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COMMENTS OF

NEW YORK APPLESEED

relating to the

Draft Where We Live NYC Report

for

The NYC Department of Housing Preservation and Development,

along with

Agencies responsible for implementing the City of New York's fair housing planning process

March 6, 2020

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SUMMARY OF COMMENTS

The draft *Where We Live NYC Report* a.k.a. Draft Plan to be submitted in final form to the U.S. Department of Housing & Urban Development ("HUD") as a Fair Housing Analysis of Impediments ("Draft AI") states that "As the largest and most diverse city in the nation, the City of New York is in a unique position to address the complexities of growth in a 21st century urban environment in a way that advances equity" (181). The Draft AI fails to rise to the challenge it sets for itself, and, in fact, requires substantial revision even to meet the minimum requirements of HUD's 2015 Affirmatively Furthering Fair Housing final rule ("AFFH Rule" or "the Rule") for an Assessment of Fair Housing (AFH).

FAILURE TO MEET ESSENTIAL REQUIREMENTS OF THE 2015 AFFH RULE

With great fanfare, the City of New York ("the City") announced in early 2018 that it intended to move forward with a planning process and Assessment of Fair Housing (AFH) compliant with the AFFH Rule recently suspended by HUD.[1] At what we presume to be enormous public

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[1] See, for example, announcement from HPD, March 9, 2018: "the City will use the same framing and cover the same content as the AFH as part of Where We Live NYC," available at https://wherewelive.cityofnewyork.us/2018/03/09/hpd-launches-where-we-live-nyc-a-comprehensive-fair-housing-planning-process/.

expense, the City engaged "hundreds of residents, over 150 community-based and advocacy organizations, and dozens of governmental agencies" with this understanding (3).

The Draft AI, however, flouts, rather than honors, the essential requirements of the AFFH Rule. Commentators have identified "the greater clarity in objectives" and "more structured planning process as compared to the relatively unguided [Analysis of Impediments] submissions" as central to the potential efficacy of the AFFH Rule. Specifically, the regulations required participants to:

> (ii) Identify significant contributing factors [for segregation, racially or ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs], prioritize such factors, and justify the prioritization of the contributing factors that will be addressed in the program participant's fair housing goals. In prioritizing contributing factors, program participants shall give highest priority to those factors that limit or deny fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance; and

> (iii) Set goals for overcoming the effects of contributing factors…. For each goal, a program participant must identify one or more contributing factors that the goal is designed to address, describe how the goal relates to overcoming the identified contributing factor(s) and related fair housing issue(s), and identify the metrics and milestones for determining what fair housing results will be achieved."[2]

The Draft AI ignores these requirements. Specifically:

- The discussion of "contributing factors" appears as an afterthought confined to a sidebar on a single page of the Draft AI (178).
- The Draft AI fails to disclose its process of prioritizing the contributing factors and its justification for the prioritization.
- The Draft AI fails to identify which contributing factors its goals in Chapter 6 are designed to address. Perhaps as a result of failing to prioritize the contributing factors, the goals seem tailored to a different (if related) set of concerns than those articulated as contributing factors.

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[2] Justin Steil and Nicholas Kelly, "The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance," Working Paper for The Future of Housing Policy in the U.S. Conference, September 15, 2017, available at https://furtheringfairhousing.mit.edu/sites/default/files/documents/Steil%20Kelly%20Fairest%20of%20them%20All%202018%2005%2008.pdf, citing (24 C.F.R. §5.154(d)(4)(iii))

- **Most critically, the Draft AI fails to identify "the metrics and milestones for determining what fair housing results will be achieved" with each goal.**

Comparison to an AFH compliant with the AFFH Rule demonstrates how far the Draft AI strays from the mark: The phrase "contributing factor" occurs 116 times in the AFH submitted by the City of Los Angeles. By comparison, it appears four times in the Draft AI. The Los Angeles document has an entire appendix devoted to prioritization of the contributing factors, while the Draft AI doesn't even pretend to address this requirement.

