

May 10, 2016

Secretary Julian Castro
Department of Housing and Urban Development
451 7th Street, SW, Room 10276
Washington, DC 20410-0500

Re: Affirmatively Furthering Fair Housing Assessment Tool for States and Insular Areas, Docket No. FR-5173-N-08 (March 11, 2016)

Dear Secretary Castro,

We are writing on behalf of the undersigned civil rights, fair housing and other organizations to comment on the Affirmatively Furthering Fair Housing (AFFH) Assessment Tool for States and Insular Areas, as set out in the Notice published at 81 Fed. Reg. 12921 (March 11, 2016). The Assessment Tool for States and Insular Areas is a critical component of the AFFH process, and it must be structured so as to provide a meaningful assessment of the fair housing challenges faced by States and Insular Areas. As many aspects of the Assessment Tool for States and Insular Areas are shared with the Local Government Assessment Tool, many of the observations in this letter are consistent with our past comments on that tool. Our perspective is also informed by our work with HUD grantees and local civil rights advocates who are preparing for the upcoming Assessment of Fair Housing (AFH) process.

The Assessment Tool for States and Insular Areas has many of the features that are needed in order for the tool to provide a meaningful assessment; however, HUD could make the Assessment Tool much more effective by addressing a few key gaps and several more minor issues. HUD should move quickly to implement the changes suggested in this letter in order to facilitate the publication of the Assessment Tool for a subsequent 30-day public comment period and the finalization of the Assessment Tool as soon as possible. Time is of the essence in light of the need to minimize any delays in submission deadlines that may be required by 24 C.F.R. § 5.160(a)(1)(ii). The recommendations included in this letter fall into three categories: comments on issues that are addressed for the first time in the Assessment Tool for States and Insular Areas; comments on issues where there is a need for HUD to adopt a modified approach to fit the context of States and Insular Areas as opposed to local governments; and unresolved comments that apply to the tools for both States and Insular Areas and local governments. In addition to the comments included in this letter, the undersigned organizations endorse the comments made by the Consortium for Citizens with Disabilities, which are summarized below.

I. Comments on issues that are addressed for the first time in the Assessment Tool for States and Insular Areas:

There are a few key issues that, because of the different powers and responsibilities of state and local governments, as well as their varying geographic scopes, require a more detailed and focused approach at the state level. HUD has recognized this through the inclusion of important new content in the Assessment Tool for States and Insular Areas, but additional changes are needed to ensure that the tool provides for a meaningful assessment of the fair housing issues facing States and Insular Areas.

Build upon Promising Foundation in Low Income Housing Tax Credit Sub-Section: In light of the important role of state housing finance agencies in the administration of the Low Income Housing Tax Credit (LIHTC) program, HUD has included a sub-section dedicated to the LIHTC program within the Publicly Supported Housing Analysis. The questions that HUD poses in this sub-section are important and provide a helpful starting point for a meaningful analysis of issues relating to LIHTC administration. In particular, questions addressing definitions of “concerted community revitalization plans,” incentives for developments in certain areas (potentially including high opportunity areas), local approval or support requirements, the role of gap financing in influencing the location of LIHTC developments, and source of income discrimination are all critical. HUD can improve upon this promising foundation by adding two new questions, revising three of the existing questions, and providing more detailed instructions to guide States and Insular Areas in completing the LIHTC sub-section.

First, because concentrations of LIHTC units in low-income communities of color can occur through inertia rather than solely because of direct incentives to locate properties in such areas, HUD should include a question asking States and Insular Areas to consider the effect of the absence of incentives for developments in high opportunity areas on the location of LIHTC projects, particularly developments for families with minor children. Alternatively, HUD could accomplish the same end by broadening question (1)(c)(i)(2) to ask about the absence, as well as the presence, of incentives. Second, HUD should include a question asking about efforts to leverage the LIHTC program to increase the supply of housing units that are accessible to persons with disabilities. Many state housing finance agencies currently require LIHTC developments to comply with the requirements of Section 504 of the Rehabilitation Act. Some require or incentivize developers to go above and beyond the requirements of Section 504 and include higher percentages of accessible units. Given the outsized importance of the LIHTC program in the development of affordable multi-family housing, it is critical that the program serve as a vehicle for expanding the fair housing choice of persons with disabilities who need accessible units.

