



August 23, 2016

Comments on the City of Houston's Draft Action Plan

Thank you for this opportunity to provide comments on the City of Houston's draft Action Plan for Community Development Block Grant for Disaster Recovery (CDBG-DR) funds appropriated for unmet needs related to 2015 flood events.

Texas Low-Income Housing Information Service (TxLIHIS) and Texas Appleseed have worked on CDBG-DR programs since Hurricane Rita. Since Hurricane Ike, we have worked with grassroots community organizations of people of color within the City of Houston seeking equal and fair treatment from the State of Texas and the City of Houston in federally funded disaster recovery programs. We are also actively working with low income community leaders of color to assess the adequacy of public services, public infrastructure, public safety and public facilities provided by the City of Houston in low income neighborhoods of color. In the course of this work, we have documented the historical and ongoing concerns of residents of these communities that have suffered from systemic neglect and underinvestment by the City of Houston: specifically, complaints that the City has withheld public funds for basic and essential public infrastructure in these neighborhoods.¹ Many of these concerns are related to the frequent and repeated flooding in these historically disinvested neighborhoods.

Residents of these communities have requested adequate storm water drainage protection from the City at CDBG-DR Action Plan and public hearings and city council meetings for almost eight years. In response to these demands, the City used CDBG-DR funds from Hurricane Ike to undertake a city-wide engineering study of the adequacy of the open ditch drainage system that is the principal storm water system providing flood protection to Houston's low income communities of color. That study documented the inadequacy of the open ditch system to provide flood protection to many African-American and Latino neighborhoods even in routine annual rainfall events.

Inequitable public investment in drainage infrastructure has a clear disparate impact on the basis of race, color, and national origin. The failure of the City to provide equal levels of flood protect to African-American- and Latino-segregated neighborhoods harms people of color

¹ This is by no means a pattern unique to the City of Houston.

directly by depressing the economic value of their homes and subjecting them to disproportional exposures to hazards from flooding. These hazards now include disproportionate exposure to the Zika virus transmitted by mosquitos that breed in standing water in open drainage ditches, which local elected officials, including the City's mayor have rightly described as a public health emergency.

City officials and city council members, in response to our presentation at the City's public hearing on August 18, 2016, raised the issue of whether the City could use CDBG-DR funds to address the problems outlined above. The answer is unequivocally yes. The City's drainage study documents that these low and moderate income neighborhoods flood frequently, most severely during natural disasters including the 2015 floods.

The CDBG-DR funds for recovery from the 2015 floods, and potential additional allocations of CDBG-DR for the 2016 floods, present the City of Houston with an opportunity to address systemic flooding and infrastructure issues, not only to redress historical discrimination and meet its fair housing obligations, but also to target the most severely disaster-affected areas, rebuild more resilient communities, and reduce the damage from future disasters. The draft Action Plan states that "the City proposes to focus on the root cause of flooding in the City of Houston and our proposed budget document reflects this. We believe that through this strategy, we can make the greatest impact on the greatest number of low- and moderate-income residents within highest impacted areas." (draft Action Plan at 32) The city's recognition of the opportunity presented by these funds to address root causes, and commitment to do so, is a significant step forward.

Currently, the draft Action Plan is substantively incomplete, fails to clearly state data-supported disaster-related needs, and fails to detail the activities the City proposes to undertake with the available funds. Particularly troubling is the draft Plan's failure to adequately assess the impact of the disaster on low and moderate income communities of color.

We understand that the City has a regulatory deadline for submission of a draft Action Plan, and has indicated that its Needs Assessment will be incorporated into the Action Plan and drive the selection of activities when that assessment is completed. However, the unmet needs data that is included in the draft Action Plan is not consistent with either the Federal Register notice (81 Fed.Reg. 117, Friday, June 17, 2016) or the recently released Department of Justice Guidance on civil rights obligations in disaster recovery programs.²

At most, the City can treat its current plan as only a rough framework for developing a compliant Action Plan that will be amended until it reached the regulatory standard. Those subsequent Action Plan amendments must be presented for public comment once complete.

² Guidance to State and Local Governments and Other Federally Assisted Recipients Engaged in Emergency Preparedness, Response, Mitigation, and Recovery Activities on Compliance with Title VI of the Civil Rights Act of 1964. Available: <https://www.justice.gov/crt/file/885401/download>

Citizens cannot be expected to comment on a plan that offers no detailed program activities, or a plan that is not based on a final needs assessment.

The Federal Register Notice clearly sets out the requirements for an Action plan.

