



July 14, 2017

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Re: Fair Housing Comments to the Draft Affordability Policy Chapter of CodeNext, from Texas Applesseed, Texas Low Income Housing Information Service, the Austin Tenants' Council, and the University of Texas School of Law Entrepreneurship and Community Development Clinic

These comments are submitted in response to the June 16, 2017 first draft of the CodeNEXT Affordability Policy Chapter on behalf of a group of fair housing and affordable housing advocates at Texas Applesseed, Texas Low Income Housing Information Service, the Austin Tenants' Council, and the University of Texas School of Law.

We applaud all the hard work of City staff to update Austin's zoning and land use code to incorporate the huge influx of new residents to our City and to address Austin's need for more, high quality affordable housing throughout the city. Our comments identify fair housing concerns with the initial draft of the Affordability Policy Chapter and make recommendations for how to improve the chapter to comply with fair housing laws and properly incent the integration of affordable housing opportunities throughout Austin, thereby creating inclusive, integrated communities.

We start with a brief overview of fair housing and the Assessment of Fair Housing process and then list our specific comments on the first draft of the Affordability Policy Chapter.

Fair Housing Laws and the Assessment of Fair Housing Process

Zoning and other land-use laws that discriminate, in intent or effect, against members of protected classes may be found to violate the federal Fair Housing Act. Local governments must choose land use and zoning policies related to their legitimate goals, such as increasing density, creating more affordable housing near transit routes, and taking advantage of walkable, public transit corridors, that have the least discriminatory effect, as measured by the impact of the policy on members of protected classes and on the perpetuation of existing residential segregation that harms the entire community. The seven protected classes under the federal Fair Housing Act are race, color, national origin, religion, sex, disability, and familial status.

In addition to prohibiting discrimination, the Fair Housing Act requires recipients of federal housing and community development funds, such as the City of Austin, to affirmatively further fair housing ("AFFH"). Recognizing that racial segregation is a product of years of deliberate government policy and resource allocation, the affirmatively furthering provision of the Fair Housing Act requires government entities to take affirmative steps to remedy the segregation and inequity that their predecessors created.

Jurisdictions demonstrate their compliance with their AFFH obligation in part through a periodic fair housing assessment process. In 2015, the U.S. Department of Housing and Urban Development (“HUD”) issued a final rule laying out a new assessment process. The AFFH Rule reminds jurisdictions that “[t]he Fair Housing Act not only prohibits discrimination but also directs HUD program participants to take significant actions to overcome historic patterns of segregation, achieve truly balanced and integrated living patterns, promote fair housing choice, and foster inclusive communities.”

Austin’s Fair Housing Action Plan, dated May 20, 2015, Exhibit A

In 2015, the City of Austin engaged in the required Assessment of Fair Housing planning process and produced the report attached as Exhibit A and titled “The City of Austin’s Fair Housing Action Plan (FHAP), May 20, 2015.” The opening line of that plan says “... the City of Austin is committed to enforcing the federal, state, and local fair housing laws, as well [as] addressing practices, programs, and behaviors that have the *effect* of restricting housing choice for protected classes.” The plan lists 12 Fair Housing Barriers and for each barrier lists Fair Housing Goals/Activities to overcome those barriers.

- The **second Fair Housing Barrier** in Austin’s 2015 Fair Housing Action Plan states: “Lack of affordable housing citywide exacerbates segregation created through historical policies and practices.” The list of Fair Housing Goals/Activities to overcome this barrier includes: **“Strengthen and align density bonus programs in terms of formula for calculating the number of units, accessibility requirements, the affordability period, and on site requirements. Develop programs to incent family-oriented units in high opportunity areas. Create a goal to increase access to affordable housing in all council districts.”**
- The **sixth Fair Housing Barrier** in Austin’s 2015 Fair Housing Action Plan states: “Overly complex land use regulations limit housing choice and create impediments to housing affordability. These include: minimum site area requirements for multifamily housing, limits on ADUs, compatibility standards, overly restrictive neighborhood plans and excessive parking requirements.” The Fair Housing Goals/Activities to overcome this barrier is **“Work through the CodeNEXT process to modify land use and regulatory requirements to expand housing choice and reduce housing access barriers.”**
- The **eighth Fair Housing Barrier** in Austin’s 2015 Fair Housing Action Plan states: “City incentives to create affordable housing may not be equitably distributed throughout the city and may not serve the protected classes with the greatest needs.” The list of Fair Housing Goals/Activities to overcome this barrier includes: **“Calibrate S.M.A.R.T. Housing incentives to function in high opportunity areas.”**
- The **eleventh Fair Housing Barrier** in Austin’s 2015 Fair Housing Action Plan states: “Lack of knowledge about fair housing requirements creates barriers to affirmatively furthering fair housing.” The list of Fair Housing Goals/Activities to overcome this barrier includes: **“Provide fair housing training of city staff in planning, development review, economic development, and other city departments with impact on housing development and conditions that affect people who are members of protected classes. City leaders should engage neighborhood associations, Community Development Corporations and academics in a goal to create**

economic, racial and ethnic diversity as a core value for each neighborhood and the city as a whole. The obligation to affirmatively further fair housing should be incorporated into city policies. Add to the City's affordable housing impact statement, which is used in code and zoning changes, a "Fair Housing Impact" statement, which would analyze the impact of the change on fair housing opportunities for all protected classes."