With respect to the questions that should be revised, question (1)(c)(i)(5) currently employs two examples that are inconsistent with the overarching question. The question asks States and Insular Areas to identify “[p]references, points or threshold criteria for projects serving particular protected class groups” but then identifies “projects serving elderly” households and projects with “particular affordability requirements” as examples. Under the federal Fair Housing Act, neither example directly implicates a protected characteristic. This is particularly unfortunate because this question would be an ideal vehicle for discussing efforts to leverage the LIHTC program to produce integrated permanent supportive housing for persons with disabilities. Additionally, a consideration of deep affordability requirements may be highly relevant to efforts to develop integrated permanent supportive housing for persons with disabilities because many prospective residents of such housing may rely on Supplemental Security Income as their primary source of income. However, the inclusion of “particular affordability requirements,” without that kind of context, is potentially confusing and does not facilitate meaningful analysis. With regard to leveraging deep affordability to foster residential racial integration, HUD should ask States whether qualified allocation plans provide incentives for developments that commit to Project-Based Voucher contracts and, if so, in what types of neighborhoods and with what array of bedroom sizes. Lastly, between the two sentences in the current version of question (1)(c)(iii), the tool should ask program participants to describe how the State reviews data on occupants of

LIHTC properties, particularly regarding share of residents in protected classes and that use vouchers or other rental assistance. Adding this question will better ensure that States meaningfully analyze discrimination in LIHTC properties.

More robust instructions would also help ensure that the LIHTC sub-section prompts a meaningful fair housing analysis. Specifically, the instructions should explain that 26 U.S.C. § 42(m)(1)(B)(ii)(III) requires that housing finance agencies give priority among selected developments in high-poverty qualified census tracts if those developments contribute to concerted community revitalization, but that the statute does not more broadly require incentives for developments in high-poverty neighborhoods. Additionally, it would be helpful for HUD to explicitly connect the concerted community revitalization provision to efforts to overcome disparities to access to opportunity within a community. Question (1)(c)(ii), which addresses the effect of gap financing on LIHTC siting, would provide a more meaningful platform for analysis if the instructions referenced the fact that high opportunity areas tend to have more limited access to forms of gap financing than do relatively high-poverty areas. Lastly, the instructions accompanying question (1)(c)(i)(5) should highlight the importance of limiting concentrations of persons with disabilities when evaluating permanent supportive housing programs.

Direct States and Insular Areas to Identify Sub-State Areas for Analysis in the Demographic Summary Section and Provide Instructions on the Relevant Considerations for the Selection of Sub-State Areas: Question (1) within the Demographic Summary section of the tool states, “[i]f the State is choosing to perform its analysis using sub-State areas, identify and describe these areas and explain why the use of these sub-State areas will facilitate a meaningful assessment from a fair housing perspective.” This question reflects HUD’s recognition, as reflected in the instructions, that “it may be helpful to break up the geography of the State into different sub-State areas to conduct analysis of fair housing issues and contributing factors that may be unique in different parts of the State.” This language sells short the fair housing implications of looking at sub-State areas. Rather than merely being helpful to the analysis, breaking a state down into sub-State areas may be necessary to conducting a meaningful analysis, even in geographically small states. This is true because housing markets are not organized along state lines. Different regions within states may also vary considerably in terms of their demographics thus complicating any analysis of segregation and integration based on HUD’s definitions wherein the concentration or lack of concentration of groups is the hallmark of segregation or integration in the absence of some consideration of sub-State areas. For example, an outlying suburb in a diverse metropolitan area may be more segregated than a rural community in a largely homogeneous region, even if the two communities have identical demographic compositions.

Accordingly, HUD should establish a default position that States and Insular Areas must identify sub-State areas unless they can explain why that is unnecessary. Although States and Insular Areas must explain the rationale for their selection of sub-State areas, the prompt that they do so must not serve as a disincentive to the identification of such areas. Additionally, the instructions should be expanded upon to provide criteria for the selection of sub-State areas for analysis, including but not limited to the contours of regional housing markets and common demographic, economic, and housing characteristics across contiguous rural counties.

Discussion of Added Dimensions of Access to Opportunity Should Be Mandatory: In Question (2)(b) within the Disparities in Access to Opportunity section, the tool says that states “should”

describe additional categories (on top of those discussed in the Local Government Assessment Tool and reiterated in this tool) of disparities if it has identified them and lists emergency preparedness, public safety, public health, housing finance and other financial services, and prisoner re-entry as examples of additional dimensions of access to opportunity. Provided that a State or Insular Area has local data reflecting disparities in these areas, the tool should use clear mandatory language to describe the program participant's obligation to discuss and analyze that information. As with other categories, HUD should make clear that state participants should include an analysis of how *state-level* policies inform or could address such disparities. HUD's examples of additional dimensions of access to opportunity are all critical to meaningful access to opportunity and fair housing choice.

