OPINION NO. 87-095

Syllabus:

1. The Ohio Housing Finance Agency has the implied power to reserve approximately ten percent of the

total mortgage loan funds allocated by it to a particular county under R.C. 175.04 and R.C. 175.05 for the purpose of making those reserved funds available for a three month period exclusively to eligible loan applicants who agree to purchase homes in specific areas that the Agency has determined are racially segregated and whose race is different from the race of the majority of persons currently residing in that area. The Ohio Housing Finance Agency may exercise its implied power to give such limited and temporary priority to mortgage loans that will promote the integration of racially segregated areas provided it concludes that there is a positive relationship between racial integration and the objectives set forth in Ohio Const. art. VIII, §14 and a need for integrated housing opportunities in the jurisdiction in which the pro-integrative program will be undertaken, or that such program is appropriate upon consideration of the preferences indicated from the local community.

2. The guarantees of equal protection set forth in the United States and Ohio Constitutions do not prevent the Ohio Housing Finance Agency from undertaking a program whereby it reserves ten percent of the mortgage loan funds allocated to a particular county for the purpose of making such reserved funds available for a three month period exclusively to eligible loan applicants who are willing to purchase homes in specific areas predominantly populated by persons of a different race. Further, such undertaking does not violate R.C. 175.05(D) or similar statutory enactments prohibiting discrimination by the Ohio Housing Finance Agency by reason of race, color, ancestry, or national origin.

To: David J. Baker, Director, Department of Development, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 14, 1987

Your predecessor requested my opinion regarding a proposal the Ohio Housing Finance Agency (OHFA) wishes to implement in Cuyahoga County with respect to the single-family residential housing mortgage loan program authorized under R.C. 175.05. According to your predecessor's letter, OHFA desires to reserve approximately ten percent of the total funds allocated to Cuyahoga County under R.C. 175.04 and R.C. 175.05 for facilitating mortgage loans to persons and families of low and moderate incomes. OHFA proposes to make those reserved funds available for a three month period exclusively to loan applicants who agree to purchase homes in specific areas of metropolitan Cleveland that have been determined by OHFA to be racially segregated. OHFA contemplates that the reserved funds shall be made available to whites and other non-blacks who agree to purchases homes in certain areas of metropolitan Cleveland that have residential populations comprised of at least sixty percent non-whites, and, conversely, to blacks and other non-whites who agree to purchase homes in certain areas of metropolitan Cleveland that have residential populations comprised of at least ninety percent non-blacks. The letter states that the purpose of this proposed reservation of funds

is to encourage and promote the integration of neighborhoods and communities within Cuyahoga County that historically have been racially segregated.

The specific question is whether OHFA may, in the exercise of the powers conferred upon it by R.C. Chapter 175, develop a residential racial integration program within OHFA's single-family residential housing mortgage loan program. The resolution of this question necessarily entails consideration of two distinct issues: first, whether OHFA is statutorily empowered to implement the program, and second, whether the implementation of such program comports with federal and state laws prohibiting discrimination on the basis of race, color, ancestry, or national origin.

As a state agency created by statute, see R.C. 175.02(A), OHFA may exercise only those powers and responsibilities expressly conferred upon it by statute or necessarily implied therefrom. Burger Brewing Co. v. Thomas, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975); State ex rel. Alden E. Stilson & Associates, Ltd. v. Ferguson, 154 Ohio St. 139, 93 N.E.2d 688 (1950); State ex rel. Copeland v. State Medical Board, 107 Ohio St. 20, 140 N.E. 660 (1923); 1986 Op. Att'y Gen. No. 86-092; 1977 Op. Att'y Gen. No. 77-090.