And one need only glance at a page from the goals section of the AFH from the City of Los Angeles to see how thoroughly the Draft AI ignores the AFFH Rule: In a neatly legible matrix, the Los Angeles AFH lists each strategy along with the "fair housing issues," and contributing factors addressed. Most importantly, the strategy has clear metrics and milestones and even a "timeframe for achievement." For example: "Successful introduction and passage of proposed ordinance, amount of money in fees collected, 1-2 Years, development of approximately 1000 units annually with a $100,000/unit contribution from the linkage fee, 3-5 years."[3]

The City's failure to follow the very requirements *that make the AFFH Rule what it is* renders the Where We Live NYC process and its hype something of a ruse. Even worse, by ignoring the very same regulatory requirements at the heart of HUD's decision to suspend the AFFH Rule - indeed by availing itself of the freedom offered by the suspension of the Rule, the Draft AI serves to validate the Trump administration's misguided decision.[4]

RECOMMENDATION:

- **Bring the Draft AI into compliance with the AFFH Rule.**

GOALS, STRATEGIES, AND ACTIONS

Chapter 6 of the Draft AI, "Fair Housing Goals and Strategies," appears to constitute the City's plan. This section, however, reads more like a progress report.

The 77 specific "actions" listed in this section are for the most part vague and noncommittal; in several cases they are patently dilatory. Of these:

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[3] City of Los Angeles & The Housing Authority of the City of Los Angeles, Assessment of Fair Housing Plan: 2018-2023, 382, available at file:///C:/Users/David/Downloads/city_of_la_afh_plan%20(1).pdf.
[4] New York Appleseed is indebted to Alexandra Fennell of Churches United for Fair Housing for this insight.

- Six involve **support or advocacy** relating to processes outside of the City's direct control (state or federal legislation, cultural organizations, MTA).
- Three involve establishing a **task force or working group**;
- Ten involve **exploration of a possible idea or solution**;
- Thirteen involve **reviewing, tracking, evaluating, or studying** - usually with no commitment to use results in any specific way;
- At least 17 involve expansion of, improvement on, ensuring the success of, or "building on" a **pre-existing initiative** with no definition of scale, magnitude, or detail; and
- Nine involve **education, training, coordination, or engagement** of some kind with no or little definition of success.

Of the remaining "actions" only 18 are specific enough that it will be possible at a future date to know with any certainty whether or not implementation occurred. But even these lack sufficient detail as to hold the City accountable for quality of implementation ("Revise the process by which HPD evaluates developments," "Develop social service plans…"). **We can find only one action that is time-bound in any way** (Action 6.6.4.).

We note further that every one of the strategies and actions listed in Chapter 6 is described as merely "under consideration" (180, 182, 186, 189, 190, and 193). In other words, the City is not willing to be held accountable for a relatively weak action plan. The Draft AI has not even settled on a working definition of an "integrated neighborhood," but plans to continue "engaging New Yorkers in this conversation" (83).

The Draft AI's avoidance of "metrics and milestones" is especially problematic in light of the fact that many of the proposed actions address problems that were not identified and explained in the analysis of the Draft AI. It is all the more difficult for members of the public to assess the quality of the proposed solutions or craft a definition of success without an understanding of the problems meant to be solved. As discussed below, Action 1.1.3. proposes to address discrimination by co-op boards even though the Draft AI never defines the problem. Action 3.3.2. proposes support for the Uniform Partition of Heirs Property Act as a means of protecting "low-income homeowners from speculative investment" even though there is not a single reference to either fractionated title to property or forced partition sales (or even speculation) in the analysis.