Question (1)(3)(iii) in the Disparities in Access to Opportunity Section Should Be Clarified:

Question (1)(3)(iii) in the Disparities in Access to Opportunity section of the proposed Assessment Tool solicits important information about policies and practices that affect access to environmentally healthy neighborhoods. However, as currently drafted, the question may confuse program participants and community-based advocates because of an apparent mistake in the parenthetical list of examples of policies and practices that might affect access to environmentally healthy neighborhoods. HUD should eliminate that risk of confusion by replacing the close parenthesis before "siting of industrial and energy facilities" with a comma.

The Statewide Scope of the Obligations of States Is Necessary and Must Be Retained: The instructions for the proposed Assessment Tool make clear that the geographic scope of analysis for States and Insular Areas includes their entire territories and not just the parts of their jurisdictions that are not located within entitlement jurisdictions. This is a pivotal distinction and a necessary condition for any meaningful fair housing analysis at the state level. State agencies administer the largest federal affordable housing program – LIHTC – predominantly within entitlement jurisdictions. Many entitlement jurisdictions only receive direct allocations of Community Development Block Grant funds from HUD while other formula grant programs are administered by states or other larger grantees. Additionally, state-level policies and practices often establish the framework that defines the policy options that are available to local governments, including entitlement jurisdictions, such as by permitting local exclusionary zoning, or requiring, incentivizing, or prohibiting local inclusionary zoning efforts. The approach of having states review their entire territories is also required by the language defining "[g]eographic area" in the Affirmatively Furthering Fair Housing regulation. Unfortunately, under the Analysis of Impediments to Fair Housing Choice requirement, many states omitted entitlement jurisdictions from the scope of their analysis. That approach was unacceptable under the prior rule and is unacceptable now, as well.

II. Comments on issues where there is a need for HUD to adopt a modified approach to fit the context of States and Insular Areas as opposed to local governments.

Because the powers and resources of state governments vary in important ways from those of local governments, there are certain changes to the Assessment Tool for States and Insular Areas that will be necessary to ensure that the analysis solicited by the tool provides a platform for meaningful action.

The Definition of the Contributing Factor of Land Use and Zoning Laws Must Include

Additional State-Level Examples: States play an important role in the regulation of land use, both because of state-level laws that directly control land use and because of laws that set the parameters for effective action. These laws are different in kind from the types of regulations that local governments use to control land use, yet HUD has not expanded the list of examples of land use and zoning laws in its definition of that contributing factor. For example, types of state laws that directly regulate land use and that may have fair housing implications include environmental regulations and coastal preservation laws. Types of state laws that control how local governments regulate land use include zoning enabling acts and laws that allow for the appeal of zoning decisions that prevent the development of affordable housing. In one state, North Carolina, discrimination in land use decisions against affordable housing developments is a violation of that state's fair housing law.

The Assessment Tool Should Instruct State Participants to Examine How *State-Level Policies* Affect Fair Housing: The proposed language for the assessment is not sufficiently directive with regard to states' obligation to identify, document, and identify goals that relate to state-level structural issues. This raises the hazard that the AFH may produce a compilation of local-level issues while failing to document meaningful responsibilities of the states. Clear language on this general obligation, as well as specific examples, should be inserted throughout the tool.

This adjustment needs to be made at multiple points throughout the guidance. The discussions of contributing factors should lead with instructions (and follow with expanded lists) that explicitly guide participants to scrutinize policies and practices at the state level (as well as cumulative local issues). This should also be made explicit in the Instructions, e.g., by insertion of a paragraph or two that states and illustrates this requirement (following the last full paragraph on the current p. 17). Examples of structural state-level goals should be included with the example goals listed for illustrative purposes on the current p. 42. The contributing factors descriptions should also be amended accordingly.

Specifically, participants need to be prompted to consider issues such as the following: state tax structures; fiscal systems, such as revenue distribution with regard to transportation (i.e., highway or transit funding), or funding programs that incentivize certain development patterns, e.g. economic development of greenfields; laws and regulations in areas that affect redevelopment, such as foreclosure, bankruptcy, land banking; state-level laws and policies that affect or incentivize zoning and other land use structures; administration and funding programs of social services; ways that states create barriers or disincentives (or can set goals that encourage) regional cooperation among local jurisdictions, as with tax-sharing, government consolidation, joint planning and program implementation, and shared services; and executive decisions to sign into law legislation which prevents local governments from adding protected classes to their local fair housing laws.