The General Assembly enacted R.C. Chapter 175 for the purpose of implementing the directives set forth in Ohio Const. art. VIII, §14 that the state may provide financing for single-family housing and multiple-unit housing for persons sixty-two years of age and older. See 1983-1984 Ohio Laws, Part I, 1408 (Am. Sub. H.B. 1, eff. Jan. 20, 1983). See also 1983-1984 Ohio Laws, Part II, 2872, 2948 (Am. Sub. H.B. 291, eff., in part, July 1, 1983). With respect to single-family residential housing, OHFA is authorized to contract to purchase mortgage loans for single-family residences in situations in which the occupant mortgagor meets certain requirements established by state and federal law. R.C. 175.05. OHFA derives its mortgage purchase moneys from revenue bonds it authorizes and issues from time to time in compliance with R.C. Chapter 175. The moneys of OHFA are used to purchase qualified loans from banks, savings and loan institutions, mortgage brokers, and other traditional lending institutions.

My review of Ohio Const. art. VIII, §14 and R.C. Chapter 175 persuades me that OHFA is not expressly empowered to undertake the particular proposal described in your request. There is no constitutional or statutory provision stating that OHFA may reserve a certain percentage of the funds devoted to the single-family residential housing mortgage loan program under R.C. 175.05 for the purpose of lending the funds thus set aside exclusively to loan applicants who agree to purchase homes in racially segregated neighborhoods as a means of promoting integration. Cf. R.C. 175.05(D) and R.C. 175.05(F) (OHFA shall reserve not less than twenty per cent of the moneys for mortgage loans from each bond issue for not less than one year for mortgage loans in targeted areas, including areas of chronic economic distress, as designated by the Director of

Development and confirmed by OHFA).[1] Thus, any authority OHFA may exercise in this regard must exist, if at all, by implication in OHFA's general powers to effect the purposes expressed in Ohio Const. art. VIII, §14 and R.C. Chapter 175.

The general powers conferred upon the OHFA are enumerated in R.C. 175.04. I note, in particular, R.C. 175.04(J), which empowers OHFA to "[u]ndertake and carry out or authorize the completion of studies and analyses of housing conditions and needs within the state relevant to the purpose of this chapter to the extent not otherwise undertaken by other departments or agencies of the state satisfactory for such purpose." I also note that R.C. 175.04(Q) broadly empowers OHFA to "[d]o any and all things necessary or appropriate to carry out the purposes and exercise the powers granted in this Chapter and the purposes of Section 14 of Article VIII, Ohio Constitution." Article VIII, §14 has two stated purposes: "[t]o create or preserve opportunities for safe and sanitary housing and to improve the economic welfare of the people of the state."

OHFA's authority to administer the single-family residential housing mortgage loan program is described with more particularity in R.C. 175.05. Among the requirements OHFA is authorized to include in its agreements with lending institutions are requirements relating to "[t]he location and other characteristics of single-family residential housing to be financed by mortgage loans." R.C. 175.05(B)(3). R.C. 175.05(D) further directs OHFA to accord priorities to certain mortgage loan commitments. R.C. 175.05(D) states, in pertinent part, as follows:

> The agency shall provide for making not less than twenty per cent of the moneys for mortgage loans from each issue of bonds available for not less than one year for mortgage loans in targeted areas as described in the "Mortgage Subsidy Bond Tax Act of 1980," 94 Stat. 2660, 26 U.S.C. 103A, including areas of chronic economic distress as designated and confirmed under division (F) of this section. The agency shall solicit commitments for all qualified lending institutions and shall accord priorities to commitments proffered for mortgage loans up to amounts for each county which bear the same ratio to the moneys from the bond issue available for mortgage loans as the population of such county bears to the population of the state, using the most recent available statewide census data as determined by the

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[1] R.C. 175.05(D) refers to "targeted areas as described in...26 U.S.C. 103A, including areas of chronic economic distress as designated and confirmed under division (F) of this Section." Under R.C. 175.05(F), the Director of Development is authorized to "designate areas within the state as areas of chronic economic distress within the meaning of...26 U.S.C. 103A." 26 U.S.C. §103A was recently amended and renumbered as 26 U.S.C. §143. Internal Revenue Code of 1986, Pub. L. No. 99-514, §1301(b) (1986). The renumbering of the federal statute does not limit the authority of the Director of Development to designate areas within Ohio as areas of chronic economic distress, however, as the reference to "26 U.S.C. 103A" in R.C. 175.05(D) and (F) is clearly descriptive rather than restrictive.

