

January 28, 2013

Shaun Donovan, Secretary
Department of Housing and Urban Development
451 7th Street S.W.
Washington, DC 20410

Re: Contents of Notice re criteria for post-Sandy disaster relief Plans

Dear Secretary Donovan:

We the undersigned community-based organizations, community development, fair housing, civil rights groups from Sandy affected areas and others, urge you to use the full power of your office to ensure that CDBG funds appropriated to support post Hurricane Sandy recovery fairly address the needs of lower-income people and people of color impacted by the storm and facilitate the revitalization and development of affordable housing in compliance with civil rights laws as an integral part of recovery in all communities. In the wake of prior disasters across the country, state and local governments too often have used disaster recovery money to drive poor and minority households from their towns and to fund pet projects unrelated to the victims of the storms. Many of the communities impacted by Sandy unfortunately have histories of excluding lower-income people and people of color and pushing out such communities where they have existed. Too often, people who are low-income with special needs that may be barriers to their housing stability and people who are homeless and at risk of becoming homeless have been displaced or excluded as well. HUD must ensure that post-Sandy rebuilding changes, rather than exacerbates, this pattern, and includes lower-income people, people of color, people with special needs, and people who are homeless and at risk of becoming homeless fully. With the devastating loss of homes, especially for lower-income people, in the storm, the recovery could either make impacted communities even more exclusive and segregated, or make them work for everyone.

To this end, we write to identify concerns which we believe should inform the Notice for disaster aid grant applicant Plans provided for in H.R. 152. We ask HUD to focus on four basic goals in the Notice: 1) Public Participation and Transparency, 2) Affirmative Furtherance of Fair Housing, 3) Meeting All of the Housing Needs Created by Sandy and 4) Fair Treatment of Low-Income People. Meeting these goals, and the specific actions we suggest, will ensure that the intent of Congress is carried out and the recovery is a fair, equitable, and sustainable one. In all of these areas, we believe that HUD should (a) set out clear standards in the Notice; (b) require certifications of adherence to these requirements in plan submission (as was the case in prior notices, 74 FR 7254); and (c) include plan performance requirements mandating that Plans affirmatively address the substance of each required certification that HUD will carefully review.

We appreciate that the Departmental Notice published pursuant to the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (Pub. L. 110-329) at 74 FR 7244: February 13, 2009, contained a number of provisions designed to strengthen citizen participation in the development of recipient Action Plans for Disaster Recovery (Plans) and enforce the application of funding to benefit low and moderate income families. Building on that

Notice, we have the following observations and suggestions drawn from the experiences of affected households and advocacy organizations.

PUBLIC PARTICIPATION AND TRANSPARENCY IS CRITICAL TO ENSURING FUNDS ARE WELL-SPENT

Public participation, including opportunity for public comment, is important during the creation of Plans. Experience has shown that it is no less important during the implementation and execution of those Plans. We therefore request that HUD review the Citizen Participation provisions of the 2009 Notice and consider formalizing a uniform set of applicant/grantee behaviors in disaster recovery which will provide the transparency necessary to support such participation and respond to the following concerns.

- 1) We support the requirement that Plans be published to allow for at least seven (7) days of public comment (74 FR 7247 and 7250), and ask that HUD clarify that this requirement is based on seven working days and not calendar days.
- 2) Plans further should include a detailed description of how the applicant intends to provide citizens, affected local governments and other interested parties with reasonable and timely access to information and records relating to the Plan and to the use of the grant.
- 3) We further support the requirements that grantees post their Quarterly reports to HUD on their official websites within three (3) days of submission (Id and 74 FR 7252).
- 4) Each applicant should be required to provide, on its official home page, a mechanism through which the applicant/grantee will receive and respond to comments from interested parties. While the 2009 Notice required applicants/grantees to respond to comments (74 FR 7250), it appears that the comments and responses were made available only to HUD. Making both comments and applicant/grantee responses thereto available, in real-time, on the applicant/grantee's official webpage, would both enhance public confidence in the recovery process and allow beneficiaries of assistance and their advocates to provide HUD and the applicant/grantees with constructive feed-back as the process progresses.
- 5) The same concerns of transparency and public participation raise questions about the decision in the 2009 Notice not to require the public posting of non-substantial amendments to the Plans (74 FR 7250).

We believe public participation would be advanced if grantees were required to timely post all amendments to their Plans on their official website. Even with the benefit of HUD's characterization of what is a substantial amendment (74 FR 7250), experience has shown that grantees are at times inclined to characterize a change as non-substantial while beneficiaries and advocates believe such change goes to the heart of the activity. Given the ease of electronic posting, there seems to be no reason not to provide for full transparency in the workings of grantees.

If HUD determines that only substantial changes must be reported, we suggest that the criteria for determining that a change is substantial should, in addition to adding or deleting an activity or changing a beneficiary, include any reassignment or reallocation of funding from or to any line item, activity or program. This would enable a public response if the grantee attempted to eviscerate an activity by de-funding, while such activity or program is still technically part of the plan.