III. Unresolved comments that apply to the tools for both States and Insular Areas and local governments.

Although HUD made some important changes in response to comments from the undersigned organizations on the Assessment Tool for local governments, deficiencies from that

tool that have been incorporated into the tool for States and Insular Areas remain. In order to address those gaps, we recommend taking the following steps.

The Discrete Sub-Section on Mobility for Residents of Publicly Supported Housing Must Be Restored: The September 2014 version of the Assessment Tool for local governments included a specific section focusing on types of constraints to and enhancers of housing mobility for residents of publicly supported housing. HUD omitted this discussion from the July 2015 and the final versions of the Assessment Tool for local governments. This information solicited by the mobility questions in the September 2014 version of the tool is critical to any effective fair housing analysis. At a state level, the information has special salience because, in addition to including a discussion of local PHAs that choose to participate in state AFHs, state-level agencies in 30 states administer the Housing Choice Voucher program, including a number of large programs that operate statewide. In addition, two states administer public housing throughout the state or in most of the state (Alaska and Delaware, respectively). And many states have state-level agencies that have oversight responsibilities for HUD's multifamily assisted properties, as well as properties that use state funds to provide a portion of units at affordable rents. In addition, because of the inherently cross-jurisdictional perspective of state governments, state housing agencies (including but not limited to large PHAs that administer HUD programs) have the potential to play a catalytic role in facilitating housing mobility for residents of publicly supported housing, including properties converted under the Rental Assistance Demonstration that often receive other state-controlled funds or tax credits.

Whether or not HUD agrees to restore the mobility sub-section as we recommend, HUD should include state-administered HCV and public housing program in the list of programs for which information is required by section V(C)(1)(d)(i).

The Assessment Tool Should Require States and Insular Areas to Set As Many Goals As Are Necessary to Address Each Contributing Factor: The draft Assessment Tool has retained language from the local government tool that directs States and Insular Areas to "set one or more goals" for each significant contributing factor. This language sets an extremely low bar and appears to condone an unambitious approach to addressing contributing factors. HUD should change the language of Question 2 in the Fair Housing Goals and Priorities section to clarify that States and Insular Areas must set as many goals as are necessary to meaningfully address each contributing factor with a view toward actually overcoming the underlying fair housing issues.

The Assessment Tool Should Clarify That Inclusionary Zoning Is a Strategy for Addressing Contributing Factors Rather Than a Contributing Factor Itself: In the definition of the contributing factor of Land Use and Zoning Laws, inclusionary zoning is listed in a manner that could create confusion as to whether inclusionary zoning itself could be a contributing factor or a strategy for addressing contributing factors. HUD should address this ambiguity by adding "lack of" in front of "inclusionary zoning" in the bullet list of relevant types of land use and zoning laws.

The Assessment Tool Should Ask More Specific Questions about Gentrification and Displacement: The draft Assessment Tool does not solicit information designed to meaningfully address the issue of gentrification and the displacement of long-time residents of color from revitalizing neighborhoods due to economic forces and public investments. In some high cost

cities, patterns of gentrification and displacement pose a risk of contributing to the re-segregation of city neighborhoods. In light of the role of States and Insular Areas in the administration of LIHTC and other important programs, including with respect to the funding of public transportation improvements, there is a great deal that States and Insular Areas can do to ensure that revitalizing neighborhoods in cities emerge as stable, integrated communities of opportunity in which resident choice and autonomy is respected.

The Assessment Tool Should Ask Specific Questions about the Administration of Relocation Assistance and the Location of Replacement Housing: When households are displaced because of activity funded by HUD or other federal agencies, significant fair housing issues can result, both because of potential infringements on autonomy and enabled resident choice and because of the perpetuation of segregation. Federal agencies and their grantees have a duty to ensure that their administration of relocation assistance and replacement housing programs affirmatively furthers fair housing. The unique role of states in administering federal disaster relief and recovery funds necessitates the inclusion of specific questions about these issues in the tool for States and Insular Areas.