The Appropriations Act requires that prior to the obligation of funds a grantee shall submit a plan detailing the proposed use of all funds, including criteria for eligibility and how the use of those funds will address long-term recovery, restoration of infrastructure, and housing and economic revitalization in the most impacted and distressed areas. . . To inform the plan, grantees must conduct an assessment of community impacts and unmet needs to guide the development and prioritization of planned recovery activities. (81 Fed. Reg. 117: 39688, 2016)

HUD's approval of the action plan and obligation of funds requires grantees to meet the standards set out in the Federal Register Notice. ("The Secretary may disapprove an action plan as substantially incomplete if it is determined that the plan does not satisfy all of the required elements identified in this notice." (81 Fed.Reg. 117: 39691, 2016) "All grantees must include sufficient information so that all interested parties will be able to understand and comment on the action plan." (81 Fed.Reg. 117: 39693, 2016).

I. Impact and Unmet Needs Assessment

In addition to the requirements in the Federal Register Notice, the City should review the August 16, 2016 U.S. Department of Justice (DOJ) guidance on Title VI of the Civil Rights Act for federally assisted recipients engaged in disaster preparedness, response, mitigation, and recovery. In particular, Section E provides additional guidance on collecting and analyzing data in order to ensure Title VI compliance and equitable recovery that may be helpful to the City in complying with the impact and needs assessment required by the Federal Register Notice.

a. Geographic Level and Impact by Demographic Group

"Impacts should be described geographically by type **at the lowest level practicable** (e.g. county level or lower if available for States, and **neighborhood or census tract level for cities.**" (81 Fed. Reg. 117: 39691, emphasis added.) The draft Action Plan offers demographics only at the citywide level and there seems to be no analysis at the block group or neighborhood level. While the analysis by LMI area is useful, the assessment is incomplete and masks which specific neighborhoods were most impacted by the disaster.

Inherent in the reporting and civil rights requirements of the CDBG-DR program, and made explicit by DOJ's new guidance, is that this needs analysis must include, "information about the race, color, national origin, languages spoken by LEP populations, and other demographic information of communities served by a federally assisted program, activity, or service. Grantees should "identify, obtain, review, and share aggregate race, color, and national origin

data concerning the extent and geographic distribution of damage caused by disasters and emergencies before formulating recovery and mitigation plans.”³ (DOJ Guidance at 14) Again, using demographic data at the city level does not meet this standard, or the Title VI data collection requirements.

At the August 18, 2016 public hearing, many witnesses, including ourselves, stated that the draft Action Plan’s reliance on 311 data to assess flooding is flawed and racially biased because of systemic underreporting by low income communities of color. This underreporting is the result of the City’s failure to equitably address 311 complaints from low-income communities of color. Many residents of those communities have simply “given up” on the 311 system as a vehicle for obtaining action from the City to deal with local infrastructure problems. The three city council members who were present at the August 18, 2016 hearing acknowledged this fact in their responses to public testimony. The City must collect objective data on the impact of the flooding based on professional assessments. 311 call data should be considered, but, as has been the practice in past, this data should be corrected for bias through the use of objective, professional, supplemental damage assessments.

b. Available Objective Data on Infrastructure Deficiencies

The City does not need to rely on 311 reporting in part because it has undertaken, through its Public Works Department and funded with Hurricane Ike CDBG-DR funds, an extensive study of flooding patterns and where the open ditch drainage system is substandard and inadequate. The study does not identify open ditch drainage, it identifies **inadequate** open ditch drainage. As the attached maps show, that study found inadequate drainage protection concentrated in LMI and African-American and Latino neighborhoods, which are subject to disproportionate and repeated flooding, as often as once a year. (Attachments 1 and 2) Correcting the substantially inadequate storm water drainage protection provided to low income communities of color, in contrast to infrastructure provided and maintained by the City in higher income and majority white neighborhoods would not only address disaster related impacts, but “leav[e] communities sustainably positioned to meet the needs of their post-disaster population, economic, and environmental conditions.” (81 Fed.Reg. 117:39693, 2016)

However, despite the fact that the City’s open ditch flood engineering study provides the best available data to estimate and assess the adequacy of the City’s storm water protection system at the neighborhood level, and demographic data on which communities are most affected by that infrastructure’s failure to function in an emergency, the draft Action Plan does not cite it. Reliance on subjective and possibly biased 311 reporting instead of an objective study is neither an equitable nor an effective way to identify projects to be funded with CDBG-DR.