> agency. Such priorities shall be accorded for periods determined by the agency and subject to availabilities to be accorded to targeted areas and the areas of chronic economic distress, and within such priorities the agency may establish priorities for stated purposes such as, among others, for new construction, rehabilitation, or home improvements, as the agency may determine upon consideration of any preferences that may be indicated from the local community. Any amounts given such priorities which are not claimed by commitments, origination of loans, or loan closings within the time prescribed by the agency may be reallocated in a manner which places the maximum amount of the funds on an equitable basis and which achieves broadest distribution to the extent practical, as the agency may determine or authorize to be determined. (Emphasis added.)

R.C. 175.05(D) requires initially that OHFA set aside at least twenty percent of the moneys for mortgage loans from each bond issue for at least one year for mortgage loans in federally targeted areas.[2] It also requires OHFA to accord priorities to loan commitments in each county based on its relative population size. Of particular significance to your inquiry, however, is the fact that R.C. 175.05(D) also provides that, "within such priorities the agency may establish priorities for stated purposes...as the agency may determine upon consideration of any preferences that may be indicated from the local community."[3] While R.C. 175.05(D) gives examples of the type of priorities OHFA might consider, it is clear from the language used in the statute that the reference to priorities for "new construction, rehabilitation, or home improvements" is intended to be illustrative only and was not intended to limit OHFA's authority to establish other priorities. Thus, once OHFA has determined the amount to be set aside for federally targeted areas, it must then allocate the remaining funds among the counties based on population size. OHFA, however, may establish priorities within these geographical priorities for stated purposes based upon "any preferences" that may be indicated from the local community.

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[2] Targeted areas are defined in 26 U.S.C. §143(j) to include census tracts in which seventy percent or more of the families have income which is eighty percent or less of the statewide median family income and areas of chronic economic distress. Each state is responsible for designating areas of economic distress, but such designations must be approved by the Secretary of Housing and Urban Development. 26 U.S.C. §143(j)(3); R.C. 175.05(F). The criteria used by the Secretary to evaluate any proposed designation of an area include the condition of the housing stock, the need of area residents for owner-financing, the potential use of owner financing to improve housing conditions, and the existence of a housing assistance plan which provides a displacement program and a public improvements and services program. 26 U.S.C. §143(j)(3)(B).

[3] I note that Am. Sub. H.B. 291, 115th Gen. A. (1983) (eff., in part, July 1, 1983), appearing in 1983-1984 Ohio Laws, Part II, 2872, contained an amendment to R.C. 175.05(D) that would have deleted this particular portion of the statute. Am. Sub. H.B. 291 also proposed to amend

These statutory provisions appear to give OHFA considerable discretionary authority to administer the single-family residential housing mortgage loan program. There would, for example, be little reason for the General Assembly to have expressly authorized OHFA to undertake housing needs studies, see R.C. 175.04(J), if it did not intend OHFA to consider and respond to the needs so identified within its own program activities. Moreover, the General Assembly has given OHFA the authority to do any thing appropriate to carry out the purposes of its constitutional and statutory mandates, see R.C. 175.04(G), and has expressly empowered OHFA to establish priorities "for stated purposes" in addition to those expressly required by R.C. 175.05(D). Thus, OHFA's discretionary authority includes the authority to establish program priorities or preferences based upon documented housing needs or on local community preferences to the extent that such priorities or preferences are appropriate to carry out the purposes of R.C. Chapter 175 and Ohio Const. art. VIII, §14, and are not inconsistent with requirements, priorities, or preferences specifically established by law.

