POLICY 07-13 (2018), <https://www.env.nm.gov/wp-content/uploads/sites/10/2018/02/NMED-Policy-and-Procedure-07-13.pdf> [<https://perma.cc/K8FW-DM58>].

125. *Learn to Use EJScreen*, EPA (Oct. 2, 2023), <https://www.epa.gov/ejscreen/learn-use-ejscreen> [<https://perma.cc/T4GB-DST3>].

126. 26 U.S.C. § 42(m)(1)(B)(i)–(ii) (2020).

127. *Id.* § 42(m)(1)(C)(i)–(x).

guidance as to how an agency should determine the ideal project location, or whether to evaluate project location as a certain point value in comparison with other criteria; it simply lists project location as one of the selection criteria that must be considered in a QAP.

Furthermore, the Code does not limit a housing authority from considering other criteria in addition to those explicitly listed. In fact, state housing authorities “hold most of the power in selecting program recipients” because of the minimal guidelines in the Code; states have broad discretion in selecting the application criteria and in the overall process of allocating tax credits.<sup>128</sup> The New Mexico MFA’s most current QAP, effective as of December 1, 2022, includes the ten criteria required under the Code.<sup>129</sup> It also contains additional criteria that the MFA considers consistent with the *2020-2024 New Mexico Consolidated Plan & 2020 Action Plan*, a statewide housing planning document the MFA published in coordination with the Department of Finance and Administration.<sup>130</sup> The MFA updates its QAP annually to make changes to its selection criteria and other program details.<sup>131</sup>

Developers in New Mexico seeking federal tax credits for affordable housing development through the competitive 9% LIHTC program must submit applications to the MFA, which then ranks projects against other applications of the same project type.<sup>132</sup> For example, new construction projects would be ranked in comparison with other new construction projects.<sup>133</sup> Project applications earn a certain number of points for each criterion they meet, and the MFA tax credits are awarded to the projects with the highest total points.<sup>134</sup> Projects involving new building developments that are eligible for the 9% LIHTC, must score at least 53 points to be eligible to receive the tax credit (unless there are too few projects that score above 53 points).<sup>135</sup> Additionally, there are Minimum Project Threshold Requirements that each project application must meet, regardless of its total point score.<sup>136</sup>

This Comment proposes that the MFA revise its LIHTC application criteria and scoring rubric to require developers to submit as part of their applications the EJScreen’s EJ Index values at the proposed project location, and award points to applications with healthier EJ Index values. There are two possible ways that the EJ Indexes could be incorporated into the project selection criteria. One approach would be to include the EJ Indexes as a Minimum Project Threshold Requirement. Currently, the Minimum Project Threshold Requirements include that the sites are

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128. Desai et al., *supra* note 80 at 184.

129. N.M. MORTG. FIN. AUTH., *supra* note 82 at 23–51.

130. *Id.*; N.M. MORTG. FIN. AUTH. & N.M. DEP’T OF FIN. & ADMIN., DRAFT 2020–2024 NEW MEXICO CONSOLIDATED PLAN & 2020 ANNUAL ACTION PLAN (2019), [https://housingnm.org/uploads/documents/Consolidated\\_Plan\\_Draft\\_09-27-19.pdf](https://housingnm.org/uploads/documents/Consolidated_Plan_Draft_09-27-19.pdf) [<https://perma.cc/GUC4-F5GS>].

131. *Qualified Allocation Plans (QAP’s)*, N.M. MORTG. FIN. AUTH., <https://housingnm.org/developers/lihtc> [<https://perma.cc/AA6R-NABH>].

132. N.M. MORTG. FIN. AUTH., *supra* note 82 at 4.

133. *Id.*

134. *Id.* at 23.

135. *Id.*

136. *Id.* at 18–21.



properly zoned for the proposed project, and that the applicants are in good standing with the MFA and other state and federal housing authorities.<sup>137</sup> This is the more stringent of the two suggested approaches; it would effectively prohibit housing developments in certain areas from receiving the LIHTC. For example, if the threshold requirement related to environmental risk was that the location of the proposed project cannot have an air toxics cancer risk about the 80th percentile, then developers whose proposed projects would be in areas with a risk above the 80th percentile would be ineligible for the LIHTC, regardless of their overall application score.

The extreme shortage of affordable housing in Albuquerque and across New Mexico<sup>138</sup> outweighs any benefits of such a rigid approach. According to the Metropolitan Housing and Communities Policy Center, Albuquerque needs at least 15,500 more affordable rental units before there is adequate housing supply to meet the needs of its residents.<sup>139</sup> Because the MFA was created primarily to address this housing shortage,<sup>140</sup> any threshold requirement that would outright prevent the allocation of tax credits to developments in particular locations would be contradictory to the MFA's role and purpose of creating more affordable housing throughout New Mexico. Such an approach could also be viewed as discriminating against neighborhoods, depriving the residents of new affordable housing options in their own communities.