³ “Data can include the geographic distribution of individuals by race, color, and national origin (including Limited English Proficiency); the reliance of particular communities on public transit; the proximity of different groups to emergency or disaster danger zones; and the geographic distribution of damage, taking into account various degrees of severity.” (DOJ Guidance at 15)

c. The City's Fair Housing Obligations

DOJ's new guidance is specific to Title VI of the Civil Rights Act of 1964 (which prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance) but is clear that "[r]ecipients of federal financial assistance that provide information or services in connection with disasters must also comply with all other federal anti-discrimination provisions, including prohibitions against discrimination and specific affirmative obligations."⁴ (DOJ Guidance at 2)

As a CDBG entitlement community, and as a recipient of CDBG-DR funds, the City of Houston has an obligation, and as a condition of its eligibility for these CDBG-DR funds must certify, that it will affirmatively further fair housing (AFFH). As we laid out in our April 6, 2016 letter to the City of Houston regarding Hurricane Ike CDBG-DR funds, the City's failure to comply with its fair housing obligations affects its eligibility for HUD housing and community development and other federal funds. The City's failure to provide low-income families of color a choice of housing units in areas outside of high-poverty minority-segregated areas - where assisted housing has historically been over-concentrated in a manner that creates a disparate impact on persons protected by the Fair Housing Act - is one of the issues that may render the City unable to truthfully certify that it is affirmatively furthering fair housing choice and place its eligibility to receive these CDBG-DR 2015 funds at risk. The Federal Register notice for these funds in fact requires the City to assess how disaster recovery planning decisions "may affect racial, ethnic, and low-income concentrations, and ways to promote the availability of affordable housing for low poverty, nonminority areas where appropriate and in response to natural hazard - related impacts." (81 FR 177:39692, 2016)

The Fair Housing Act of 1968 and the obligation to AFFH apply to **both** housing and community development funds, and **to all the activities program participants conduct with those funds - housing, infrastructure, and economic development**. Grantees are not only required to refrain from discrimination, they must take proactive steps to redress the legacy of segregation and to further the creation of more integrated and diverse communities where all classes of persons protected under the Fair Housing Act have not only free and fair access to housing opportunities, but equal access to key community assets. The AFFH goal cannot be accomplished solely by focusing on funding allocated to housing or on the geographic location of housing; jurisdictions must also ensure non-discrimination and address the effects of segregation in the provision of public services. "[N]o agenda for public policy and public action can address itself strictly to the integration of the privileged communities . . . at the expense of

⁴ Other statutes prohibiting discrimination include, but are not limited to, the Robert T. Stafford Disaster and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5121 et seq. (2013) (as amended by the Post-Katrina Emergency Management and Reform Act of 2006); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.; **the Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq.; HUD's Final Rule on Affirmatively Furthering Fair Housing, 24 C.F.R. Parts 5, 91, 92, et al.**, and the Age Discrimination Act, 42 U.S.C. 6101 et seq. (emphasis added)

those who continue to live in, or move into, disadvantaged areas. Improving life and expanding opportunity for members of disadvantaged groups *who do not move* is also critical.”⁵

Housing segregation does not produce “separate but equal” neighborhoods (as illegal as that would be in and of itself), it paints a target on minority neighborhoods that makes other forms of discrimination easier to perpetrate and maintain: including the failure to provide adequate infrastructure and public services.

Low-income and historically disinvested minority communities are the prioritized recipients of CDBG funds by statute. They are also more likely to be located in disaster-vulnerable areas, and to suffer disproportionately severe housing and infrastructure damage in a disaster. Both the income-targeting provisions of the CDBG program and the requirements of the Fair Housing Act mandate prioritizing low-income and historically underserved neighborhoods for infrastructure and economic development disaster recovery spending. Disaster recovery housing programs tend to be (although are not always) targeted at specific households in the lower- and middle-income population – a population in which persons in classes protected by the Fair Housing Act are overrepresented. On the other hand, infrastructure projects tend to serve a broader segment of the local population, diluting the targeting of the funds to poorer and historically disinvested neighborhoods of color.

