

FAIR HOUSING COMPLAINT

Pursuant to 42 U.S.C. §§3608 and 3610, Texas Low Income Housing Information Service (“TxLIHIS”)¹ lodges the following complaint pursuant to the Fair Housing Act (“FHA”), alleging that, in the administration of its federal housing and community development funds, the State of Texas has: (1) made housing unavailable on the basis of race, color and national origin, in violation of 42 U.S.C. §3604(a); (2) discriminated in the terms, conditions, or privileges of sale or rental of a dwelling, and in the provision of services or facilities in connection therewith, because of race, color, and national origin, in violation of 42 U.S.C. §3604(b); and (3) failed in its obligation to affirmatively further fair housing (“AFFH”) as required by 42 U.S.C. §3608 and related federal statutes and regulations.

Through the acts and omissions detailed herein, and those to be discovered during the course of HUD’s investigation, the State has engaged in, and permitted its subrecipients to engage in, differential treatment of the ultimate beneficiaries of federal housing and community development funds—including those provided to the State under the Community Development Block Grant (“CDBG”), HOME Investment Partnership Program (“HOME”), Emergency Shelter Grant (“ESG”) and Housing Opportunities for People with AIDS (“HOPWA”) programs (including those additional funds made available for disaster assistance)—on the basis of race, color and national origin. Furthermore, the State has adopted rules and policies, and permitted its subrecipients to adopt rules and policies, that have the effect of discriminating on the basis of race, color and national origin, and that have perpetuated segregation on the basis of race, color and national origin.

In addition to the specific examples outlined below, and despite substantial evidence that Texans with very low, low and moderate incomes are experiencing dire needs for housing assistance, the Texas Department of Rural Affairs (“TDRA”) has permitted subrecipients to steer CDBG funds away from these housing needs in order to

¹ TxLIHIS is a nonprofit 501(c) (3) corporation established in 1988 by a concerned group of community leaders, nonprofit, public and private housing providers and low- income people. Its mission is to support low-income Texans' efforts to achieve the American dream of a decent, affordable home in a quality neighborhood. TxLIHIS believes that critical low income housing and community development needs can best be solved through a public-private partnership led by the initiative of low-income Texans and supported by government, the private sector, and the general public. TxLIHIS carries out its mission by researching and evaluating low-income housing and community development programs, needs and issues to discover solutions; providing information about low-income housing and community programs, needs and issues to promote public understanding and support; and organizing and empowering low-income people and communities to take the initiative to solve their housing and community development problems. It has standing to bring these complaints because its mission has been frustrated by the State’s acts and omissions as detailed herein, and it has been required to divert staff time and financial resources to investigate the State’s acts and omissions and to attempt to counteract their effect on the housing choices of its members.

avoid the integrative effect such housing (and its affirmative marketing requirements) would have on overwhelmingly white communities, especially those in East Texas. Further, TxLIHIS alleges that the State has permitted subrecipients to steer infrastructure and other CDBG money away from areas where it would be perceived to promote integration on the basis of race, color and national origin.

The State has also openly disregarded its affirmative obligations to identify and analyze all existing impediments to fair housing choice experienced by the people of Texas, most notably those related to race, color and national origin, in violation of 42 U.S.C. §3608. This complaint also challenges the State's actions and inactions that have resulted in such a small proportion of HUD and other funding being available for the housing needs of low and moderate income families, as distinct from funding for non-housing purposes.

For the foregoing reasons, TxLIHIS asks HUD to find that the State's Analysis of Impediments to fair housing choice ("AI"), most recently revised in January 2003, is substantially incomplete and that the State's multiple, subsequent AFFH certifications based on that AI are inaccurate. Such findings would require HUD to disapprove the State's Consolidated Plan ("Con Plan"), bar it from receiving funds under any of the housing and community development programs listed above, and require the State to conduct a new, AFFH-compliant AI and submit a revised Con Plan and certifications to HUD.

Factual Background

Above and beyond its annual appropriations for CDBG, HOME, ESG and HOPWA, Congress appropriated \$6.5 billion in supplemental CDBG funds for "necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing, and economic revitalization in areas affected by hurricanes, floods, and other natural disasters occurring during 2008" through the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act. (Appropriations Act).