Instead, the MFA can incorporate a new EJ Index criterion into the 21 existing Project Selection Criteria.<sup>141</sup> Existing criteria range from 2 to 16 points each, and some criteria include several tiers, meaning projects may be awarded a partial score for that individual criterion.<sup>142</sup> The MFA could implement a tiered EJ Index criterion based on the 13 EJ Indexes available on the EPA's EJScreen tool. Each project application could be awarded one point for each Environmental Justice Index for which the project location falls at or below the 80th percentile, which is the percentile at or above which the EPA considers an area to be a community of concern for potential environmental justice issues.<sup>143</sup> The MFA could also implement a more cautious approach and chose a lower percentile. Before doing so, it can consult with the New Mexico Environment Department, or another state agency that uses the EJScreen tool, for expertise in selecting the appropriate threshold. If each EJ Index is worth one point, the total EJ Index Criterion would be worth up to 13 points.

For developers who propose housing projects in neighborhoods that fall below one or more of the EJ Index percentile thresholds, the MFA can allow opportunities for developers to earn back points in the EJ Index criterion by incorporating design elements that address environmental health concerns into their housing projects. There are numerous resources available for developers who seek to make such design improvements. Enterprise Community Partners, a national nonprofit focused on affordable housing issues, created the Green Communities

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137. *Id.*

138. *See, e.g.*, JOSH LEOPOLD, ET. AL., *supra* note 6 at vi.

139. *Id.*

140. N.M. STAT. ANN. § 58-18-2 (1995).

141. N.M. MORTG. FIN. AUTH., *supra* note 82 at 24–51.

142. *Id.*

143. EPA, *supra* note 103.

Criteria, which many states now include as application criteria in their QAPs for the LIHTC 9% tax credits.<sup>144</sup> These criteria include cost-effective green design measures, site considerations, and other environmental concerns in the development of affordable housing, with the goal of reducing the climate impact of development.<sup>145</sup> Similarly, the Leadership in Energy and Environmental Design (LEED) program offers green building design standards and a certification program for residential and non-residential buildings, which is recognized across the U.S. and globally.<sup>146</sup>

While these programs are not focused on environmental justice specifically, they suggest numerous design elements that could benefit the environmental health of building occupants and the communities surrounding the building. Some examples of include performing lead risk assessments and abatement to reduce poisoning from lead paint in existing buildings;<sup>147</sup> planting trees and reducing pavement to minimize heat island effect,<sup>148</sup> which affects air quality and respiratory conditions;<sup>149</sup> and using efficient air filters to reduce air pollutants that enter into the building.<sup>150</sup> Notably, the option to incorporate such design elements could increase costs for affordable housing developers. However, providing developers with this option to improve their EJ Index criterion score is necessary to address the shortage of housing within EJ communities specifically. Otherwise, a point system that gives preference solely to communities above EJ Index thresholds could bias affordable housing developments to wealthier, whiter communities.

This approach is also more favorable than including EJ Indexes as Minimum Project Threshold Requirements. It incentivizes developments that favor environmental health without completely barring the allocation of tax credits to developments in certain neighborhoods or areas. A 13-point EJ Index criterion would allow a significant boost to an application for a development proposed in an area with low environmental health risks across all or most of the EJ factors. However, it would not outweigh the other important criteria that the MFA uses to evaluate applications, like the proposed income levels of the tenants or the sustained affordability of the units.<sup>151</sup> Importantly, this approach would not exclude the

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144. *Green Communities*, ENTER., <https://www.enterprisecommunity.org/impact-areas/resilience/green-communities> [<https://perma.cc/AQ7W-PJRR>].

145. *Id.*

146. *LEED Rating System*, LEED, <https://www.usgbc.org/leed> [<https://perma.cc/3MF8-8HCK>].

147. ENTER., 2020 ENTERPRISE GREEN COMMUNITIES CRITERIA 139 (2020), [https://www.greencommunitiesonline.org/sites/default/files/egc\\_2020\\_criteria\\_manual.pdf](https://www.greencommunitiesonline.org/sites/default/files/egc_2020_criteria_manual.pdf) [<https://perma.cc/N5HE-BCFE>].

148. “Heat islands are urbanized areas that experience higher temperatures than outlying areas . . . [because] buildings, roads, and other infrastructure absorb and re-emit the sun’s heat more than natural landscapes such as forests and water bodies. Urban areas, where these structures are highly concentrated and greenery is limited, become ‘islands’ of higher temperatures relative to outlying areas.” *Heat Island Effect*, EPA (Mar. 18, 2024), <https://www.epa.gov/heatislands> [<https://perma.cc/46BA-VE6J>].

