

August 17, 2015

Secretary Julian Castro  
U.S. Department of Housing and Urban Development  
451 7<sup>th</sup> Street, SW, Room 10276  
Washington, DC 20410-0500

Re: Affirmatively Furthering Fair Housing Assessment Tool, Docket No. FR-5173-N-05

Dear Secretary Castro,

On behalf of the undersigned civil rights, fair housing, and other non-profit policy organizations, we are writing to offer our detailed comments on the Affirmatively Furthering Fair Housing (AFFH) Assessment Tool for the Assessment of Fair Housing (AFH), published for comment at 80 Fed. Reg. 42108 (July 16, 2015). The U.S. Department of Housing and Urban Development (HUD) published a previous version of the Assessment Tool for public comment in September 2014. Although the release of the current version of the Assessment Tool is an important step forward in the process of implementing of the recently finalized AFFH rule, HUD's revisions to the Assessment Tool have resulted in a weaker instrument. The Assessment Tool is a critical component of the AFFH process, and it must be structured so as to provide a meaningful assessment of jurisdictions' fair housing challenges. Below we respond to HUD's solicitation of comment on the two alternative options for the Assessment Tool that it has proposed and set out changes that we believe must be made in the final version of the Assessment Tool in order to accomplish that goal.

We strongly urge HUD to adopt Option B of the Assessment Tool over Option A. The central difference between the two versions of the Assessment Tool is that Option B would require jurisdictions to separately identify contributing factors for the fair housing issues of segregation, R/ECAPs, disparities in access to opportunity, and disproportionate housing needs while Option A would include a combined fair housing issue analysis. Option A would increase the likelihood of jurisdictions omitting key contributing factors and would result in less clear and effective analysis.

Our comments on the revised Assessment Tool are also applicable to the forthcoming supplemental forms, including the Assessment Tool for states, the Assessment Tool for public housing authorities, and the Assessment Tool for joint regional submissions.

These comments are structured as follows:

1. Comments on changes between the September 2014 and July 2015 versions of the Assessment Tool
2. Comments on the definitions and instructions included in the July 2015 version of the Assessment Tool
3. An overview of unresolved recommendations from our comments on the September 2014 version of the Assessment Tool

## **1. Comments on changes between the September 2014 and July 2015 versions of the Assessment Tool**

Two aspects of the July 2015 Assessment Tool demonstrate tangible improvement over the September 2014 version of the document: first, the inclusion of a list of definitions of key terms and more detailed instructions for the completion of the template; and second, the provision of and requirement to analyze data going back to the 1990 Census for questions requiring a discussion of historical trends in relevant data points. Some important long term trends may be discernible with the benefit of 25 years of data but not with only ten years.

To enable these positive changes to have their intended effect, we recommend that HUD address the areas in which the revised Assessment Tool is weaker than the September 2014 document.

Restore Section on Mobility and Publicly Supported Housing Patterns: The September 2014 version of the Assessment Tool had a relatively robust section on mobility issues for subsidized housing tenants, particularly Housing Choice Voucher tenants. HUD eliminated that section from the July 2015 document. “Impediments to mobility” is included as a contributing factor for “Publicly Supported Housing Patterns,” but the more detailed list of specific types of impediments to mobility and important guiding questions are missing. The lack of emphasis placed on this crucial set of issues is concerning. Breaking down barriers to mobility and providing high-quality mobility counseling to households with Housing Choice Vouchers (HCVs) have both proven to be the most successful strategies for fostering residential racial integration and increasing access to opportunity. Additionally, onerous, unjustified policies that restrict the mobility of HCV holders may violate the Fair Housing Act.

It is critical for AFHs to address mobility issues very carefully, whether they are AFHs of entitlement jurisdictions working alone, regionally, or in tandem with public housing authorities (PHAs). With respect to AFHs that involve PHAs, administration of the HCV program is one of the most critical parts of their operations. Omitting a discussion of aspects of the program that relate to mobility from a document that PHAs are required to use for fair housing planning would be akin to not asking an entitlement jurisdiction to discuss its site selection policies with respect to developments that receive HOME Investments Partnerships Program (HOME) funds.