Austin's Regional Assessment of Fair Housing in 2018

The City of Austin is getting ready to engage in a regional Assessment of Fair Housing planning process in 2018, in partnership with the Housing Authority of the City of Austin, Georgetown Housing Authority, Travis County, Housing Authority of Travis County, Williamson County, Taylor Housing Authority, City of Pflugerville, City of Round Rock, Round Rock Housing Authority, and Granger Housing Authority. As part of this process, the entities will be hiring a consultant to help them in their Assessment of Fair Housing which covers an assessment of "patterns of integration and segregation, racially or ethnically concentrated areas of poverty; disparities in access to opportunity; and disproportionate housing needs." See Assessment of Fair Housing (AFH) Status Update available on the City of Austin's website. The AFH process explicitly requires jurisdictions and regions to analyze their land use and zoning laws and consider whether and how they create, contribute to, perpetuate, or increase factors including segregation, Racially or Ethnically Concentrated Areas of Poverty, disparities in access to opportunity, and access for persons with disabilities.

Fair Housing Resolutions Adopted by Austin City Council

The Austin City Council has passed two resolutions, attached here as Exhibit B, that call on CodeNEXT to fulfill fair housing goals. The first, City Council Resolution No. 20151210-030, calls on the CodeNEXT consultant and staff to, among other things:

- "provide a statement for each proposed [affordable] housing type that demonstrates how it can further fair housing choice over the life of the Code"
- "provide options and analysis of ways to maximize the Code's potential to give low- and moderate-income residents the ability to live in high opportunity areas and rapidly gentrifying areas;"

Neither of these items appear to be met by the current draft of CodeNEXT.

In June of 2016, the Austin City Council passed Resolution No. 20160616-035. This resolution also had many components, but it specifically called for

- The creation of "goals to increase economic and racial integration in 'high opportunity' areas and to slow displacement in more vulnerable neighborhoods; and to provide policy recommendations to achieve the goals, which could include, but should not be limited to, allowing for smaller housing and smaller lot sizes that support affordability in CodeNEXT, especially in less vulnerable areas."

- “The City Council directs the City Manager to present options to the City Council to create more diverse housing opportunities in areas where deed restrictions or other private covenants may have a disparate impact on low- to moderate-income communities or communities of color.”

Again, there does not appear to be any consideration of this resolution in this draft of CodeNEXT. Another component of that resolution did not specifically reference CodeNEXT, but should have initiated a stakeholder process to develop “stay-in-place” initiatives allowing low- and moderate-income homeowners to add uses or units to their property in order to better afford rising property taxes. CodeNEXT would be an appropriate place to develop such initiatives.

Specific Comments to Draft Affordability Policy Chapter released June 16, 2017:

I. Comments re Division 23-3E-1: Citywide Affordable Housing Density Bonus Program

We **support** the expansion of the Citywide Affordable Housing Density Bonus Program to over 300% more land area than current density bonus programs.

We **recommend** that the program be updated to include incentives and requirements for the creation of “family-oriented units in high opportunity areas,” as specifically mentioned in the second Fair Housing Barrier in Austin’s 2015 Fair Housing Action Plan, cited above.

We **support** the requirement in 23-3E-1030 that an applicant for a Density Bonus is prohibited from denying an affordable unit to any prospective tenant based on that tenant seeking to cover part of their rent with a Housing Choice Voucher or any other housing voucher program that provides rental assistance.

We **recommend** this provision be amended such that the requirement to accept housing vouchers is expanded to all units in a project under the Density Bonus Program, including those participating in fee-in-lieu and off-site development.

We do not support the options of allowing developers to develop affordable units off-site, to dedicate land to the City, or pay a Fee in Lieu.

We **recommend** that the language “except as provided in Section 23-3E-1050 (Alternatives to On-site Production of Density Bonus Units)” be struck from 23-3E-1030 (C) and that the entirety of Sections 23-3E-1050 and Sections 23-32-1060 be struck as well. We believe it critically important that all affordable units be developed on-site as part of the market development for which increased density is being requested. Including the required number of affordable housing units on-site is consistent with the goal of the Fair Housing Act to build open, integrated, and diverse communities, and to increase access to housing choice for members of protected classes.