HUD allocated \$3 billion in these supplemental recovery funds to the State for unmet needs related to Hurricanes Dolly and Ike in 2008. The State's performance in Round One funding allocations highlights its failures to meet requirements explicitly laid out in federal law and regulations. HUD is to be congratulated for its November 10, 2009, decision to reject the State's Round Two plan, in part because of concerns about the State's compliance with AFFH and civil rights certifications, and to delay disbursement of \$1.7 billion in CDBG funds.

Hurricanes Ike and Dolly were like Hurricane Katrina in at least one important respect: They damaged and destroyed the homes of people of color, people with disabilities and the poor far more so than others. For that reason, it is essential that the State of Texas abide by *both* the norms governing CDBG income beneficiary targeting *and* the civil rights and fair housing norms that also apply to the State's Disaster Recovery Plan.

Yet, by its public statements since HUD's November 10 decision, the State is continuing on a path by which State and local officials are certain to flout both sets of norms. The funds will not go to housing for low-income or minority residents, nor to housing for other protected classes. Indeed, it will not, in the main, go to housing at all, and certainly not in the proportions required by federal law. County, not state, officials will have the lion's share of decision-making power over the uses of these federal funds. They are ill-equipped and ill-disposed to ensure that the federal norms at issue here are observed. In their hands, the housing needs of minority citizens rendered homeless by the hurricanes will be ignored. Far from "affirmatively furthering" the federal goal of integration, the State's uses of these federal funds will further the isolation of the state's minority poor. Unless HUD acts, the critical housing needs of the most vulnerable Texan hurricane survivors will go unmet; and the state and nation will see a repeat performance of some of the tragic mistakes of the Katrina recovery.

The use of CDBG funds in the wake of Katrina and Rita has demonstrated repeatedly that when government does nothing, when local, state, and finally, federal, governments do nothing to enforce the federal laws and requirements of the CDBG program, particularly those requiring grantees to affirmatively further fair housing, the recovery becomes whiter and richer. The very households that are the intended beneficiaries of CDBG funds—low- and moderate-income households in protected classes—are excluded from recovery and forced deeper into poverty and segregation.

Statutory and Regulatory Framework and HUD Enforcement Authority

Before disaster relief funds can be obligated, a State must submit an Action Plan for Disaster Recovery or Action Plan Amendment (Action Plan) to the Secretary as an "Application for Allocation." Pub. L. No.110-329, §122 Stat. 3574, 3599-3601 (2008); 74 Fed. Reg. 7244, 7246; 74 Fed. Reg. 41146, 41151. States cannot receive the funds that make up their allocation (in other words, those funds cannot be obligated) until an Action Plan has been submitted to and *approved by* the Secretary. Plainly, Congress intends the Secretary's control over the obligation of funds to act as an enforcement mechanism for mandatory requirements imposed on the states, just as the Secretary must refuse to obligate funds until a state has met all mandatory requirements under the annual CDBG program.

HUD has made clear that that it “is applying the regulations at 24 CFR 570.480(c) with respect to the basis for HUD determining whether the state has failed to carry out its certifications so that such basis shall be that the state has failed to carry out its certifications in compliance with applicable program requirements.” 74 Fed. Reg. 7244, 7251. The plain language of a regulation that HUD specifically states is applicable to the 2008 CDBG disaster recovery funds recognizes “the Secretary’s obligation and responsibility to review a state’s performance . . . and the Secretary’s obligation to enforce compliance with the intent of the Congress as declared in the Act.” 24 C.F.R. §570.480(c) (emphasis added).

HUD not only has the authority, but the obligation, to enforce compliance with the FHA and related authorities. 42 U.S.C. §3608(e)(5); Executive Order 12892, §2-202; Executive Order 11063, Nov. 20, 1962, §102; Executive Order 12259, Dec. 31, 1980, §1-202; Under the Housing and Community Development Act of 1974 (HCDA), 42 U.S.C. §5301 *et. seq.*, and its implementing regulations, the Secretary has authority to make grants “only if” grantees make certain submissions and certifications. 42 U.S.C. §5304(b)(2); 24 CFR §§91.325(a)(1), 570.601(a)(2).