- 6) The public websites maintained by grantees should include, in addition to other information, data showing:
- a. The number, by county and municipality, of housing units revitalized or constructed
 - b. The number, by county and municipality, of such units available to persons of incomes below 30% of AMI, between 31% and 50% of AMI, between 51% and 80% of AMI
 - c. The size, by bedroom number, by county and municipality, of all revitalized or constructed housing units, sorted by income levels as above.
 - d. Whether any housing units are restricted/targeted to certain groups (e.g. special needs, supportive housing for the formerly homeless, age-restricted, and/or subject to a local residence preference), sorted by income levels as above.
 - e. The date each unit or development is expected to or has become available for occupancy, sorted by income levels as above.
- 7) We ask that HUD reconsider its reliance on 24 CFR §570.480 (c) in considering whether state grantees have properly carried out their certifications. The referenced regulation provides in part that:

the Secretary will give maximum feasible deference to the state's interpretation of the statutory requirements and the requirements of this regulation, provided that these interpretations are not plainly inconsistent with the Act and the Secretary's obligation to enforce compliance with the intent of the Congress as declared in the Act. The Secretary will not determine that a state has failed to carry out its certifications in compliance with requirements of the Act (and this regulation) unless the Secretary finds that procedures and requirements adopted by the state are insufficient to afford reasonable assurance that activities undertaken by units of general local government were not plainly inappropriate to meeting the primary objectives of the Act, this regulation, and the state's community development objectives.

Disaster Recovery Plans have not been developed through the rigorous Consolidated Plan process. Post-disaster CDBG funding dwarfs, by many times, the general annual CDBG appropriation. Large amounts of money, available on short notice, invite misuses such as the diversions of funds which occurred in Gulfport, Mississippi in the wake of Hurricane

Katrina. Plans for and expenditure of disaster recovery funds, therefore, should be scrutinized more closely than general CDBG grants.

We therefore request that the Secretary waive the application of 24 CFR § 570.480 (c) and provide an alternative requirement mandating strict affirmative scrutiny of Plan representations, ongoing progress submissions, Quarterly reports (see 74 FR 7252) or whatever oversight structures HUD deems appropriate.

- 8) HUD should establish a simple, direct appeal process for any interested party to initiate a review by HUD of Plan provisions or expenditures. The review tribunal should be of a sufficient level in the Department to make decisions and, if a recipient, sub-recipient, contractor or subcontractor is found in violation of the Notice or applicable regulations or laws, to compel compliance by the offending entity.

CDBG FUNDS SHOULD AFFIRMATIVELY FURTHER FAIR HOUSING

As in prior disasters, Congress has explicitly provided that HUD must enforce fair housing and civil rights requirements in disaster relief and that they cannot be waived (H.R. 152 as passed and signed). Many of the jurisdictions impacted have a history of resistance to affordable housing, complicity in the displacement of lower-income communities and communities of color and failure/refusal to challenge existing patterns of racial segregation in housing. We are concerned about a repeat of what we have seen in places such as St. Bernard Parish, LA, where post-storm recovery becomes a way to exacerbate the exclusion of lower-income people and people of color. HUD will need to vigorously ensure that everyone is fairly included in the recovery, and not allow jurisdictions to exacerbate the pre-disaster dearth of affordable housing fairly distributed across all communities.

- 9) We support the 2009 Notice requirement that states certify that they will affirmatively further fair housing (74 FR 7254) in compliance with 24 CFR §570.487(b) and urge HUD to vigorously enforce this requirement in plan performance requirements and review.

- 10) In the Sandy recovery, some recipients of funding may not be traditional CDBG jurisdictions. Many recipients may not have current Analyses of Impediments, or have any AI at all.

HUD should condition funding for all applicants on having a compliant, updated AI which identifies both pre-Sandy barriers as well as new barriers resulting from the storm. For applicants that already have an AI, it must be updated to reflect both impediments created or exacerbated by the storm, and how the use of recovery dollars will address those impediments. For applicants that do not have a current AI, one must be provided that meets all regulatory requirements. Applicants should also be required to demonstrate the capacity to meet all statutory and regulatory obligations related to their AI and have systems in place to properly record their relevant actions and outcomes.

Each Plan should describe, in detail, how the grantee's or sub-grantee's activities and programs will overcome impediments identified in the analysis and affirmatively further fair housing through the development of affordable housing that addresses the impediments.

HUD should make clear to applicants that technical assistance is available to enable the applicant to properly conduct or update an analysis of impediments and that funding will be withheld pending the completion of the AI and the incorporation of its findings and requirements into the applicant's Plan.