In the absence of a collaborating PHA, entitlement jurisdictions still have a clear stake in HCV mobility issues and a policy toolkit that they can use to overcome barriers. For example, some jurisdictions have used block grant funds to help HCV holders pay their security deposits when they move to high opportunity areas. Others have passed ordinances prohibiting housing discrimination on the basis of source of income. In the final version of the Assessment Tool, HUD should restore the September 2014 versions’ rightful focus on mobility issues in publicly supported housing.

Restore Use of Local Data for Disability and Access Section: As outlined in more detail in comments submitted to HUD by the Co-Chairs of the Consortium for Citizens with Disabilities Housing and Rights Tasks Forces, HUD is able to provide data for fewer than half of the questions in the Disability and Access Section. Despite its inability to provide national data, however, by removing the following instructions from the draft, HUD also discourages localities from seeking out local data.

“There are limited sources of nationally consistent data on the extent to which individuals with different types of disabilities are able to access housing and community assets. To complete this [Disability and Access] section, program participants should solicit input from individuals with disabilities and disability advocates, who often have the most relevant information on these topics.”

We understand that HUD has trimmed the initial Tool in response to comments about the burden on local jurisdictions. However, since local and state data is the *only* data that can inform responses to the majority of the disability questions, HUD should maintain more rigorous local data requirements in the Disability and Access section of the Tool.

Eliminate Compound Questions: Throughout the July 2015 Assessment Tool, HUD has combined previously distinct questions into compound questions that solicit different strands of analysis and pieces of information in one text box. This approach has two clear downsides. First, combining many answers into one field will make it more difficult for stakeholders to extract the information that they need from the AFH thus making the entire process less transparent. Second, it increases the likelihood that some jurisdictions, regardless of their intent, will not answer certain questions. It may be difficult for jurisdictions to keep track of the five or six substantive responses that may need to go into a text box, and it increases the possibility that HUD might overlook the failure to respond to one part of a compound question. HUD should revise the Assessment Tool to solicit information and analysis through a greater number of discrete questions rather than a smaller number of compound questions, consistent with the approach of the September 2014 version of the Assessment Tool.

Restore Items Deleted from the Lists of Contributing Factors: Throughout the Assessment Tool HUD has removed several previously included items from the lists of common contributing factors that significantly affect fair housing. For example, in the list of Contributing Factors for the Fair Housing Issue Analysis, contributing factors such as foreclosure patterns, major private investments, residential real estate steering, and the availability of units with two or more bedrooms are eliminated. The notice accompanying the release of the Assessment Tool does not provide any explanation for these deletions. Such contributing factors are crucial to understanding important fair housing issues that are present in many jurisdictions. Racial disparities in the origination and pricing of mortgage loans have historically led to far higher foreclosure rates in communities of color. The harms stemming from the increased vacancy and abandonment that accompany waves of foreclosures are integral to any discussion of disparities in access to opportunity. The failure of major institutions to maintain their foreclosed properties in communities of color adequately and market those properties effectively has an enormous impact on the quality of life and financial security of residents of those communities. This is a problem with significant fair housing ramifications. Likewise, understanding the role of major private investments is critical to developing policy solutions that address involuntary displacement in areas undergoing rapid gentrification. The final Assessment Tool must include the same broad range of potential contributing factors included in the September 2014 version.

Restore the Requirement to Rate and Explain the Level of Significance of Contributing Factors: The Assessment Tool requires jurisdictions to identify contributing factors that have a significant impact on fair housing issues and to note which fair housing issues those contributing factors affect. By contrast, the September 2014 version of the Assessment Tool required jurisdictions to

assess the impact of each of a series of listed contributing factors and to explain the rationale for their determinations as to whether the effect of a given contributing factor was highly significant, moderately significant, or not significant. That system provided a much stronger basis for effective analysis, transparency, and accountability than the approach in the current version of the Assessment Tool.