Before the State of Texas’ Hurricane Ike and Dolly Round 2 CDBG-DR Action Plan, disaster recovery programs tended to meet their LMI requirements with housing programs that forced low-income families to stay in high-risk and distressed areas, while denying those same neighborhoods the infrastructure and economic development funds they needed to truly recover. Again, the City’s stated focus on root causes of flooding is an important and laudable use of CDBG-DR funds, but only if those funds are targeted to the communities and neighborhoods with the most severe unmet needs – low-income historically minority neighborhoods with inadequate open ditch drainage infrastructure.⁶

Long term disaster recovery must look beyond the rebuilding of individual structures to rebuilding distressed communities in a way that supports their ability to become more diverse and higher opportunity neighborhoods offering decent infrastructure, safe and affordable homes, and access to important community services. Investment in affordable housing alone in high poverty neighborhoods of color has not historically, and cannot be expected, by itself, to catalyze community revitalization and “remove the walls of discrimination which enclose other minority groups;” and foster “truly integrated and balanced living patterns” as required by the Fair Housing Act. The pattern of limiting “investment” in low-income neighborhoods of people of color to housing funds has too often been replicated in disaster recovery programs, denying those neighborhoods comprehensive recovery and perpetuating segregation and its harms.

⁵ de Souza Briggs, Xavier, “Politics and Policy,” in *The Geography of Opportunity*, pp. 316-317.

⁶ We note that this is also the most effective use of funds, mitigating the risk and cost of future disasters, or even lower-level flooding.

Federal guidance requires that the City assess and include in the Action Plan how its decisions “may affect racial, ethnic, and low-income concentrations, **and** ways to promote the availability of affordable housing for low poverty, nonminority areas where appropriate and in response to natural hazard – related impacts.” (81 FR 177:39692, 2016, emphasis added)

The draft Action Plan states that, “one of the ways that the city proposes to affect the concentration in LMI areas is through multifamily acquisition/buyout activities funded with CDBG – DR 15” without specifying target properties or areas. These activities should prioritize and target government subsidized housing developments within the city of Houston in floodways and high-risk flood zones. The tenants of these developments, overwhelmingly low income people of color, suffer from repeated structure flooding, and are at the mercy of building owners and landlords for repair and rebuilding.⁷

In accordance with federal requirements that the Action Plan must include a description of how the grantee will prevent “low-income individuals and families with children (especially those with incomes below 30 percent of the area median) from becoming homeless” and “assess how planning decisions may affect racial, ethnic, and low-income concentrations, and ways to promote the availability of affordable housing in low-poverty, nonminority areas where appropriate and in response to natural hazard-related impacts”, the Action Plan must specifically address activities the City intends to take to assist tenants of these developments to relocate, and state how they will assist people to relocate into non-flood vulnerable, low poverty, non-racially concentrated neighborhoods. (81 FR117:39692, 2016) The City also needs to specify its intent with regards to the ultimate disposition of the properties acquired. It is not an acceptable outcome that landlords are bought out by the City while tenants are left on their own to relocate in an expensive, highly segregated Houston rental housing market.

d. Public Comment on Amendments to the draft Action Plan

An Action Plan that meets statutory and regulatory requirements will require one or more substantial amendments and associated public comment processes to the current draft.⁸ The draft Action Plan is insufficiently clear that specific amendments are substantial and will be accompanied by a public comment process.

The draft Action Plan’s definition of “substantial amendment” is insufficient to ensure that the public comment requirements for an Action Plan are met. Publication and incorporation of the needs assessment is a substantial amendment. Any change that identifies the use of funds in a more specific way, addresses public housing needs, and any prioritization of infrastructure

⁷ The Federal Register Notice specifies that the Action Plan must address how the grantee will prevent “low-income individuals and families with children (especially those with incomes below 30 percent of the area median) from becoming homeless.” (81 FR117:39692, 2016)

⁸ For example, “the grantee must amend its action plan to update its needs assessment, modify or create new activities, or reprogram funds, as necessary.” (81 FR 117:36994, 2016)

projects that the City includes must be considered a substantial amendment and the definition of the Action Plan needs to be changed to include this.

When natural disasters like the recent recurring floods strike cities, it is essential that public infrastructure be in place to protect the citizens. We have seen in flooding events, most recently in the Greenspoint area, that low income Houstonians, both homeowners and renters, who lack insurance and the private economic resources to recover from disaster are often the ones who end up paying the cost of being compelled by residential segregation to live in neighborhoods where the city has failed to provide essential infrastructure. The City's proposed focus on root causes of flooding is promising, but these investments must be done in a way that specifically targets the hardest hit neighborhoods and redresses historical inequities in low-income neighborhoods where people of color were compelled by government action to live. The Action Plan must also be amended, with public comment, to provide sufficient information that the public can understand the proposed use of funds and have a meaningful opportunity to comment.

We look forward to working with the City on equitable and effective disaster recovery.

Sincerely,

John Henneberger, Co-Director
Texas Low Income Housing Information Service

Madison Sloan
Texas Appleseed