- 11) HUD should provide for the funds to be allocated at both the state and county levels, at the discretion of the Secretary and based on a jurisdiction's level of experience in administering CDBG and other federal funding fairly and efficiently. We oppose the full allocation of CDBG funding going to the states. It is important that the funds be allocated in a way that makes them both easy to track while being at a sufficiently local level to ensure they meet needs on the ground. At the same time, allocating substantial amounts of funding to municipalities threatens to undermine fair housing.
- 12) HUD should deny funding to applicant jurisdictions which have or which adopt zoning or other local ordinances, state laws or executive orders which allow or encourage economic, racial or other types of segregation and concentration.

CDBG FUNDS SHOULD MEET ALL OF THE HOUSING NEEDS CREATED BY SANDY

The priorities set by Congress for Sandy recovery are more expansive than those found in recovery acts prior to what has been referred to as the Second 2008 Act (such as P.L. 110-329). In addition to "long-term recovery and restoration of infrastructure" (language used in the First 2008 Act - P.L. 110-252), HR 152 includes "housing and economic revitalization in the most impacted and distressed areas". Congress also has required at least 50% of funds to go to low- and moderate-income people, and only allowed HUD to grant waivers based on a "compelling need."

- 13) HUD should specifically require that applicants/grantees Plans address how they will meet the newly expressed will of Congress to ensure funds provide "housing and economic revitalization in the most impacted and distressed areas" and HUD should incorporate these requirements into grantee certifications.
- 14) In addition to a certification that at least 50% of funds will principally benefit low and moderate income families (74 FR 7254), the budget of each Plan should specifically identify the 50% plus of its expenditures which will support such activities, and specifically identify which activities will benefit different key subpopulations, including low-income and very-low-income families, people with special needs, and people who are homeless and at risk of becoming homeless.

- 15) Any request for a waiver allowing less than 50% of funds to be used to benefit low and moderate income families should be subject to heightened scrutiny by the Secretary. The compelling need standard should be defined narrowly and require a public process as described above for comments and objections before any decision.
- 16) Each Plan should demonstrate that the applicant has given the maximum feasible priority to activities that will benefit low and moderate income families. (42 USC §5304(b)(3), HCD act of 1974)

LOWER-INCOME PEOPLE SHOULD FAIRLY BENEFIT FROM REBUILDING

- 17) After prior disasters, assistance to homeowners has, at times, been determined by the pre-storm value of the home.

This standard resulted in denial of adequate aid to tens of thousands of households. In the Road Home Program the revitalization of homes in communities of generally depressed market values was systematically thwarted, further depressing values in decimated communities and channeling funding into affluent and non-minority neighborhoods.

The notice should require that assistance to eligible home owners be based upon the cost for the applicant household to rebuild or otherwise acquire proper affordable housing.

- 18) Grants for renovation or rebuilding should give lower-income people impacted by the storm the same choices that other people have on whether they want to rebuild on-site in identified flood zones; there should not be sustainability requirements that only apply to lower-income communities. The notice should require that impacted people who would rather move outside of neighborhoods of historic concentrations of minority and low-income households should have the choice and relocation assistance needed to move if they want to, but jurisdictions should not be allowed to tilt the choices available to either prevent rebuilding on site or stop people from moving if that is truly their choice. As with all aspects of recovery assistance, these choices should be available to renters and homeowners alike.
- 19) Much of the work generated by recovery activity will involve revitalization of single homes and other projects much smaller than the developments normally associated with community development activities. A significant reduction in potential §3 benefits will be realized if the thresholds set out in the 24 CFR 135.3 are applied.

In enforcing § 3 training, employment and contracting opportunities, we ask you to consider waiving the contract threshold requirements of 24 CFR 135.3 (a)(3)(ii)(B) and (C) (which are not statutorily mandated by 12 USC § 1701u) and inserting instead, for subparagraphs (B) and (C), assistance thresholds of \$100,000 and a contract or subcontract threshold of \$25,000.

- 20) Each Plan should include, or have attached, copies of contractor and subcontractor provisions the jurisdiction will utilize, together with a description of how it will proceed, to the greatest extent feasible, to create Section 3 training, employment and contracting opportunities and meet these obligations under 12 USC 1701u.
- 21) Each applicant must be required to attach its residential anti-displacement and relocation assistance plan to its application. (42 USC §5304(d), HCD act of 1974)

CONCLUSION

HUD, through the Disaster Recovery Task Force and its office of Fair Housing and Equal Opportunity, must bring the lessons from the past decade to bear on post-Sandy challenges. HUD must review each state and local disaster recovery Plan not just to note that the proper certifications are attached, but to confirm that each required certification is justified by the content of the Plan. And HUD must establish verifiable data-driven performance-management protocols, accessible by the public, to facilitate oversight and underpin compliance efforts.

Thank you for your attention to our concerns. We look forward to working with HUD and others to meet the challenges of facilitating affordable housing that furthers fair housing in the post-Sandy recovery.

Very truly yours,

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