CDBG grant funds are expressly conditioned on a jurisdiction’s certification that it will affirmatively further fair housing. “The AFFH certification [is] not mere boilerplate formality, but rather a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations, requiring the [jurisdiction] to conduct an AI, take appropriate actions in response, and to document its analysis and actions.” *United States of America ex rel. Anti-Discrimination Center of Metro New York, Inc., v. Westchester County*, --- F.Supp.2d ----, 2009 WL 455269, at *20 (S.D.N.Y. Feb. 24, 2009).² The Secretary cannot obligate funds when a grantee has failed to make a certification that is material to its eligibility to receive CDBG funds.

² “[A]n individual government employee’s decision to approve or continue such funding, even with full access to all relevant information or knowledge of the falsity of the applicants certification does not demonstrate that the falsity was not material . . . the assertion that certain HUD bureaucrats reviewed the County’s submissions and continued to grant the County funding cannot somehow make the false AFFH certifications immaterial, where the funding was explicitly conditioned on the certifications.” *ADC v. Westchester County*, at *21.

The State Cannot Certify That It Will Affirmatively Further Fair Housing

Before receiving CDBG disaster recovery funding, Texas must certify that it “will affirmatively further fair housing.”³ Under federal regulations, this means that the state must truthfully certify that it (a) has or will conduct an analysis to identify impediments to fair housing choice within the state, (b) take appropriate actions to overcome the effects of any impediments identified through that analysis, and (c) maintain records reflecting the analysis and actions in this regard. *See* 24 CFR §570.487(b)(2); 74 Fed. Reg. 7254. The State in fact has a *dual responsibility* to affirmatively further fair housing. It must engage in its own activities that affirmatively further fair housing, and must also ensure that any subrecipient jurisdictions to which it is providing funds comply with their individual certifications in order to affirmatively further fair housing.⁴

A fair housing certification “is not satisfactory to the Secretary” when HUD reviews applicable documents and data and concludes that “(1) the jurisdiction does not have an AI, (2) an AI was substantially incomplete, (3) no actions were taken, (4) the actions taken were plainly inappropriate to address identified impediments, or (5) the jurisdiction has no records.”⁵ In reviewing certifications, “HUD will consider **whether a program participant has made appropriate revisions to update the AI.**”⁶

An Analysis of Impediments to Fair Housing Choice (AI) involves the following:

1. An extensive review of a State or Entitlement jurisdiction's laws, regulations, and administrative policies, procedures, and practices;
2. An assessment of how those laws affect the location, availability, and accessibility of housing;
3. An evaluation of conditions, both public and private, affecting fair housing choice for all protected classes; and
4. An assessment of the availability of affordable, accessible housing in a range of unit sizes.⁷

HUD’s guidance reminds grantees that “each jurisdiction . . . should update, where appropriate, its Analysis of Impediments to Fair Housing Choice,” and “it is

³ 74 Fed. Reg. 7254 citing 24 C.F.R. §570.487(b)(2)

⁴ *See e.g.* HUD OFFICE OF FAIR HOUSING AND OPPORTUNITY (FHEO), FAIR HOUSING PLANNING GUIDE: VOLUME 1 at 3.3-3.49, Chapter 3: Fair Housing Planning Guidelines for States and State-Funded Jurisdictions, (#HUD-1582B-FHEO).

⁵ HUD, GUIDANCE MEMORANDUM; ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE REISSUANCE, (September 2, 2004).

⁶ *Id.*

⁷ HUD FHEO, PROMOTING FAIR HOUSING, (January 28, 2008).

appropriate to update their AIs to reflect the current fair housing situation in their communities.”⁸

Texas last revised a statewide Analysis of Impediments to Fair Housing Choice in January 2003. Since that date, Texas has experienced three major hurricanes, and a population increase of 3% tied directly to an influx of refugees from Hurricane Katrina in Louisiana.⁹ The particular impact of these disasters on the housing needs of persons of color and persons with disabilities is undeniable, yet the State’s AI has not been updated to reflect the current fair housing situation in affected communities. The State does not appear to be updating its AI even as part of a new Consolidated Plan process: fair housing is mentioned only once in the Draft 2010 Consolidated Plan.¹⁰