For example, under the current version of the Assessment Tool, a jurisdiction might conclude that land use and zoning laws do not have a significant impact on fair housing issues, such as residential racial segregation. Under the new approach, the completed AFH would provide no insight into the rationale behind that conclusion. In its review of the AFH submission, HUD would either have to adopt the blanket approach that submissions that conclude that very common contributing factors like zoning ordinances are not significant are invalid, and then perform the analysis itself to determine whether zoning is a contributing factor, or allow widespread contributing factors to go unaddressed. Neither of those outcomes would effectively further fair housing. In the final version of the Assessment Tool, HUD must require jurisdictions to explain why certain common contributing factors are not significant, just as it did in the September 2014 version of the Assessment Tool.

In addition, the requirement to determine whether contributing factors are highly significant, moderately significant, or not significant, as proposed in the September 2014 version of the tool, is an important step for jurisdictions to take in setting priorities. Jurisdictions may interpret the removal of these categories to mean that what they formerly would have deemed moderately significant should now not be considered significant. Although that may not be the intent of the change in the Assessment Tool, the risk of confusion is high. HUD should restore the three tiers of significance in the final Assessment Tool.

Relegation of Tables and Maps to the Appendices: The Assessment Tool now includes the data tables and maps in appendices to the AFH rather than in the body of the document where they were located in the previous document. The new arrangement is problematic because it makes it more difficult for stakeholders to navigate the document and quickly find the information they need to understand the jurisdiction's analysis and conclusions. Further, separating the data and maps from the parts of the document in which jurisdictions will conduct their analysis increases the risk that some key data points or geographic patterns will not be addressed in the jurisdiction's analysis. This would undermine the integrity, transparency and accountability of the AFH process.

Restore the Question Concerning Fair Housing and Civil Rights Organizations: In the Fair Housing Enforcement, Outreach Capacity, and Resources Analysis, HUD has eliminated the question that asks jurisdictions to identify fair housing or other civil rights organizations operating in their areas. It is absolutely critical that jurisdictions be aware of these key stakeholder organizations and involve them in the process. The final Assessment Tool must include this important question from the September 2014 version of the document.

## 2. Comments on the definitions and instructions included in the July 2015 version of the Assessment Tool

Appendix C to the Assessment Tool includes definitions of the contributing factors included in the Assessment Tool. The Tool also includes instructions that can help make it a stronger, clearer document. While the many of the definitions and instructions are helpful, others need further refinement.

### a. Definitions:

Admissions and occupancy policies and procedures, including preferences in publicly supported housing: Although this description mentions tenant selection policies and admissions policies, the list of examples of types of such policies does not include policies that limit occupancy on the basis of credit history or criminal record. Sweeping policies that deny tenancy on the basis of largely irrelevant information – such as records of arrests rather than convictions or the failure to maintain a high FICO score despite having an exemplary rent payment record as a tenant – may raise serious fair housing concerns. It is important that HUD explicitly flag overbroad tenant screening policies as an area of inquiry for jurisdictions. This description should also expressly include housing providers' policies for processing reasonable accommodations requests.

Community opposition: The description of community opposition unduly creates the impression that the phenomenon is equally likely to be based on factual concerns as it is to be based on biases. It is far more common for opposition to either be based on prejudice or to be purely arbitrary rather than based on fact. HUD should change the description of community opposition to reflect that it is often used as a pretext to prevent affordable housing for discriminatory reasons and can raise Fair Housing Act concerns.

Deteriorated and abandoned properties: The description of deteriorated and abandoned properties is quite narrow and does not encompass distressed properties that are occupied. Occupied distressed properties may raise fair housing concerns, and thus this description should explicitly emphasize that these properties can raise serious health and safety concerns or reduce the ability of homeowners with protected characteristics to access opportunity by accumulating home equity.

Lack of affordable in-home or community-based supportive services: This description describes many of the more common types of supportive services that persons with disabilities living in community-based settings may use, but it does not contain important details on funding for supportive services, especially the role of state Medicaid agencies, that are necessary for jurisdictions to assess the availability and cost of such services.

Lack of affordable, integrated housing for individuals who need supportive services: Many individuals with disabilities rely primarily or exclusively on Supplemental Security Income (SSI) as their source of income. In general, SSI beneficiaries are likely to be extremely low-income, with benefits likely to fall below 30% of the Area Median Income (AMI). Housing that is affordable to households with incomes at 50% or 80% of AMI is not likely to be affordable to many individuals who need supportive services. This description should clarify the role of units that are affordable to extremely low-income households in meeting the needs of individuals who use supportive services.

