



October 28, 2009

The Honorable Shaun Donovan  
Secretary  
United States Department of Housing and Urban Development  
451 Seventh Street, S.W.  
Washington, D.C. 20410

**Re: State of Texas Amended Plan for Disaster Recovery after Hurricanes Ike  
and Dolly**

Dear Secretary Donovan:

Attached please find our Administrative Complaint setting out the reasons that the State of Texas's proposed Amended Plan for Disaster Recovery, submitted to HUD on September 30, 2009, fails to comply with applicable law and regulations and is insufficient to support the obligation of CDBG funds. We ask you to deem Texas's Plan insufficient to support obligation of CDBG funds at this time, and require revision and resubmission of the Action Plan in accordance with applicable federal laws and regulations.

Prerequisites to a grantee's receipt of CDBG disaster recovery assistance include adoption of a citizen participation plan; publication of its proposed Action Plan for Disaster Recovery; public notice and comment; and submission to HUD of an Action Plan for Disaster Recovery, including certifications. Texas' Amended Plan for Disaster Recovery fails to meet a number of these prerequisites, including publication of an Action Plan for public comment and submission of an Action Plan for Disaster Recovery and certifications to HUD.

1. Texas has failed to submit an "Action Plan" as defined by federal law and regulations.

Under the appropriating statute, PL 110-329, Texas is required to submit a plan that "details the proposed use of all funds, including criteria for eligibility." Texas' submitted

Action Plan repeatedly *defers* decisions on how disaster recovery grant funds will be used and criteria for eligibility. Neither the original Plan for Disaster Recovery nor the Amended Plan describe the activities proposed for the use of CDBG disaster recovery grant funds beyond minimal set asides for state-level activities. The overwhelming majority of CDBG disaster recovery funds, almost \$2.5 billion of a \$3 billion total allocation, and the substantive decisions about how those funds will be used, have been sub-allocated to regional Councils of Government. In the first round of funding allocations under PL 110-329, these same subrecipients “prioritized projects other than those serving LMI residents” to the extent that Texas would not meet the 50% LMI benefit requirement based on Round 1 alone. Amended Plan at 6.

2. Texas has failed to provide for public comment on its Action Plan.

Texas has provided a total of eight public hearings, and has posted both drafts of the submitted Action Plan on its website for at least 7 days. However, the key element of citizen participation is neither public hearings nor provision of a specific number of days for public comment, but that the process “provides for reasonable public notice, appraisal, examination, and comment on the activities proposed for use of CDBG disaster recovery grant funds.” 74 Fed. Reg. 7244, 7247. Because Texas has not published an Action Plan that describes activities proposed for the use of CDBG disaster recovery funds, it has not provided for required citizen participation as mandated by HUD.

3. Texas has failed to make mandatory certifications that are a material condition of eligibility for CDBG grant funds.

HUD has waived Section 91.325 of Title 24 of the Code of Federal Regulations, and substituted alternative certifications. Submission to HUD of these mandatory certifications as part of an Action Plan is a prerequisite to a grantee’s receipt of CDBG disaster recovery assistance. 74 Fed. Reg. 7244, 7254. Before approving an Action Plan, the Secretary must determine that the Action Plan contains all required certifications *and* that those certifications are credible and accurate. 24 C.F.R. §91.5

a. Texas cannot certify that funds will be used solely for necessary expensed related to disaster relief, long-term recovery, and restoration of infrastructure in areas affected by natural disasters declared in 2008.

CDBG disaster recovery funds have traditionally been allocated using FEMA damage estimates and other federal data. HUD allocated Texas half of the total 2008 CDBG disaster recovery funding appropriated by Congress using available data on observed damages in a formula designed to estimate unmet need. 74 Fed. Reg. 41146, 41147, Appendix 1. However, the State has chosen to distribute that \$3 billion without any reference to actual damage or unmet disaster recovery needs - over the objections of

disaster-affected communities, elected officials, affected citizens, advocacy groups, and members of Congress.