Specific Allegations

1. **The State Discriminates and Permits its Subrecipients to Discriminate:**
Through its own policies, and its acquiescence in policies of its subrecipients, the State actively discourages people of color from settling in certain communities, or tends to segregate them in less desirable parts of those communities, in violation of 42 U.S.C. §3604(a), §3604(b) and §3608. Representative examples include:
 - a. **Methods of Administration:** The State proposes to pass through the bulk of \$1.7 billion in federal disaster funding to various Council of Governments entities and units of local government that have little knowledge, capacity or inclination to comply with the civil rights and AFFH obligations that are preconditions to the receipt of these federal funds. Many of the communities have a long and troubled history of civil rights violations as evidenced by the protracted fair housing litigation in the Young case against thirty-two East Texas counties and the Vidor case that ultimately failed to achieve desegregation of public housing in that southeast Texas community. Their recent history with respect to racial issues and their continuing resistance to pro-integrative affordable and

⁸ HUD, GUIDANCE MEMORANDUM; ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE REISSUANCE, (September 2, 2004).

⁹ Eugene Boyd, *CRS Report for Congress: Community Development Block Grant Funds in Disaster Relief and Recovery* at 8 (April 25, 2006) (Order Code RL 33330. 8.); TEXAS HHSC, HURRICANE KATRINA EVACUEES IN TEXAS at 3 (August 2006), available at, http://www.hhsc.state.tx.us/survey/KATRINA_0806_FinalReport.PDF (Evacuees in Texas a year after Hurricane Katrina were 81% African-American, 54% lived in households with children, and 24% of households included a member with a physical or mental disability – all protected classes under the Fair Housing Act.)

¹⁰ TDHCA, 2010-2014 STATE OF TEXAS CONSOLIDATED PLAN: DRAFT FOR PUBLIC COMMENT, at 161 (2009). Available: <http://www.tdhca.state.tx.us/housing-center/docs/10-14-DraftConsPlan.pdf>

multifamily housing suggests that they will do little to assess the fair housing impediments experienced by their politically-marginalized African-American and Latino communities, and less to take appropriate actions in response to those impediments. Without State directives about minimum proportions of such funds to be spent addressing the housing needs of low- and moderate-income people of color, the COGs and local governments are likely to divert funds to non-housing purposes as part of their effort to avoid the integrative effect of affordable housing. Further, permitting COGs and local governments to divert funds away from housing needs will invariably deprive African-American and Latino families of the funds they need to rebuild hurricane-damaged homes.

- b. Vidor: The City of Vidor remains eligible for CDBG disaster assistance (and other federal) funds, through the Southeast Texas Regional Planning Commission, even though the City has failed, since at least 1994 to address race-based impediments to fair housing and has remained overwhelmingly hostile to African-Americans and other people of color

- c. Galveston: The City of Galveston proposes to rebuild public housing units destroyed by Hurricane Ike on sites that are highly vulnerable to future extreme weather conditions, and in neighborhoods that are hyper-segregated, rather than develop housing in neighborhoods with greater opportunities for residents. Furthermore, although the City's CDBG plan identifies uses for more than \$160 million in proposed disaster assistance, it provides zero funding for "fair housing activities." Galveston's Analysis of Impediments is stunningly inadequate. It simply states that "there were no policies that contributed to the concentration of racial/ethnic minorities and that city building codes or ordinances did not impede or limit the development or improvement of affordable housing in Galveston."¹¹ Jurisdictions are required to go beyond a review of policies, codes, and ordinances in conducting an Analysis of Impediments, and the racially charged opposition to subsidized and affordable housing, along with policy decisions that have substantially reduced the number of affordable housing units that will be built in Galveston, demonstrates that there are in fact impediments to fair housing choice, and that neither the City nor the State has taken actions to address these impediments.

¹¹ CITY OF GALVESTON GRANTS AND HOUSING DEPARTMENT, CITY OF GALVESTON, TEXAS 2005 CONSOLIDATED PLAN ES.5 (2005).