The racial integration of residential neighborhoods is not expressly articulated as one of the purposes underlying the adoption of Ohio Const. art. VIII, §14 or R.C. Chapter 175. The two purposes stated in Ohio Const. art. VIII, §14 are "to create or preserve opportunities for safe and sanitary housing and to improve the economic welfare of the people of the state." There is, however, support for the proposition that racial segregation may have a bearing on the availability of safe and sanitary housing and on the economic welfare of the residents of such areas. For example, in Banks v. Perk, 341 F.Supp. 1175 (N.D. Ohio 1972), modified, 473 F.2d 910 (6th Cir. 1973), a group of nonwhite tenants in, and applicants for, public housing in the City of Cleveland sought to enjoin certain city officials and the Cuyahoga County Metropolitan Housing Authority from perpetuating what the plaintiffs alleged to be a racially discriminatory public housing system by refusing to allow the construction of public housing in predominantly white neighborhoods. The court granted the plaintiffs' request for a preliminary injunction on the grounds that plaintiffs had sufficiently shown an irreparable injury as a result of having to live in a segregated environment. The court described the plaintiffs' injury in the following terms:

> The plaintiffs and the class they represent have suffered and, even with this injunction, will continue

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R.C. 175.05 by adding a new subsection (I) which would have stated:

> Except to the extent necessary to comply with the requirements of federal law or division (D) of this section, the agency shall not promulgate any rule, nor include a provision in any agreement with a lending institution, that gives preference to any applicant or class of applicants with respect to the availability of mortgage loans under this section.

These amendments were vetoed by the Governor pursuant to Ohio Const. art. II, §16, and were not subsequently repassed by the General Assembly. See 1983-1984 Ohio Laws, Part II, 2872, 2948-50 (Am. Sub. H.B. 291, eff., in part, July 1, 1983).

> to suffer the loss of safe, sanitary, decent and integrated housing; the loss of achieving integrated schools without the necessity of massive busing; the loss of housing which is accessible to jobs; and the loss of being unable to escape the never-ending and seemingly unbreakable cycle of poverty.

Banks v. Perk, 341 F.Supp. at 1185. It is, therefore, certainly possible that OHFA may conclude that there is a positive relationship between racial integration in housing and the more general objectives of providing safe and sanitary housing and improving the economic welfare of the people it serves. If this relationship can be established, the initiation of a pro-integration housing program within the single-family residential housing mortgage loan program would be an appropriate exercise of OHFA's power under Ohio Const. art. VIII, §14 and R.C. Chapter 175.

It is, therefore, my opinion that OHFA has implied statutory authority to develop a residential racial integration program as a priority within the single-family residential housing mortgage loan program under R.C. 175.05. I cannot, however, render an opinion whether the particular proposal described in your predecessor's request is a permissible exercise of OHFA's implied powers, because any such determination of the appropriateness of a particular pro-integration housing program is dependent upon factual findings that can be made only by OHFA based upon its knowledge of documented housing needs or local community preferences, and the relationship between residential integration and the purposes mentioned in Ohio Const. art. VIII, §14.

As your predecessor acknowledged in his request, however, the determination that OHFA may have the requisite statutory authority to undertake the proposal described in the request does not end the inquiry. OHFA may not exercise its implied powers in this manner if to do so would constitute unlawful discrimination on the basis of race, color, ancestry, or national origin. Of course, the question of whether a particular residential integration program adopted by OHFA constitutes unlawful discrimination can be ultimately determined only by a court of law. It is not within my power as an executive officer to affirm or invalidate administrative agency determinations. I do, however, have the duty under R.C. 109.12 to give legal advice to state officers "in all matters relating to their official duties," when so requested, and I believe a response to your concern about the legality of the proposed program falls within my duty under the statute.

With respect to this issue, I note that there are no fewer than six antidiscrimination laws that may be implicated by the program described in your predecessor's request. R.C. 175.05(D) expressly states as follows:

> In connection with the issuance of any issue of bonds to provide funds to purchase mortgage loans or other evidence of debt, the agency shall provide for the reasonable availability of such funds on an equitable, statewide basis, and without discrimination by reason of race, color, ancestry, national origin, religion, sex or physical handicap.