The problem runs in the other direction as well: In many cases, the analysis strongly supports a particular strategy, but finds no corresponding section in Chapter 6. The Draft AI explains that the City "*must* consider the complicated dynamics between families' residential choices and school enrollment in making its fair housing plan" and that "conversations on school diversity *must* consider both housing and school policies" [emphasis added] (97, 109), yet Chapter 6

offers no strategies or actions rising to this challenge (See section on Mandatory Inclusionary Housing below for an example of what such a recommendation could look like.) Similarly, the analysis cites the work of the School Diversity Advisory Group positively (29, 96-97), but Chapter 6 ignores its recommendations - particularly the concrete steps in its final report for what the Department of Education can do on its own initiative.[5]

RECOMMENDATIONS:

- **Ensure that the Draft AI's goals, strategies, and actions in Chapter 6 comply with the requirements of the AFFH Rule.**
- **Ensure that each action in Chapter 6 is supported by analysis in the body of the report defining the problem to be solved by the proposed solution.**
- **Draft strategies and actions that respond to the conclusions of the Draft AI's own analysis.**

CONTINUED RESISTANCE TO EFFECTIVE LEGISLATION TO PREVENT DISCRIMINATION BY CO-OP ASSOCIATIONS

It is especially disappointing that every one of the actions under Goal 1 relating to combatting discrimination falls in the "expand," "explore," or "evaluate" categories. The absence is not for lack of good proposals: If there is a single piece of legislation for which the city's three local pro-integration policy organizations (Anti-discrimination Center, Fair Housing Justice Center, and New York Appleseed) have consistently advocated over the last decade, it is legislation to require cooperative-housing associations to disclose the reasons that they reject applicants. Housing Preservation & Development (HPD) and the New York City Commission on Human Rights, have, however, consistently opposed such legislation when it is introduced by City Council.

Symptomatic of the document-wide disconnect between analysis and action plan, the body of the Draft AI makes no reference to the problem of discrimination by co-op boards, yet Strategy 1.1.3 includes a proposed action to "explore … regulations" to address discrimination by co-op boards, noting that "homeowners … can rarely identify discriminatory treatment on their own." (180).[6] If there was analysis by the authors that undergirded the proposed action, we believe such analysis should be included in the body of the report so that the public can assess the

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[5] School Diversity Advisory Group, *Making the Grade II: New Programs for Better Schools*, August 2019, available at https://docs.wixstatic.com/ugd/1c478c_f14e1d13df45444c883bbf6590129bd7.pdf.
[6] This statement would seem to support the need for the legislation proposed by fair-housing advocates.

reasons the Draft AI opted for "exploring new regulations" rather than the legislation supported by fair-housing advocates.

RECOMMENDATIONS:

- **Include a discussion of discrimination by co-op boards in the analysis sections of the Draft AI.**
- **Change action 1.13 to read "Work with City Council in 2020 to pass effective legislation to require disclosure of the reasons that a co-op board rejects an otherwise qualified applicant for housing."**

UNWILLINGNESS TO ADDRESS CITY POLICIES

The Draft AI's ambivalent treatment of the problem of discrimination by co-op boards is symptomatic of a larger problem in the report. While we support and applaud the extensive community engagement leading up to the release of the Draft AI, we are concerned that the voices and perspectives of advocates and experts uniquely positioned to offer guidance to the City are obscured. And this fact seems related to the Draft AI's general unwillingness to consider the extent to which the City's own policies are perpetuating segregation.

We acknowledge the awkwardness presented by ongoing litigation, but we might still expect the Draft AI to include a discussion of the conclusions reached by advocates and experts - if only to explain its reasons for rejecting them. A more rigorous and less political exercise might have addressed City's resistance to a co-op disclosure law and explained the reasons the City believes the "community preference" (outsider-restriction) policy is not, as fair housing advocates have submitted, a cause of segregation and violative of the Fair Housing Act.[7] (Instead, the Draft AI celebrates the policy with no hint of controversy (186)). Similarly, the report mentions a successful partnership with the Fair Housing Justice Center, but offers no suggestions for building on such partnerships in the future.

The Draft AI might also have explained why it substituted a bizarre hodgepodge of recommendations on school integration under Strategy 6.5 for the actual recommendations of the School Diversity Advisory Group that squarely implicate the City's policies of competitive admissions as major drivers of school segregation. Further, calling for "support" for "robust" community-school district diversity plans is unhelpful without requiring those plans to address

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[7] See http://www.antibiaslaw.com/article/support-challenge-nycs-outsider-restriction-policy. We note that the Draft AI may have been required to disclose the litigation under 24 CFR § 5.154(d)(1) (if it were following the AFFH Rule).

the issues identified by stakeholders in the Proposed Solutions section (39). As stakeholders suggested, these plans must address the ways in which geography-based student-assignment policies perpetuate neighborhood segregation.