We **support** the threshold and affordability periods set forth in Table 23-3E-1040(B), specifically 80% of MFI and below for ownership units for a 99 year affordability period and 60% of MFI and below for rental units with a 40 year affordability period.

We **support** the definition of “affordable” provided in footnote 1 to Table 23-3E-1040(B).

We **recommend** that the definition of affordable be modified slightly to make clear that monthly utility costs are included as part of monthly housing costs, for both rental and ownership housing.

We **support** the assignment of staff at the City's Neighborhood Housing and Community Development Department ("NHCD") to affordability compliance and monitoring for the rental and ownership units created under the Density Bonus Program per 23-3E-1090

We **recommend** that NHDC staff prepare and adhere to an Affirmative Marketing Plan that lets all residents of Austin know about all of the affordable units available to them throughout the city under the Density Bonus Program and specifically targets persons least likely to apply for that housing. In addition, affordable rental and ownership units with two or more bedrooms should be specifically marketed to and allotted to families with children since those households are the ones most in need of housing with two or more bedrooms and prioritizing families with children does not violate the fair housing laws. See Legal Opinion on Fair Housing Laws and Prioritizing Families with Children for Larger Affordable Housing Units, December 10, 2015, attached as Exhibit C. We recommend that NHCD adopt a marketing and preference policy similar to the Massachusetts Department of Housing and Community Development, Affirmative Fair Housing Marketing and Resident Selection Plan Guidelines described and referenced in the Legal Opinion attached as Exhibit C.

II. Comments re Division 23-3E-4: S.M.A.R.T. Housing

There is a typo in 23-3E-4040 that should be corrected: the affordability period for rental dwelling units set forth in (A)(2) should be 40 years, not 49 years, to be consistent with the rest of the Code.

We recommend that 23-3E-4070 at the very end of this Division be removed in its entirety; it appears to be a mistaken iteration of Section 23-3E-3070 from Division 23-3E-3: Tenant Notification and Relocation.

III. Comments re Division 23-3E-5: Affordability Impact Statement

The Draft Affordability Policy Chapter released to the public on June 16, 2017 does not include any text in its Affordability Impact Statement section.

We **recommend** that the public be given sufficient time to review and comment on the draft Affordability Impact Statement. We look forward to reviewing it.

IV. Comments re Division 23-3E-5: Affordability Impact Statement Needs to Include a Fair Housing Impact Statement

The Draft Affordability Policy Chapter released to the public on June 16, 2017 does not include a Fair Housing Impact Statement, despite a specific, written goal articulated by the City of Austin in its May 20, 2015 Fair Housing Action Plan attached as Exhibit A, to incorporate a "Fair Housing Impact Statement" as part of future "Affordable Housing Impact Statements."

We **recommend** the City look as a model at the fair housing analysis conducted by staff from the Travis County Community Development Block Grant Office in 2016 regarding the Del Valle/969 affordable housing development. A draft of that analysis is attached to these comments as Exhibit D. It is critical that the public be given sufficient time to review and comment on the draft Fair Housing Impact Statement. We look forward to reviewing it.

V. Comments re Division 23-3E-6: Definitions

We **recommend** that the definition of High Opportunity Area be amended to read as follows:

“A geographic area that has good to excellent access to jobs, amenities, social and medical services, transit, high-performing schools, low crime rates and is free of environmental hazards as defined by the Kirwan Institute maps or their equivalent/replacement.”

Thank you for your attention to these fair housing comments. We would be happy to answer questions, provide additional information, and attend meetings as a follow-up to these comments.

Sincerely,



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Karen Paup, co-director, Texas Low Income Housing Information Service
Juliana Gonzalez, Executive Director, Austin Tenants' Council
Eliza Platts-Mills, Clinical Law Professor, University of Texas School of Law

Texas Appleseed is a public interest justice center that works to change unjust laws and policies that prevent Texans from realizing their full potential. Texas Appleseed promotes social and economic justice for all Texas by leveraging the skills and resources of volunteer lawyers and other professionals to identify practical solutions to difficult, systemic problems.

Texas Low Income Housing Information Service is a nonprofit organization with a mission to support low-income Texans' efforts to achieve the American dream of a decent, affordable home in a quality neighborhood. TXLIHIS believes that Texas' critical low-income housing and community developments needs can best be solved through a public-private partnership led by the initiative of low-income Texans and supported by government, the private sector, and the general public.

The Austin Tenants' Council's stated mission is to protect tenants' rights and educate the community on fair housing. The Council's vision is to make Texas communities open to all without discrimination and free of landlord-tenant disputes.