Lack of state or local fair housing laws: This description asks jurisdictions to consider whether there are state or local laws that are “substantially equivalent” to the federal Fair Housing Act. Although that term is defined in the Fair Housing Act and in other HUD regulations, HUD should briefly define it in this description, as well, because local governments are less likely to be familiar with the concept than states. Additionally, in light of recent legislative threats to multiple state fair housing laws, the description should identify the proposed repeal or dilution of state fair housing protections as issues raising fair housing concerns.

Land use and zoning laws: The definition of land use and zoning laws has three shortcomings. First, although land use regulation is generally a function of local governments, it is an area of overlapping federal, state, and local powers. In particular, federal environmental laws and state conservation laws can exert powerful effects on the ability of developers to construct housing and the price of housing. Additionally, some state laws explicitly supersede local land use regulation in connection with affordable housing. Thus, the definition should not focus exclusively on the role of local governments. Second, the list of ways in which zoning and land use laws affect housing choice should be expanded to include their effect on the amount of housing that is developed. Third, growth management ordinances, which limit the number of building permits that may be issued on an annual basis in a specific geographic area and/or attempt to steer development within urban growth boundaries, are a type of land use regulation that can have a profound effect on fair housing choice. This type of regulation is particularly common in western states. HUD should include growth management ordinances in the list of examples of land use and zoning laws.

Location and type of affordable housing: The focus of the definition of affordable housing is on publicly supported housing. But, non-publically supported affordable housing production may occur through inclusionary zoning and laws that give existing tenants the opportunity to purchase multi-family buildings. These strategies may be integral to understanding a jurisdiction’s affordable housing landscape or may be valuable options for jurisdictions to consider when taking action to overcome fair housing issues. HUD should revise the definition of affordable housing to explicitly encompass units created through regulatory strategies.

b. Instructions:

Contributing Factors: The instructions for the Contributing Factors section of the Assessment Tool states that:

“Contributing factors may be outside the ability of the program participant to directly *control* or *influence*; however, such factors, if relevant to the jurisdiction and region, must be identified and prioritized. In such cases, there may still be policy options or goals that a program participant should identify, while recognizing the limitations involved.” (emphasis added)

HUD should delete the words “or influence” from the first sentence quoted above. The clearest way to explain jurisdictions’ obligations to them, in the absence of direct control, is to focus on their ability to influence the actions of other entities. Using the word “influence” in the instructions as above risks creating the false impression that there are fair housing issues that are beyond the capacity of jurisdictions to address in even a limited way. This error is repeated

throughout the instructions in other areas where contributing factors are addressed. Jurisdictions may influence factors that are outside of their direct control by highlighting them in their AFHs and bringing them to the attention of the entities within whose control they fall, as well as the attention of other stakeholders. For example, Texas recently passed legislation prohibiting municipalities from including source of income as a protected class in their fair housing ordinances. While individual cities may not be able to change that statute, they could flag this as a fair housing concern in their AFHs, which could help the legislature better understand the ramifications of the law and encourage legislators to reconsider the legislation.

Disability and Access Analysis: With respect to question (2)(c), the instructions ask jurisdictions to consider policies and practices including “residency preferences.” This reference is ambiguous as it could either be referring to preferences that give priority for assistance to households that reside within a given jurisdiction or preferences that give priority to persons with disabilities. The former type of preference raises serious fair housing concerns and often perpetuates residential racial segregation. The latter type of preference may be a necessary component of a strategy to overcome the historical legacy of discrimination against persons with disabilities and to promote meaningful community integration. The instructions should clarify the type of preference to which HUD is referring and explain why one type may be harmful while the other is potentially beneficial.

