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REPORT BY THE CIVIL RIGHTS COMMITTEE

**COMMENTS ON 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**

The Civil Rights Committee of the New York City Bar Association¹ (“the City Bar”) respectfully offers the following comments on the draft “Where We Live NYC Report” (“Draft Plan”)² to be submitted in final form to the U.S. Department of Housing & Urban Development (“HUD”) as a Fair Housing Analysis of Impediments (“AI”).³

FAILURE TO MEET ESSENTIAL REQUIREMENTS OF THE AFFH RULE

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 HUD’s 2015 Affirmatively Furthering Fair Housing final rule (“AFFH Rule” or “the Rule”), which has since been suspended.⁴ The City engaged “hundreds of residents, over 150 community-based and advocacy organizations, and dozens of governmental agencies” with this understanding (Draft Plan at 3).

¹ The City Bar, founded in 1870, is a voluntary association of lawyers and law students. With over 24,000 members and over 160 committees, its mission is to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest. The Civil Rights Committee addresses issues affecting the civil rights of New Yorkers, especially the rights of marginalized communities. Committee members are acting in their respective individual capacities as members of the City Bar, not in their professional or academic roles.

² “Where We Live NYC” Draft Plan, available at <https://wherewelive.cityofnewyork.us/wp-content/uploads/2020/02/Where-We-Live-NYC-Draft-Plan.pdf>.

³ These comments align with, and rely in part on, comments separately submitted by New York Appleseed. However, they were subject to a separate drafting and review process by the membership of the City Bar’s Civil Rights Committee and include input from other committees, were reviewed by the City Bar’s policy staff, and were reviewed and approved by the President of the City Bar.

⁴ 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/>, last viewed February 24, 2020.

The Draft Plan, however, fails to meet even the minimum requirements of the AFFH Rule for an Assessment of Fair Housing (AFH). And by failing to chart a meaningful course to affirmatively further fair housing in New York City, the Draft Plan can be read as effectively evading the Fair Housing Act itself.

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.”⁵

The Draft Plan falls short of these requirements. Specifically:

- The discussion of “contributing factors” is confined to a sidebar on a single page of the document (Draft Plan at 178).
- The Draft Plan fails to disclose its process of prioritizing the contributing factors and its justification for the prioritization.
- The Draft Plan 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,

⁵ 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>, last viewed February 24, 2020, citing (24 C.F.R. §5.154(d)(4)(iii))

the goals seem tailored to a different (if related) set of concerns than those articulated as contributing factors.

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

Recommendation:

- Bring the Draft Plan into compliance with the AFFH Rule.

GOALS, STRATEGIES, AND ACTIONS

Chapter 6 of the Draft Plan, “Fair Housing Goals and Strategies,” is the centerpiece of the City’s plan. The 77 specific “actions” listed in this section, however, are for the most part vague and noncommittal. Of these:

- 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**;
- 10 involve **exploration of a possible idea or solution**;
- 13 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 evaluate whether implementation occurred. But even these lack sufficient detail to hold the City accountable for quality of implementation. And we can find only one action that is time-bound in any way (Action 6.6.4.).

Furthermore, every strategy and action listed in Chapter 6 is described as merely “under consideration” (Draft Plan at 180, 182, 186, 189, 190, and 193). The Draft Plan has not even settled on a working definition of an “integrated neighborhood,” but plans to “continu[e] engaging New Yorkers in this conversation” (Draft Plan at 83).

Moreover, many of the proposed actions address problems that were not identified and explained in the analysis of the Draft Plan. It is 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. For example, Action 3.3.2. proposes supporting implementation of

the Uniform Partition of Heirs Property Act as a means of protecting “low-income homeowners from speculative investors” even though there are no references to fractionated title to property or forced partition sales in the analysis.

The problem runs in the other direction as well. In many cases, the analysis supports a particular course of action, but finds no corresponding strategy or action in Chapter 6. The Draft Plan 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] (Draft Plan at 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 (Draft Plan at 29, 96-97), but Chapter 6 fails to address its recommendations in its strategies and actions.

Recommendations:

- Ensure that the Draft Plan’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.
- Include strategies and actions that respond to the analysis and conclusions of the Draft Plan.

ABSENCE OF EXPERT OPINION

While we support and applaud the extensive community engagement leading up to the release of the Draft Plan, we are concerned that the Draft Plan does not address or respond to perspectives of advocates and experts uniquely positioned to offer guidance to the City.

While acknowledging that the Draft Plan should not weigh in on ongoing litigation, the Plan seems incomplete without a discussion of conclusions reached by advocates and experts on key factors contributing to ongoing housing discrimination in New York City. For example, the Draft Plan should include an explanation of 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.⁶ And the Draft Plan should explain why it adopts a hodgepodge of recommendations on school integration rather than the recommendations of the School Diversity Advisory Group mentioned frequently and positively in the analysis section.

⁶ See <http://www.antibiaslaw.com/article/support-challenge-nycs-outsider-restriction-policy>, last viewed February 24, 2020. 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).

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.

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.
- 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 links to publicly available court documents.
- Replace recommendations 6.5.2. - 6.5.3. 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.”

MANDATORY INCLUSIONARY HOUSING AND 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 (Draft Plan at 25). The Draft Plan, however, offers no thorough or reflective analysis of the 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 (Draft Plan at 10, 25). Even when MIH appears under Goal 2, it is treated as a fait accompli with no apparent need for evaluation or improvement (Draft Plan at 182).

As representatives of Fair Housing Justice Center and New York Appleseed 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.”⁷

The Manhattan Institute also recommended that more high-amenity neighborhoods be targeted for rezonings in a recent report.⁸

The City has made some progress in this area and might have discussed the evolution of its approach and provided plans for further development in the Draft Plan. Instead, the public is offered no real opportunity to reflect on the successes and failures of the program, nor is there a single proposed action suggesting how MIH might be improved.

Similarly, one might also expect the Draft Plan to include a discussion of the possible benefits of mobility programs, including HPD’s *Housing Choice* mobility-counseling pilot. The only mention of the program is in proposed action 4.1.3. without any prior analysis of the program or the problems it was meant to solve. 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 for improvement.
- Include recommendations to improve MIH through legislative or administrative processes, including at a minimum:
 - 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.
 - Off-site housing built under MIH is strategically located in community school districts with lower student poverty rates.⁹

Civil Rights Committee
Kyle Rapiñan, Secretary

March 2020

⁷ 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>, last viewed February 24, 2020.

⁸ Sadeef 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 last viewed February 24, 2020.

⁹ 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, last viewed February 24, 2020.