OHFA is also subject to the similar antidiscrimination mandate set out in R.C. 4112.02, which states, in pertinent part, as follows:

> It shall be an unlawful discriminatory practice:
> ...
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> (H) For any person to:
> (1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable or withhold housing accommodations from any person because of the race, color, religion, sex, ancestry, handicap, or national origin of any prospective owner, occupant, or user of the housing....

OHFA's ability to undertake the program envisioned in the request is also subject to the Civil Rights Act of 1866, 42 U.S.C. §1982 (1982), which provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." It may also be subject to the Federal Fair Housing Law, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601 et seq. (1982).[4] Finally, the guarantees of equal

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[4] 42 U.S.C. §3605 states:

> After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, sex, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: Provided, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 3603(b) of this title [42 U.S.C. § 3603(b)].

I note that this statute does not impose any express limitation on the states, political subdivisions thereof, or state agencies. It is arguable, however, that a state housing financing agency is an "enterprise whose business consists in whole or in part in the making of commercial real estate loans," and, therefore subject to 42 U.S.C. §3605. See United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981) cert. denied, 456 U.S. 926 (1982) (holding that it was the intent of Congress to provide for actions against states and political subdivisions for violations of 42 U.S.C. §§3604, 3613, and 3717, even though those

protection contained in the Fourteenth Amendment to the United States Constitution and Article I, §§1 and 19 of the Ohio Constitution also must be considered in any assessment of the OFHA's ability to use its single-family residential housing financing program to promote racial integration in housing.

I am not aware of any case law specifically addressing the permissibility of a voluntary residential racial integration program of the type described in your request under federal or state statutory antidiscrimination laws or the equal protection guarantees of the United States Constitution or a state constitution. OHFA's pro-integrative residential housing mortgage loan program does, however, have some of the characteristics that are common to voluntary affirmative action plans in the areas of public and private employment, public housing, public education, and governmental contracting. The OHFA proposal is not unlike these more common affirmative action programs in that its stated purpose is to alleviate, if not remedy, the present effects of past discrimination or segregation, and because it purports to achieve this purpose through the use of a preference based, in part, on racial considerations. On the other hand, the OHFA proposal differs from the typical affirmative action plan in at least one important respect. A common characteristic in voluntary affirmative action plans is the reservation of a benefit for, or the granting of a preference to, members of a minority group, and the concomitant unavoidable deprivation or diminution of nonminority persons' rights to that same benefit. The OHFA proposal is not such a strictly racially classified remedy. The reserved funds temporarily set aside under the OHFA proposal to encourage residential integration will be available to all persons, blacks, other non-whites, whites, and non-blacks, who desire to purchase single-family housing in areas not predominantly populated by members of their own race. Although racial factors necessarily will be considered in the administration of the program, no one racial group will reap the benefits or suffer the burden of the preference. Persons of all races are equally entitled to apply for the reserved funds subject only to the general program eligibility requirements and the additional racially neutral requirement that they desire to live in a more integrated environment.

Because of the similarities between the OHFA proposal and typical affirmative action plans, I believe an analysis of the case law considering the permissibility of voluntary affirmative action plans is an instructive means for assessing the legality of the OHFA proposal, absent any direct authority on this precise issue. I will first consider decisions involving challenges to affirmative action plans based upon their alleged violation of statutory antidiscrimination provisions similar to R.C. 175.05, R.C. 4112.02(H) and 42 U.S.C. §1982. I will separately consider challenges to

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statutes do not expressly include states or their political subdivisions). I shall assume, for the purpose of this opinion, that §3605 is applicable to a state housing finance agency. I find it unnecessary to specifically resolve this issue because, even if §3605 applies to the OHFA, it would not increase or materially alter the antidiscrimination prohibitions to which the agency is already subject under R.C. 175.08 and R.C. 4112.02(H).

affirmative action plans based upon their alleged violation of constitutional guarantees of equal protection.