- d. The State's Single Family Post-Hurricane Rebuilding Programs Perpetuate Racial Segregation: First round funding decisions were based on State programs that require recipients to rebuild on their pre-hurricane lot and denies assistance to any family seeking to relocate from their pre-hurricane residence, and the State proposes to use and allow COGs and units of local governments to use the same policy for second round funding. A large percentage of the recipient households were people of color who live in highly segregated neighborhoods. TxLIHIS objected to these policies in written comments to the State, detailing how these programs limit housing choice, but the State rejected program amendments that would allow participants an option to move from high crime, racially segregated, low opportunity pre-hurricane neighborhoods to higher opportunity desegregated areas.
- e. The State's Multi-Family Post-Hurricane Rebuilding Programs Perpetuate Racial Segregation: The State's rental housing rehabilitation program has funded the redevelopment of multi-family rental housing in ways that has and will reinforce patterns of segregation that existed prior to the hurricanes. Further, despite abundant evidence of its racially discriminatory effect, State statutes governing the operation of the federal Low Income Housing Tax Credit ("LIHTC") program effectively permits opponents in predominantly white neighborhoods a veto over the development of affordable rental housing in those neighborhoods, and concentrates LIHTC development in neighborhoods with high minority concentration. This latter phenomenon is the subject of federal litigation against the State by the Inclusive Communities Project ("ICP"), but the State's current AI does not mention that fact (or the ICP litigation against other municipalities, such as McKinney and Flower Mound, two jurisdictions eligible for federal housing and community development funding from the State).
- f. The State's Post-Hurricane Resettlement Methods Exacerbated Racial Segregation: Following Hurricane Katrina, the State permitted the City of Houston to use CDBG disaster recovery funds to concentrate African-American evacuees into neighborhoods characterized by substandard housing conditions and high crime rates and increasing segregation on the basis of race where they remain to this day. The State intends to allow the City of Houston to use CDBG Disaster Recovery funds to rehabilitate housing within these highly segregated, crime ridden neighborhoods to encourage African-America hurricane evacuees to remain in these segregated communities. The City of Houston explicitly would not provide any non-segregated alternatives to African-American evacuees.

2. **The State’s AFFH Certification Should be Deemed “Unsatisfactory” to the Secretary Because it is Based on an Obsolete AI:** The State’s AFFH certification is based on an AI that was revised in January 2003, and that has not been updated since that time. By definition, that AI omits significant current information about fair housing choice in Texas, including, but not limited to, the significant effects on the housing market resulting from hurricanes in 2005 and 2008; increased foreclosures and evictions related to the recent economic downturn; the extent to which that same downturn has diminished the effect of the Low Income Housing Tax Credit (“LIHTC”) program in expanding housing choice; the identification of post-2003 impediments as documented in fair housing litigation and administrative complaints against the Texas Department of Housing and Community Affairs and at least three of the State’s sub-recipients; and the effect of predatory lending practices since 2003. In other words, the State has failed to “become fully aware of the existence, nature, extent, and causes of all fair housing problems and the resources available to solve them.” *Fair Housing Planning Guide*, at 2-8.

3. **The State’s January 2003 AI Was Substantially Incomplete at the Time of its Adoption, Making its AFFH Certification False:** The January 2003 AI was substantially incomplete at the time it was adopted because it failed to conduct a thorough identification and analysis of impediments existing in the State; it failed to design, set forth, and carry out specific appropriate actions to overcome the effects of fair housing impediments; and it failed to identify parties responsible for carrying out those actions and timelines for their completion. While the specific failures are numerous, the most significant involve:
 - a. **AI Fails to Address Racial Segregation:** Despite the obligation to “describe the degree of segregation and restricted housing by race, ethnicity [or other protected class and] how segregation and restricted housing supply occurred and [to]relate this information by neighborhood and cost of housing,” *Fair Housing Planning Guide*, at 2-28, the State’s 2003 AI ignores these issues altogether, except for its references to the significant civil rights litigation brought against Texas municipalities in past decades. This failure is made all the more remarkable by the fact that, since approximately 1999, State law has required the Texas Department of Housing and Community Affairs to compile reports showing the ethnic, familial and racial composition of multifamily housing developments funded by the State. In their most recent incarnations, these appear as the 2009 State of Texas Low Income Housing Annual Report (available at <http://www.tdhca.state.tx.us/housing-center/docs/09-SLIHP.pdf>) and the 2009 Housing Sponsor Report (available at

<http://www.tdhca.state.tx.us/housing-center/docs/09-HSR.pdf>). Together, these demonstrate the dramatic segregation of these properties on the basis of race and national origin, among other protected classes. But the State's AI does not identify this fair housing impediment, and proposes no action to overcome it.