RECOMMENDATIONS:

- **Include a section in the report listing the suggestions that fair-housing and integration advocates made during the process and the City's response, including legislation to prevent discrimination by co-op boards.**
- **In the interest of comprehensiveness, transparency, and the public record, note that there is ongoing litigation over the City's community-preference policy and provide the City's official position on why it is defending the policy or link to publicly available documents providing the official explanation.**
- **In Action 6.5.1, mandate that community-school-district diversity plans address and reduce the use of geography-based student-assignment policies when they perpetuate neighborhood segregation.**
- **Replace recommendations 6.5.2, 6.5.3, 6.5.5, and 6.5.6 with a single action:**
  - **"Explore adoption of the recommendations of the School Diversity Advisory Group's second Making the Grade report."**
- **Include a new action to "Double the number of joint enforcement actions undertaken in partnership with the Fair Housing Justice Center by 2023 and provide City funding to the Center to expand its testing work."**

BALANCING CITY-WIDE AND LOCAL NEEDS

The issue of the community-preference/outsider-restriction policy raises what is surely one of the most vexing questions facing integration advocates and social-justice advocates generally: in a city of 8.5 million how is government to consult communities in addressing problems affecting them when these problems may often be structural and city-wide? How are community priorities to be honored when they conflict with the needs of the larger city - or even with those of another community?

We did not expect the Draft AI to resolve these conundrums, but we did expect it to address them. And, as with other issues discussed in these comments, the first inkling we receive that the authors of the Draft AI are aware of these issues comes in the proposed strategies and actions. Strategy 2.1 is "Effectively balance city-wide needs and local perspectives within the land use process."

Arguably, most of the proposed actions under this strategy have little to do with balancing, but are in fact suggestions to remove restrictions that were themselves attempts to balance local and city-wide needs. We choose not to comment on these proposed actions, but note only that once again the Draft AI has failed to include some robust developments in this particular conversation.

Since 2018, for instance, Chancellor of Schools Richard Carranza has articulated a top-down-bottom-up theory of integration in New York City in which local community school districts are offered flexibility in developing school integration plan with leadership and accountability from the Department of Education. In January 2018 a land-use-reform working group called for a comprehensive planning process for the city that would serve as a foundation for community-based planning efforts.[8] In April, a report by Council Member Brad Lander entitled *Desegregating NYC* (cited nowhere in the Draft AI) noted "If the fair housing planning process is real, it must lead to comprehensive citywide planning, with desegregation as one of its goals."[9] And throughout 2019, advocates and elected officials pressed unsuccessfully for a comprehensive planning process to be written into the City charter - a process that would attempt to balance robust local planning with city-wide needs.

The Draft AI acknowledges the need for community planning processes noting that "every neighborhood presents a different set of challenges and opportunities," (184) but it fails again even to mention the solutions proposed by advocates and experts. Instead the Draft AI punts on the issue by promising to convene a "Fairness in Land Use" task force. We can only hope that the recommendations of this group will not meet the same fate as the final recommendations of the mayor's School Diversity Advisory Group.

MANDATORY INCLUSIONARY HOUSING? MOBILITY COUNSELING?

In most large cities, "one of the nation's most demanding" inclusionary zoning programs would serve as the lynchpin of all efforts to affirmatively further fair housing (25). The Draft AI, however, offers no thorough or reflective analysis of the City's Mandatory Inclusionary Housing ("MIH") program, its results, or its potential. Indeed the report offers more information on anti-violence initiatives than on MIH. There are only two references to the program in the body of the report - both within laundry lists of City programs (10, 25). Even when MIH appears under Goal 2, it is treated as a fait accompli with no apparent need for evaluation or improvement (182).