149. Meg Anderson & Sean McMinn, *As Rising Heat Bakes U.S. Cities, the Poor Often Feel it Most*, NPR (Sept. 3, 2019, 5:00 AM), <https://www.npr.org/2019/09/03/754044732/as-rising-heat-bakes-u-s-cities-the-poor-often-feel-it-most> [<https://perma.cc/LQ98-H2U9>].

150. Vannan Kandi Vijayan, Haralappa Paramesh, Sundeep Santosh Salvi & Alpa Anil Kumar Dalal, *Enhancing Indoor Air Quality - The Air Filter Advantage*, 32 LUNG INDIA 473, 478 (2015).

151. N.M. MORTG. FIN. AUTH., *supra* note 82 at 28–29.

allocation of tax credits for developments in higher-risk areas, but rather, incentivize affordable housing in communities with lower environmental justice concerns either in safer geographic areas, or by incentivizing developers to implement design features that benefit the environmental health of the communities they will house.

Although it may increase costs to developers, this strategy incorporates environmental justice concerns into affordable housing development without discouraging development entirely, because it does not require developers to make design or location changes. Developers can decide whether it is feasible to locate a project in an area that meets the EJ Index thresholds, or implement design elements that address environmental justice concerns. If neither are feasible, they can focus on earning points towards other Application Criteria.

**C. The MFA Should Include the Environmental Justice Indexes as Application Criteria for its State Tax Credit Program.**

Similarly, the MFA could incorporate the EJ Indexes as application criteria for its state tax credit program. The MFA reviews applications for state tax credits in a manner similar to its 9% LIHTC review process. It uses a rubric of Project Selection Criteria to score applications.<sup>152</sup> The MFA requires a minimum score of 70 before an applicant can receive an award, and the rubric allows for a score of up to 120.<sup>153</sup> The MFA currently uses only six criteria in evaluating applications for state tax credits, but the criteria are worth between 10 and 40 points and each criterion is broken down into lower-level categories so that partial points can be awarded.<sup>154</sup> For example, one criterion is “the degree to which the applicant has leveraged other public or private sector resources,” and applicants can score between 0 and 20 points depending on how much outside funding the applicant has received for its project.<sup>155</sup>

The EJ Indexes can be included in the state tax credit program’s Project Selection Criteria so that each project application can be awarded one point for each EJ Index for which the project location falls at or below the 80th percentile, for example. The total EJ Index criterion would be worth up to 13 points per application—one point for each EJ Index with a value below the threshold that MFA identifies. Alternatively, the MFA could take a more aggressive approach and double the point values so that the total possible score for the EJ Index criterion is 26 points. This approach would be highly preferential to applications for proposed developments with the least risk for environmental justice concerns. The MFA should also allow opportunities for developers to earn back points in the EJ Index criterion by including design elements to address environmental health concerns, as described above for the LIHTC application program.

Because the state tax credit is worth only 50% on the dollar for affordable housing contributions (lower than the LIHTC), developers may be less incentivized to apply for it and build affordable housing if the MFA imposes additional requirements. Including the EJ Index Criterion does not necessarily require developers to expend extra funds, as they have different options to score points

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152. N.M. MORTG. FIN. AUTH., *supra* note 96 at 6.

153. *Id.* at 6–8.

154. *Id.*

155. *Id.* at 6.

within this and other application criteria. However, to combat any possible financial burden, the MFA could consider increasing the worth of its tax credits so that affordable housing developers remain incentivized to apply and develop affordable housing in New Mexico. Although this would be a significant expenditure and change to the program, the Governor and Legislature have shown immense support for efforts to address affordable housing issues in New Mexico.<sup>156</sup> During the 2024 legislative session, the Legislature approved \$200 million for various housing issues, including for affordable housing infrastructure and loans for development of low-income housing.<sup>157</sup> This included \$50 million for the MFA's Housing Trust Fund, which is significant compared to the \$61 million total is received between 2005 and 2022.<sup>158</sup>

#### **D. The MFA's Incorporation of Environmental Justice Indexes into its Selection Criteria will Combat Inequitable Community Impacts.**

By incorporating EJ Indexes into its tax credit selection criteria, the MFA will also be taking a precaution against possible concentration of poverty and racial segregation that can be exacerbated by affordable housing tax credits. Because affordable housing tax credit programs can incentivize developments where there is the highest need for affordable housing, they may result in more affordable housing being sited in areas with high poverty, reinforcing the concentration of poverty in those areas.<sup>159</sup> This can "steer" low-income individuals to those areas due to limited housing options elsewhere, further entrenching the pattern.<sup>160</sup> Other conditions, like zoning restrictions<sup>161</sup> and affordability of land,<sup>162</sup> also contribute to these patterns.