- Texas is using a funding allocation model that looks solely at weather data and high water maps without taking into account actual damage, population numbers in affected areas, housing density, types of economic activity, or community demographics. Comparison of actual damages data, for example, number of homes damaged, with allocations produced by the weather model demonstrate how unsuited this model is to ensuring an appropriate distribution and addressing unmet disaster recovery needs.
  - Further casting doubt on the sufficiency of the procedures used by TDRA/ORCA to provide reasonable assurances that both the state and local units of government are in compliance with federal requirements is (1) the state's unequal provision of CDBG-funded technical assistance to only certain local governments (areas affected by Hurricane Dolly, for example, were excluded) and for only infrastructure projects, and (2) the use of the same engineering firm to both provide selective technical assistance and to create the funding allocation model for all CDBG disaster recovery funds.
  - Even within disaster-affected jurisdictions, the failure to use actual data and a valid allocation model raises serious questions about whether CDBG disaster recovery funds will be spent on "necessary expenses related to disaster relief." Counties eligible for FEMA PA assistance only with Categories A and B are spending the majority of their CDBG allocations on infrastructure, despite critical housing need.
  - The funding allocation model is not only inapt; it is defective as a model. The State has not made public the input data, calculations, formulas, or basis for incorporated assumptions of the weather model. In addition, results produced by the model have been "calibrated" with no explanation of the basis for changes.
- b. Texas cannot certify that its Action Plan was developed to give the maximum feasible priority to activities that will benefit low and moderate income families, or that the aggregate use of CDBG funds will ensure that at least 50 percent of the amount will principally benefit those families

The State's proposed Amendment, like the initial Action Plan, allocates CDBG disaster recovery funds among 11 COGs without specifying an amount that must be spent on housing recovery or providing guidance or enforcement mechanisms to ensure that local government subrecipients prioritize activities that primarily benefit low and moderate income families. The State has not adjusted the distribution or administration of CDBG funds, despite its concrete knowledge that in Round 1 "[j]urisdictions have prioritized projects other than those serving LMI residents" to such an extent that "the State's

ability to fulfill its obligation to expend 50% of the total funds to meet the LMI national objective” would be unmet in Round 1. Texas’ submitted Action Plan demonstrably fails to prioritize activities benefitting low and moderate income families, and fails to ensure that at least 50 percent of aggregate funds will benefit those families.

The State has admitted the finding necessary under 24 C.F.R. §570.480(c) for a determination that it has failed to carry out its certifications in compliance with the requirements of federal law and has, therefore, failed to make a required certification that is a material condition of its eligibility to receive CDBG funds. The Secretary cannot obligate CDBG disaster recovery funds to Texas.

c. Texas cannot certify that it is affirmatively furthering fair housing.

The State in fact has a *dual responsibility* to affirmatively further fair housing. It must engage in its own activities that affirmatively further fair housing, and it must ensure that subrecipient jurisdictions comply with their mandatory individual certifications to affirmatively further fair housing.

A fair housing certification “is not satisfactory to the Secretary” when HUD reviews applicable documents and data and concludes that “(1) the jurisdiction does not have an AI, (2) an AI was substantially incomplete, (3) no actions were taken, (4) the actions taken were plainly inappropriate to address identified impediments, or (5) the jurisdiction has no records.” HUD review will include whether a program participant has made appropriate revisions to update its AI.

Texas last revised a statewide Analysis of Impediments to Fair Housing Choice in January 2003. Since that date, Texas has been affected by four major hurricanes. The particular impact of these disasters on the housing needs of persons of color and persons with disabilities is undeniable, yet the State’s AI has not been updated to reflect the current fair housing situation in affected communities.