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[8] *Inclusive City*, Jan. 2018, 5, available at http://library.rpa.org/pdf/Inclusive-City-NYC.pdf.

[9] Council Member Brad Lander, *Desegregating NYC*, April 2018, 12, at https://drive.google.com/file/d/17yqKmyjsVXJEezRc-Dxfiz08F8C3MW_n/view.

Again, the problem is not an absence of advice on how to improve the program. As Fred Freiberg and David Tipson wrote in 2018:

> "Inclusionary housing - as its name suggests - should provide historically excluded populations with expanded housing choices including access to "higher opportunity" neighborhoods. The de Blasio administration flipped this concept on its head with its mandatory inclusionary housing regime - primarily targeting some of the poorest neighborhoods of color for "affordable" housing development with limited opportunities for the lowest-income populations to participate, putting them at considerable risk of displacement and homelessness. The new law does not even include reasonable guidelines to ensure that affordable housing is built in areas that offer greater educational opportunity."[10]

The Manhattan Institute also recommended that more high-amenity neighborhoods be targeted for rezonings in a recent report.[11]

The City has actually made some progress in this area and could have used the Draft AI to discuss the evolution of its approach and provide plans for further development. Instead, the public is offered no real opportunity to reflect on the successes and failures of a program that should be at the heart of the City's efforts; nor is there a single proposed action suggesting how MIH might be improved.

Similarly, one might also expect the Draft AI to include a discussion of the possible benefits of mobility programs, including HPD's *Housing Choice* mobility-counseling pilot. Again, we find the only mention of the program in the proposed action 4.1.3. without any prior analysis of the program or the problems it was meant to solve. And once again, the proposed action is only to "evaluate" the pilot and other programs that assist with mobility without any indication of what might be done with the results of the evaluation.

RECOMMENDATIONS:

- **Include a comprehensive analysis of MIH, its goals, its role in the City's efforts to affirmatively further fair housing, its successes, and areas where the program can be improved.**

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[10] Fred Freiberg and David Tipson, "Segregation is not an excuse, Mr. Mayor; it is an opportunity to lead," *Gotham Gazette*, March 19, 2018, available at https://www.gothamgazette.com/opinion/7537-segregation-is-not-an-excuse-mr-mayor-it-s-opportunity-to-lead.

[11] Sadef Ali Kully, "Report Sees de Blasio's 'Mandatory Inclusionary Housing' Falling Short," *City Limits*, January 16, 2020, available at https://citylimits.org/2020/01/16/report-sees-de-blasios-mandatory-inclusionary-housing-falling-short/?mc_cid=8ed417be45&mc_eid=63b7730083

- **Include recommendations to improve MIH through legislative or administrative processes, including at a minimum:**
    - o **Ensuring that MIH is employed at least as often in high-amenity neighborhoods as in underserved neighborhoods with particular attention to educational opportunity and student-assignment policy.**
    - o **Off-site housing built under MIH is strategically located in community school districts with lower student poverty rates.[12]**

COUNTERPRODUCTIVE HISTORICAL ACCOUNT

We commend the City for making what appears to be genuine effort to provide a frank and unvarnished account of the City's history of race and racial segregation. Our experience is that it is difficult, if not impossible, to address racial disparities and issues of unequal opportunity without a clear understanding of the history of racist policies that led us to our present situation.

We are concerned, however, that Chapter 2 falls into a familiar trap of beginning this account with the twentieth century, which has the unintended effect of presenting African Americans as if they are relative newcomers and outsiders in the long history of New York City. The Draft AI compounds the error when it states later in the document that "The approximately 22% of New Yorkers who are Black also have varied origins—some trace their personal or family history to the great migration from the southern United States, the Caribbean, and, in increasing numbers recently, sub-Saharan Africa" (52).