- b. State's Failure to Enforce AFFH Compliance on Subrecipients: Although the State suggests that its subrecipients are required to conduct AIs and revise them as appropriate, many do not and there is no evidence that the State reviews these AIs and disallows funding to recipients that fail to comply with their AFFH obligations. In fact, the State has permitted many units of local governments to design and carry out housing activities without conducting an AI and as a result carried out plans reinforcing housing segregation. For instance, under Round One Hurricane Rita funding, the Cities of Port Arthur and Beaumont, and their associated Councils of Government, had no AI in place. Furthermore, these and other entities limited single-family funding in a way that required homeowners to remain in their often-segregated neighborhoods of origin, rather than permitting them to find replacement housing in neighborhoods with better opportunities. With respect to the disaster assistance funding that HUD has recently delayed the failure of subrecipients to have AFFH-compliant AIs, and the State's failure to enforce AFFH obligations, is of particular concern. Without such oversight, as much as \$1.7 billion in federal funds may be spent in a fashion that reinforces and perpetuates racial segregation.
- c. AI Fails to Identify, Analyze and Take Actions to Overcome Choice-Limiting Public Policies: In its virtual disregard for the effect of local zoning and land use policies on the availability of housing for people of color, the 2003 AI is evidence of the State's systemic failure to consider the effect on fair housing choice of "[p]ublic policies, practices, and procedures involving housing and housing-related activities" and "[z]oning and land use policies, tax assessment/abatement practices." *Fair Housing Planning Guide*, at 2-9.
- d. AI Confuses "Fair Housing" and "Affordable Housing" and Fails to Consider Race-Based Impediments Other than Affordability: The State's AI impermissibly conflates AFFH actions with affordable housing activities, and fails to take steps to assure that all affordable housing developed is "fully available to all residents of the community, regardless of race [or other protected class]." *Fair Housing Planning Guide*, at 5-4. In its 2003 AI, the State made the very same mistake made by Westchester

County, paying no attention to the critical fair housing issue: the geographic location of the affordable housing and the barriers experienced by members of the FHA protected classes. As Judge Cote recognized in her summary judgment decision in that litigation,

“The HUD Guide explains that while it is often the case that minorities are disproportionately represented among the low-income population, simply providing affordable housing for the low-income population “is not in and of itself sufficient to affirmatively further fair housing.” This unsurprising statement is grounded in the statutory and regulatory framework behind the obligation to AFFH, which as already discussed, is concerned with addressing whether there are independent barriers to protected classes exercising fair housing choice. As a matter of logic, providing more affordable housing for a low income racial minority will improve its housing stock but may do little to change any pattern of discrimination or segregation. Addressing that pattern would at a minimum necessitate an analysis of where the additional housing is placed.”

U.S. ex rel. Anti-Discrimination Center v. Westchester County, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009), at *15.

4. **The State Has Violated its own AFFH Obligations and Failed to Enforce the AFFH Obligations of Subrecipients:** Through its own policies and practices, and its acquiescence in policies and practices of its subrecipients, the State has violated its obligation to AFFH pursuant to 42 U.S.C. §3608. Representative examples include:
 - a. **State Opposition to AFFH Legislation:** The State opposed two bills in the 2009 Texas Legislature to improve AFFH compliance, and that legislation was defeated.
 - b. **Subrecipients are Out of Compliance with AFFH Obligations:** The State’s failure to police the AFFH certifications and performance of its subrecipients permits those subrecipients to ignore AFFH obligations and to conduct programs that exacerbate and perpetuate segregation. TxLIHIS has substantial evidence of this problem, but offers two poignant examples: (1) In the State’s eyes, the City of Vidor remains eligible for

CDBG disaster assistance (and other federal) funds even though the City has failed, since at least 1994 to address race-based impediments to fair housing and has remained overwhelmingly hostile to African-Americans and other people of color; and (2) The City of Galveston proposes to rebuild public housing units destroyed by Hurricane Ike on sites that are highly vulnerable according to FEMA storm vulnerability assessments to future extreme weather conditions, and in neighborhoods that are hyper-segregated, rather than develop housing in neighborhoods with greater opportunities for residents. Furthermore, although the City's CDBG plan identifies uses for more than \$160 million in proposed disaster assistance, it provides zero funding for "fair housing activities."