The United States Supreme Court has, on a number of occasions, considered whether voluntary affirmative action plans in the employment context violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e.[5] In United Steelworkers of America v. Weber, 443 U.S. 193, 197 (1979), the Court considered whether a private employer violated Title VII by adopting a voluntary affirmative action designed to "eliminate manifest racial imbalances in traditionally segregated job categories." The plan at issue in Weber provided that fifty percent of the new trainees in the employer's craft training program were to be black until the percentage of black skilled craftworkers in the employer's plant approximated the percentage of blacks in the local labor force. Adoption of the plan had been prompted by the fact that only 1.83% of skilled craftworkers at the plant were black, even though the work force in the area was approximately thirty-nine percent black. There was no finding that Weber's employer was attempting to remedy its own prior discriminatory acts. The respondent white employee challenged the employer's denial of his application for a position in the craft training program, contending the selection process impermissibly took into account the race of the applicants. The Court sustained the employer's decision to select less senior black applicants over the white respondent and held that Title VII's prohibition against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans. Id. at 208. The Court stated:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long'...constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Weber, 443 U.S. at 204 (quoting remarks of Sen. Humphrey, 110 Cong. Rec. 6552 (1964)).

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[5] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) states:

> It shall be unlawful employment practice for an employer--
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

In Weber the Court did not define in detail the line of demarcation between permissible and impermissible affirmative action plans under Title VII; it held only that the particular plan under consideration fell on the permissible side of the line. The Court noted four characteristics of the plan that established its consistency with Title VII. First, the plan was consistent with Title VII's objective of breaking down old patterns of racial segregation and hierarchy. Weber, 443 U.S. at 208. Second, the plan did "not unnecessarily trammel the interests of white employees" because it did "not require the discharge of white workers and their replacement with new black hirees." Id. Third, the plan did not "create an absolute bar to the advancement of white employees" because half of those trained in the program were to be white. Id. Fourth, the plan was a temporary measure "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." Id.

The Court recently reaffirmed the Weber analysis and holding in Johnson v. Transportation Agency, Santa Clara County, California, 107 S. Ct. 1442 (1987). This later case differs from Weber in that the respondent was a public employer and the plan in question did not set aside a certain number or percentage of positions, but rather created a preference for women and minorities in the agency's hiring and promotion practices. The portion of the plan at issue in the case provided that "in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant." Johnson, 107 S. Ct. at 1446. A male employee passed over for promotion in favor of a female employee alleged that in making the promotion the agency impermissibly took into account the sex of the applicants in violation of Title VII. The Court evaluated the plan using the factors identified in Weber and upheld the plan. Justice O'Connor noted that the plan used "a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force." Johnson, 107 S. Ct. at 1457 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor stated further that "[s]uch a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace." Id.

The Johnson case is significant because it extends the applicability of Weber to situations involving sex and race based preferences by public employers. It is also significant because it confirms that

> Weber held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an "arguable violation" on its part. Id., at 212, 99 S. Ct., at 2731. Rather, it need point only to a "conspicuous...imbalance in traditionally segregated job categories."

Johnson, 107 S. Ct. at 1451 (citation omitted). The holding in Johnson likewise was not dependent on a finding of prior discrimination or even an arguable violation of Title VII on the part of the public transportation agency.