As many are better qualified to relate than New York Appleseed, African Americans have been a significant part of New York City from its earliest origins, and if their numbers were small by the late nineteenth century, it was largely because of persistent violence against them. The Draft AI mentions the "nation's history of slavery," but never mentions the existence of slavery in New York City through 1827. A 2014 report on school segregation in New York City addresses this history:

> "In New York City, enslaved African Americans were brought to the area as early as 1626. By 1660, the area was 40% African, about half of whom were estimated to have died by the age of 12. The discovery and subsequent analysis of the African Burial Ground in Lower Manhattan, where 10,000 to 20,000 of Africans are buried, not only

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[12] See testimony of New York Appleseed to the City Planning Commission, December 16, 2015, available at https://nyappleseed.org/wp-content/uploads/FINALTestimony-to-city-planning-commission-12_16_15.pdf.

supported the substantial number of Africans in the area, but also how enslaved Africans lived under brutal conditions. After slavery was outlawed in 1827, the city was home to one of the largest free black communities in the north. By the mid-ninetieth century, the black proportion decreased in the city due to the massive influx of Irish immigrants competing for similar jobs. At the same time, the Republican Party and its antislavery laws were gaining traction, threatening proslavery or pro-segregation New Yorkers. This resulted in a number of racially violent demonstrations. One of the largest was the New York City Draft Riots of 1863, where hordes of white immigrants terrorized African American residents for days, massacred nearly all of the children in the Colored Orphan Asylum on 44th Street, and killed over one hundred African Americans. From 1810 to 1870, the proportion of black residents in New York City declined from 10.2% to 1.4%."[13]

Although these incidents may seem distant to some New Yorkers, they were the traumatic backdrop against which the twentieth-century history related in the Draft AI played out. They are also critical to an understanding of why some New Yorkers sought haven and protection from violence by whites in communities like Weeksville - surely an important part of the history of segregation in New York City. For many New Yorkers, these events are not ancient history.

RECOMMENDATIONS:

- **Include a section similar to the quoted passage above in Chapter 2, discussing at a minimum the role of slavery in New York City and the draft riots of 1863.**
- **To educate the public on the lasting legacies of slavery and racial violence in New York and to build support for policies to affirmatively further fair housing, include a recommendation to "Increase funding to organizations to relate and interpret properly the role of slavery in New York City - particularly on City-owned properties - such as the Lefferts Historic House Museum in Brooklyn and the Weeksville Heritage Center."**

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[13] John Kucsera, *New York State's Extreme School Segregation*, 11-12, available at https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norflet-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf.

CONCLUSION: A FEAR OF SUCCESS

For all of the Draft AI's rosy assessment of the City's progress under the de Blasio administration, there is an undercurrent of unwarranted pessimism throughout the document - even a fear of success. One almost has the sense that the City fears that citing too much success might reveal that - with the right tools and the right leadership - the problems described in the report can be solved. Doing so might obligate the City to set its sights higher than it has in this document.

As mentioned directly above, the City could have celebrated its recent shift toward targeting high-amenity neighborhoods for rezonings or its development of a mobility-counseling pilot program. It is striking that in a report on overcoming segregation the City's nationally significant progress in desegregating Community School Districts 1 and 15 and scores of individual schools is omitted from a list of accomplishments relating to schools in the chapter entitled "Progress to Date."

Following a long section outlining multiple successes in combatting private discrimination, Goal 1 opens its discussion by informing us that "addressing discrimination in the housing market is extraordinarily difficult." This statement is at odds with the success rate of the Fair Housing Justice Center, which has lost only a single court case in its history.[14] The Fair Housing Justice Center is limited not by difficulty, but by resources. (See recommendation under section on absence of expert opinion above.) The statement is also at odds with the position of HPD and NYCHR that a co-op disclosure law is unnecessary (see recommendation on this issue above).

We urge the City to take a bold and optimistic approach - that is, to lead. The City should start by following through on its promise to adhere to the 2015 AFFH Rule in the production of the AI. The City must address, rather than evade, the views and concerns of fair-housing advocates and must be willing to evaluate the role of its own policies in perpetuating segregation. Without these fundamental commitments, Where We Live NYC is a missed opportunity at best.

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[14] And the exception proves the rule: this single loss was the result of the City's failure to design a rental-subsidy program in compliance with state law.