5. **The State's January AI Fails to Organize Appropriate Actions to Overcome Impediments, Artificially Limits Consideration of Non-Federal Resources to Support Such Actions, and is Based on Insufficient Public Consultation:**

Beyond the substantive failings of the 2003 AI, the State has:

- a. Failed, with respect to any proposed actions to overcome fair housing impediments, to "organize these actions into a prioritized list of specific actions [w]ith milestones, timetables, and measurable results [t]o be undertaken by the jurisdiction in each of the 4 years following completion/update of the AI." *Fair Housing Planning Guide*, at 2-6. While the 2003 AI lists funds expended and activities undertaken with respect to previous civil rights litigation, it does not indicate how such activities address specific fair housing impediments. Having a plan of action to combat impediments, with specific goals and time frames, is an essential component of fair housing planning. An AI without definitive goals, strategies, time frames and actions, coupled with definitive dates by which to accomplish tasks designed to address, reduce or eliminate fair housing impediments is not an AI, because it does not comply with the statutory and regulatory requirements to AFFH. Without such an analysis and planning effort, HUD cannot hold the State (or its subrecipients) accountable for its AFFH certifications.
- b. Imposed artificial limitations on the resources available to the State to combat fair housing impediments. The 2003 AI implicitly assumes that the State's obligation to take appropriate actions is limited to the extent of resources or assets available through federal programs. In fact, though, the "AFFH obligation is not restricted to the design and operation of HUD-funded programs at the State or local level. The AFFH obligation extends to all housing and housing-related activities in the grantee's

jurisdictional area whether publicly or privately funded.” *Fair Housing Planning Guide*, at 1-3.

- c. Failed to comply with the consultation and citizen participation requirements of HUD’s Consolidated Plan regulations. 24 C.F.R. §§91.110, 91.115. *See also Fair Housing Planning Guide*, at 2-5. HUD needs community groups to be its “eyes and ears” and to be able to compare the assertions made in the State’s AI and AFFH certifications against actual conditions. While the 2003 AI recites that developed recommendations through a “citizen participation process,” it does not reveal what that process was or which groups and advocates participated in that process.

Conclusion

Because of its failure to conduct a compliant AI (and to enforce obligations on its subrecipients), the State cannot currently make an AFFH certification that can be “satisfactory to the Secretary.” The State’s failure to conduct the AI necessary to make a fair housing certification is particularly troubling considering the long history of race-based housing discrimination in a number of the jurisdictions that will be receiving CDBG disaster recovery funding under the submitted Action Plan, including the City of Galveston and a thirty-six county area of East Texas. In addition to demonstrating the insufficiency of the State’s procedures and requirements, these facts - the history of racial discrimination and fair housing violations in grantee jurisdictions, the State’s failure to update its AI to reflect the current fair housing situation as a result of several natural disasters, and ongoing race-based resistance to multifamily affordable housing in at least one major subrecipient jurisdiction - constitute “evidence, not directly involving the grantee’s past performance under this program, that tends to challenge in a substantial manner the grantee’s certification of future performance” sufficient to support a determination that Texas has not made a certification that it will affirmatively further fair housing satisfactory to the Secretary. 24 C.F.R §570.304 (2008).

Under all applicable laws and regulations, the Secretary has not only the authority, but the obligation and responsibility to review the State of Texas’ submissions and certifications in application for funds allocated by Public Law 110-329, and to enforce compliance with CDBG program requirements and the intent of Congress.

For the reasons set out above, we ask you to deem Texas's Plan insufficient to support obligation of CDBG funds at this time, and require revision and resubmission of the Plan in accordance with applicable federal laws and regulations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Henneberger". The signature is stylized with large loops and a long horizontal stroke at the end.

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