I find that the Weber holding and guidelines provide an appropriate standard for evaluating the OHFA proposal in terms of the applicable statutory antidiscrimination provisions. I am persuaded by the similarity of language and purpose in Title VII and the statutory prohibitions set out in R.C. 175.05(D), R.C. 4112.02(H), 42 U.S.C. §3605 and 42 U.S.C. §1982 that, if called on to consider the OHFA proposal, a court would not apply a more exacting standard than that set out in Weber. If a court would apply a different standard, I would expect that standard to be less exacting in light of the fact that the OHFA proposal does not employ strictly racial classifications. I am also persuaded that the OHFA proposal meets the Weber guidelines for a permissible affirmative action plan under statutory antidiscrimination mandates. Funds will be reserved under the OHFA proposal only for a three month period. It is clear, therefore, that only a temporary measure is intended. The reserved funds will be available only to eligible loan applicants who seek housing in a racially segregated community. It is clear, therefore, that the intent is not to maintain racial balance, but simply to alleviate manifest racial imbalance. I do not believe that a ten percent set aside creates an absolute bar or unnecessarily trammels the interests of loan applicants who do not seek to live in an integrated environment. Ninety percent of the funds will still be available to all eligible loan applicants, and even the reserved funds may become available, after the initial three month period, if there is not sufficient local interest in pro-integrative moves to exhaust the reserved funds. Thus, the OHFA proposal appears to be a moderate, flexible approach for using the state's spending power to break down historical patterns of racial segregation in housing. As such it does not appear to be inconsistent with the statutory prohibitions against discrimination on the basis of race, color, ancestry, or national origin.[6]

I must advise you, however, that the standard articulated in Weber and reaffirmed in Johnson applies only to the justification for voluntary affirmative action plans challenged on statutory grounds. See Johnson, 107 S. Ct. at 1446 n. 2 and 1449-50 n. 6. With respect to voluntary affirmative action plans undertaken by public agencies, and, therefore, subject to challenge under the constitutional guarantee of equal protection, the United States Supreme Court has continued to adhere to a more exacting standard. Id. In the context of equal protection, the Court has held "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." Wygant v. Jackson Board of Education, 106 S. Ct. 1842, 1848 (1986). In Wygant the Court noted further:

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[6] In reaching this conclusion, I have relied on a number of factual characteristics, such as the limited scope and duration of the proposed program, that are essential to the conclusion I have reached. It is beyond the scope of my opinion function, however, to consider the validity of all the factual assumptions OHFA has or must consider in administering the program. In particular, I express no opinion as to the validity of the assumptions OHFA has made to determine the percentage of racial composition in a particular area which constitutes racial segregation.

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.

Id. at 1847. Thus, because OHFA is a state agency, it may not embark upon an affirmative action program employing racial classifications unless it has sufficient evidence to justify the conclusion that such remedial action is warranted because there has been prior discrimination by the state. See, e.g., Ohio Contractors Association v. Keip, 713 F.2d 167, 175-76 (6th Cir. 1983) (Ohio minority business enterprise statute, which requires a percentage of state contracts to be set aside for minority businesses only, held not to violate equal protection because there was sufficient evidence to establish that its purpose was to correct past practices by which the state was involved in discrimination against minority contractors).

I do not believe, however, that the equal protection analysis typified by Wygant applies to the OHFA proposal under consideration. The equal protection clause of the Fourteenth Amendment of the United States Constitution "does not take from the state the power to classify" but rather "admits of the exercise of a wide scope of discretion in that regard." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).[7] Equal protection analysis requires strict scrutiny of a governmental classification only when the classification impermissibly interferes with the exercise of a fundamental right or is based on inherently suspect criteria, such as race, alienage, or national origin. Wygant, 106 S. Ct. at 1846; City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). The OHFA proposal does not interfere with the exercise of any fundamental right guaranteed by the United States Constitution. There is no fundamental right to receive public assistance for housing. Lindsey v. Normet, 405 U.S. 56 (1972); Anderson v. City of Alpharetta, 770 F.2d 1575 (11th Cir. 1985); Acevedo v. Nassau County, 500 F.2d 1078 (2nd Cir. 1974); Schmidt v. Boston Housing Authority, 505 F. Supp. 988 (D. Mass 1981). Further, the OHFA proposal does not create a classification based upon race. As noted previously, the reserved funds to be set aside under the OHFA proposal will be equally available to all persons, blacks, other non-whites, whites, and other non-blacks, who desire to purchase single-family housing in areas not predominantly populated by members of their own race. To the extent that the proposal draws a distinction, it is a distinction between persons who desire a more integrated residential environment and those who do not. The distinction drawn is facially neutral with regard to race, and, therefore, does not trigger the type of scrutiny given to affirmative action plans based on strict racial classifications. See Schmidt v. Boston Housing Authority, 505 F.Supp. at 995 (housing authority's tenant selection plan which gives preference to applicants willing to be housed in