Similarly, the allocation of tax credits can reinforce racial segregation where there are existing patterns due to historic discriminatory housing policies.<sup>163</sup> Several states have faced, or are currently facing, claims that they have violated the Civil Rights Act of 1968 because their LIHTC programs resulted in developments being sited disproportionately in communities of color, as opposed to predominately white areas.<sup>164</sup>

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156. Patrick Lohmann, *Legislature and Governor Tout 'Largest One-Time Investment in Housing' During 2024 Session*, SOURCENM (Feb. 19, 2024, 3:15 AM), <https://sourcennm.com/2024/02/19/legislature-and-governor-tout-largest-one-time-investment-in-housing-during-2024-session/> [<https://perma.cc/DYH4-GKLM>].

157. *Id.*

158. *Id.*

159. See URB. INST., *THE LOW-INCOME HOUSING TAX CREDIT 14* (2018), [https://www.urban.org/sites/default/files/publication/98758/lihc\\_how\\_it\\_works\\_and\\_who\\_it\\_serves\\_final\\_2.pdf](https://www.urban.org/sites/default/files/publication/98758/lihc_how_it_works_and_who_it_serves_final_2.pdf) [<https://perma.cc/74HY-PQE4>]; see also Michelle D. Laysner, *How Federal Tax Law Rewards Housing Segregation*, 93 IND. L.J. 915, 950 (2018).

160. Michelle D. Laysner, *How Federal Tax Law Rewards Housing Segregation*, 93 IND. L.J. 915, 950 (2018).

161. *Id.*

162. URB. INST., *supra* note 159 at 14.

163. Laysner, *supra* note 160 at 952.

164. See *Tex. Dep't Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015); see also *State of Maryland and HUD Sign LIHTC Fair Housing Settlement*, Nat'l Low Income Hous. Coal. (Oct. 10, 2017), <https://nlihc.org/resource/state-maryland-and-hud-sign-lihtc-fair-housing-settlement> [<https://perma.cc/8V7Z-VH9W>].

Although research in these areas is mixed,<sup>165</sup> the MFA should be aware of the possibility of these patterns in its allocation of tax credits, and make proactive efforts to ensure its programs do not create or exacerbate such patterns New Mexico. Some states consider demographic data more specifically in their LIHTC application criteria than New Mexico's MFA does,<sup>166</sup> and the MFA could also consider such an approach, but it should be cautious in doing so not to inadvertently reinforce racial segregation or concentration of poverty. At a minimum, the MFA's incorporation of the EJ Indexes into its application criteria for its tax credits is one small step towards addressing these potential patterns. The EJ Indexes incorporate demographic and socioeconomic data, and the MFA can use them to evaluate tax credit applications and incentivize developments that disrupt, rather than entrench, patterns of environmental, socioeconomic, and racial disparity in affordable housing.

### CONCLUSION

Albuquerque, like many cities across the country, has a history of racial segregation which affects the distribution of race and wealth across the city to this day. This history, co-mingled with an increase in environmental pollution and a lack of affordable housing, leads to environmental injustice which will only worsen unless the state and municipalities take proactive steps to intervene. While environmental regulations are a powerful tool to mitigate further health risks in low-income communities and communities of color, the siting of new affordable housing should also be addressed to ensure that patterns of environmental injustice are not further entrenched. Because affordable housing developers have a strong motivation to earn tax credits, the Mortgage Finance Authority can use its application review process to impact the siting of affordable housing by prioritizing environmental justice criteria in its application review process.

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165. See, e.g., Ingrid G. Ellena, Keren M. Hornb, & Katherine M. O'Regan, *Poverty Concentration and the Low Income Housing Tax Credit: Effects of Siting and Tenant Composition*, 34 J. HOUS. ECON. 49 (2016) (suggesting patterns of racial segregation and poverty concentration may not be as evident as previous research has indicated).

166. See, e.g., MINN. HOUS., 2024-2025 SELF-SCORING WORKSHEET: HOUSING TAX CREDIT AND DEFERRED PROJECTS 27–28 (2022), <https://www.mnhousing.gov/rental-housing/housing-development-and-capital-programs/housing-tax-credits.html> [<https://perma.cc/99KF-RJGQ>] (under “2025 HTC Documents,” click “2024-2025 Self-Scoring Worksheet” hyperlink) (including a criterion for projects that address the needs of a “Community Most Impacted (CMI) by housing disparities,” including people of color).