The Assessment Tool Should Clarify the Definition of Substantially Equivalent in the Context of State and Local Fair Housing Laws: The Assessment Tool uses a term of art – “substantially equivalent” – in connection with the contributing factor of lack of state and local fair housing laws. Although program participants at the state level should know what this term means, there is evidence that some states either do not know or do not care what the term means. In light of actual or threatened changes to state fair housing laws, as well as a failure to appropriately administer programs funded under the Fair Housing Assistance Program (FHAP), it is likely that several states are out of compliance with their purported substantial equivalency. HUD should seize upon the opportunity presented by this tool to clarify that the federal Fair Housing Act provides a floor and not a ceiling with respect to the protections of substantially equivalent fair housing laws. HUD must further clarify that in addition to protections under state or local laws, they must also have procedures for adjudication and enforcement of that conform with those under the federal Fair Housing Act. HUD must clarify this position and also express examples of barriers to fair housing present in the procedures or practice of enforcing the law. For example, a state Attorney General who chooses to not prosecute a cause determination issued by a state FHAP may be considered a barrier to fair housing. To provide a basis for this discussion, HUD must include a question about whether a state has a truly substantially equivalent fair housing law in the Fair Housing Enforcement, Outreach Capacity, and Resources Analysis. Additionally, HUD must ask whether states have adopted legislation that limits the ability of local governments to protect the fair housing rights of individuals and families.

The Assessment Tool Must Include Robust Instructions for the Community Participation Process: Despite the Affirmatively Further Fair Housing regulation’s focus on robust community participation, HUD’s successive iteration of draft and final Assessment Tools has failed to deliver on that promise. The questions in the tool alone provide States and Insular Areas with little meaningful guidance about what steps they should be taking to solicit meaningful input and what steps they should be taking in response to that feedback. HUD must supplement the instructions that correspond to that section of the draft Assessment Tool in order to ensure that States and Insular Areas will comply with the letter and the spirit of the rule.

The Assessment Tool Should Provide Recommendations on Use of Local Data and Knowledge: Program participants still have little detailed guidance with regard to the incorporation of local data and knowledge—for instance, pertaining to a recommended scope of issues, best practices for information-gathering, and coordination with other local agencies (and other prospective sources). All of these topics should be presented in depth to participants. Such recommendations should be issued without delay, either as part of the assessment tools or in accompanying guidance.

The Assessment Tool Should Provide Recommendations on Use of Fair Housing Goals to Inform Planning Processes: The regulation states that the AFH is to identify goals that are to “inform...community plans including, but not limited to, education, transportation, or environmental related plans.” Participants should be given detailed recommendations regarding the types of plans this provision contemplates, examples of relevant goals, and steps that can be taken to connect fair housing with community and interagency planning.

IV. Comments to ensure a meaningful analysis of fair housing issues and contributing factors faced by persons with disabilities.

The undersigned organizations endorse the separate comments submitted by the Consortium for Citizens with Disabilities. By implementing the recommendations outlined in detail in that letter, HUD can better assure that the AFH process provides an effective platform for advancing the civil rights of persons with disabilities and furthering community integration, a key fair housing goal. The recommendations from that letter are summarized below:

- HUD should provide existing federal data and require states to use existing state and local data concerning the housing needs of people with disabilities.
- HUD should provide guidance on the role that local governments must play to comply with their own obligations under the Americans with Disabilities Act and to support state *Olmstead* planning activities. Effective *Olmstead* planning and implementation requires active collaboration between state and local agencies.
- HUD should ask states about the steps they take to monitor their publicly-supported to ensure compliance with accessibility requirements and about where accessible units are located in relation to areas of opportunity and significant amenities. HUD should omit the question asking states to assess whether persons with disabilities have had to move out of the state to obtain accessible housing.
- HUD should rearrange and add additional instructions to ensure a more meaningful analysis.
- HUD should direct states to describe their Money Follows the Person Program, if any, as well as any Medicaid home and community-based waivers or options, and other state programs or services serving people with disabilities in integrated settings.
- HUD should ask states to describe any pending or settled *Olmstead*-related law suits, settlements, or *Olmstead* initiatives not involving litigation.
- HUD should incorporate additional contributing factors that are included in the Disparities in Access to Opportunity section of the tool into that subsection of the Disability and Access section of the tool.

- HUD should clarify that “sheltered workshops” rather than supported employment services raise civil rights concerns.
- HUD should revise the example of LIHTC incentives in (c)(1)(i)(5) of the publicly-supported housing analysis to specifically address permanent supportive housing and deep affordability.
- HUD should clarify that, with regard to educational opportunities for persons with disabilities, the focus should be on opportunities in integrated educational settings.

Thank you for the opportunity to provide comments on this draft Assessment Tool for States and Insular Areas. By incorporating the recommendations included in this letter along with those proposed by the Consortium for Citizens with Disabilities, HUD can ensure that the AFH process provides a platform for a meaningful evaluation of the fair housing challenges faced by States and Insular Areas. Only after conducting such a meaningful analysis will states and stakeholders be well-positioned to overcome segregation and other pernicious threats to fair housing choice.

Sincerely,

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