### **3. Overview of unresolved recommendations from our comments on the September 2014 version of the Assessment Tool.**

Many of the undersigned organizations signed onto letters commenting on the September 2014 version of the Assessment Tool. One letter, submitted on November 4, 2014, focused broadly on the Assessment Tool that was published. Another, submitted on November 25, 2014, provided recommendations for building an effective tool for state governments. In general, HUD did not address those comments in the revised July 2015 version of the Assessment Tool. As the underlying concerns that motivated the recommendations remain valid, we have attached both comment letters for HUD’s continued consideration. We are especially concerned about HUD’s failure, in the final Affirmatively Furthering Fair Housing regulation, to require jurisdictions to propose action steps in their AFHs. Nonetheless, there are several remaining areas in the Assessment Tool that can be improved and are highlighted below.

Fair housing goals and priorities: The Assessment Tool directs jurisdictions to set “one or more goals” to address each contributing factor that they identify. It is highly unlikely that a local government that sets just one goal would be doing enough to meaningfully address particularly complex issues like exclusionary zoning. Jurisdictions will only complete the AFH once every five years, an unduly long time to be working toward the accomplishment of one goal. We urge HUD to require jurisdictions to set goals for addressing contributing factors that are robust and specific.

Community participation: This section of the Assessment Tool needs improvement, and the new instructions do not effectively build upon that section. Input from community stakeholders is essential to robust fair housing planning. HUD should adopt the recommendations for improvements to community participation section of the Assessment Tool from the November 4, 2014 comment letter.

Measuring community-wide and regional patterns of segregation: The Assessment Tool continues to rely on just one measure of segregation, the dissimilarity index. Although dissimilarity index data are valuable when placed in the proper context and should remain in the Assessment Tool, other indices – most importantly the exposure index – are also necessary to paint a complete picture of residential segregation and to inform well-crafted strategies for fostering increased integration. We urge HUD to incorporate the exposure index in the final Assessment Tool.

Disability and access: As the Americans with Disabilities Act’s community integration mandate and the Supreme Court’s decision in *Olmstead v. L.C.* may be unfamiliar to the local government entities that will be using the Assessment Tool, it is particularly important that the Assessment Tool, including the definitions and instructions, provide clarity about key issues relating to integrated and segregated settings, the nature of supportive service delivery systems, policies that promote access to integrated, supportive housing, and the economic status of persons with disabilities who are at high risk of unjustified institutionalization.

Gentrification and economic displacement: The Assessment Tool still lacks questions that provide a platform for an analysis of gentrification and economic displacement. Additionally, the one question that indirectly provided such a basis in the September 2014 version of the Assessment Tool has been eliminated from the revised Assessment Tool. Question B(2)(g) of the previous version asked, “[h]ave any R/ECAP tracts or areas newly emerged or moved out of the R/ECAP definition since 2000? Explain what changes have occurred.” Question B(2)(1)(c) of the current version merely directs jurisdictions to “[d]iscuss how R/ECAPs have changed over time (since 1990).” By specifically referring to the phenomenon of areas moving out of R/ECAP status, the September 2014 Assessment Tool informed jurisdictions that their responses to that question would be appropriate locations to discuss gentrification. The parallel question in the current version of the Assessment Tool is too opaque to inform jurisdictions as to what information is truly needed in their responses.

Relocation and replacement housing: The Assessment Tool still does not provide an adequate basis for discussion and analysis of issues relating to relocation and replacement housing.

Housing preservation: The Assessment Tool still does not pose questions asking jurisdictions to identify affordable housing developments in areas of opportunity that are threatened with loss.

Affordable, sustainable homeownership: The Assessment Tool remains almost exclusively focused on rental housing to the exclusion of any meaningful discussion of homeownership and mortgage lending. The Assessment Tool should include questions and data relating to these issues.

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Despite its “sub-regulatory” status, the Assessment Tool is an essential element of the AFH process. Therefore it is critical for HUD to ensure that the tool and its accompanying instructions are clear and comprehensive and guide jurisdictions through a rigorous assessment of the barriers to fair housing that their residents face and the steps needed to topple those barriers. The changes

recommended here are essential for accomplishing this goal, and we strongly urge HUD to adopt them.

Thank you for the opportunity to comment on this important tool for assisting in the implementation of the now final Affirmatively Furthering Fair Housing regulation. We look forward to working with HUD to successfully implement the rule.

Sincerely,

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