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[7] The equal protection guarantee contained in Ohio Const. art. I, §2 is substantially the same as that contained in the United States Constitution and has been interpreted in the same manner. State ex rel. Struble v. Davis, 132 Ohio St. 555, 9 N.E.2d 684 (1937).

developments in which their race is substantially in the minority "is clearly facially neutral" because "[b]oth white and non-white persons can be classified as 'minority preference applicants' depending on the particular housing development chosen").

Because the OHFA proposal does not impinge on any fundamental right and is not based on a strictly racial classification, the equal protection clause requires in this instance only a rational means to serve a legitimate end. City of Cleburne, 105 S. Ct. at 3254 ("[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest"). I conclude that the OHFA proposal comports with this standard. The promotion of integration in housing is a legitimate exercise of the state's spending powers. Cf. United States v. Hunter, 459 F.2d 205, 214 (4th Cir. 1972), cert. denied 409 U.S. 934 (1972) ("[t]he Fair Housing Title was designed to provide fair housing throughout the nation and is a valid exercise of congressional power under the Thirteenth Amendment to eliminate badges and incidents of slavery"); Schmidt v. Boston Housing Authority, 505 F.Supp. at 996-7 (Federal Fair Housing Act imposes on the Secretary of Housing and Urban Development and local housing authorities the affirmative duty to promote integration in housing). As noted above, the proposal described in your predecessor's request is a moderate, flexible means for using the state's spending power to promote integration in housing. The OHFA proposal under consideration is a temporary and limited set aside intended to ameliorate racial imbalance. It does not foreclose assistance to, or unnecessarily trammel the interests of, eligible loan applicants who do not desire to live in a more integrated environment. Ninety percent of the funds allocated to Cuyahoga County will be available to all eligible loan applicants, and even the reserved funds may become available therefor, after the initial three month period, if there is not sufficient local interest in pro-integrative moves to exhaust the reserved funds. Accordingly, I believe the OHFA proposal is a rational means for furthering the state's legitimate interest in promoting racial integration in housing.

Therefore, it is my opinion, and you are so advised, that:

1. The Ohio Housing Finance Agency has the implied power to reserve approximately ten percent of the total mortgage loan funds allocated by it to a particular county under R.C. 175.04 and R.C. 175.05 for the purpose of making those reserved funds available for a three month period exclusively to eligible loan applicants who agree to purchase homes in specific areas that the Agency has determined are racially segregated and whose race is different from the race of the majority of persons currently residing in that area. The Ohio Housing Finance Agency may exercise its implied power to give such limited and temporary priority to mortgage loans that will promote the integration of racially segregated areas provided it concludes that there is a positive relationship between racial integration and the objectives set forth in Ohio Const. art. VIII, §14 and a need for integrated housing opportunities in the jurisdiction in

which the pro-integrative program will be undertaken, or that such program is appropriate upon consideration of the preferences indicated from the local community.

2. The guarantees of equal protection set forth in the United States and Ohio Constitutions do not prevent the Ohio Housing Finance Agency from undertaking a program whereby it reserves ten percent of the mortgage loan funds allocated to a particular county for the purpose of making such reserved funds available for a three month period exclusively to eligible loan applicants who are willing to purchase homes in specific areas predominantly populated by persons of a different race. Further, such undertaking does not violate R.C. 175.05(D) or similar statutory enactments prohibiting discrimination by the Ohio Housing Finance Agency by reason of race, color, ancestry, or national origin.