Nor is the State taking steps to ensure that subrecipients or other grantees are in compliance with mandatory certifications regarding fair housing. The City of Galveston presents a particularly egregious example. Hurricane Ike damaged more than 80 percent of the homes on the Island, including 569 public housing units that were declared uninhabitable. The Galveston Housing Authority (GHA) initially planned to rebuild the destroyed public housing units and then develop an additional 1,500 non-public affordable housing units within 10 years, but abandoned that rebuilding plan because of public opposition, based in large part on the race of the people to be housed.

Public response, including a petition signed by 2000 people, unruly public hearings, and several editorials, has been racially charged. Comments have included numerous

references to residents of public and subsidized housing as criminal, lazy, undesirable, and an impediment to creating a “middle class” Galveston that will be attractive to tourists. A number of the comments have included language that is identical or similar to expressions that courts have found to be “camouflaged racial expression” in fair housing cases. According to HUD data, public housing residents in Galveston, before Hurricane Ike, were 85% minority and 72% Black.

The State’s failure to conduct the AI necessary to make a fair housing certification is particularly troubling considering the long history of race-based housing discrimination in a number of the jurisdictions that will be receiving CDBG disaster recovery funding under the submitted Action Plan, including the City of Galveston and a thirty-six county area of East Texas.

Neither Galveston, as an example of an individual subrecipient, nor the State, has submitted or can submit a fair housing certification that can be “satisfactory to the Secretary.” CDBG grant funds are expressly conditioned on the certification that a recipient will affirmatively further fair housing. Texas has failed to make a certification that is a material condition of its eligibility to receive CDBG funds; therefore, funds cannot be obligated to the state.

The primary purpose of the federal CDBG program remains the “development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income.” Supplemental CDBG funds to assist with disaster recovery are not exempt from program requirements, or disassociated from the primary objective of the CDBG program, particularly since the low and moderate income families who are their intended beneficiaries are disproportionately affected by disasters and face major barriers to recovery.

Under all applicable laws and regulations, the Secretary has not only the authority, but the obligation and responsibility to review the State of Texas’ submissions and certifications in application for funds allocated by PL 110-329, and to enforce compliance with CDBG program requirements and the intent of Congress.

For the reasons set out in the attached Administrative Complaint, we ask you to deem Texas’s Plan insufficient to support obligation of CDBG funds at this time, and require revision and resubmission of the Plan to ensure that:

- A. funds are allocated according to actual disaster-damage and the most urgent unmet needs;
- B. the Action Plan details the activities proposed for the use of all CDBG disaster recovery grant funds, including criteria for eligibility;

- C. the Action Plan gives maximum feasible priority to activities that will benefit low and moderate income families;
- D. the State adopts sufficient procedures and requirements, including a designated level of funding for housing recovery, to ensure that a minimum of 50 percent of grant funds are expended for activities that benefit low and moderate income families;
- E. the State analyzes impediments to fair housing at both the state and the community level, and coordinates the allocation and program design of CDBG-funded activities to affirmatively further fair housing;
- F. the State carries out its mandated responsibilities to ensure that subrecipient jurisdictions analyze impediments to fair housing (including the availability of affordable and accessible housing) and implement CDBG-funded activities in a way that affirmatively furthers fair housing;
- G. any subrecipients of CDBG disaster recovery funding have demonstrable capacity to prioritize community recovery needs and administer programs according to federal requirements;
- H. Texas' use of CDBG disaster recovery funds is in full compliance with applicable laws, regulations, and program rules, and is consistent with the intent of Congress in the HCDA of 1974, the Cranston-Gonzalez Affordable Housing Act, and Consolidated Security, Disaster Assistance, and Continuing Appropriations Act.

We would welcome an opportunity to discuss any of these matters further, or to respond to any questions or concerns you may have. Thank you for your attention and consideration.

Sincerely,

Texas Appleseed  
Madison Sloan, Staff Attorney

Texas Low-Income Housing  
Information Service  
John Henneberger, Co-Director

Cc: Ron Sims, Deputy Secretary  
Mercedes M. Márquez, Assistant Secretary for Community Planning  
and Development  
John Trasviña, Assistant Secretary for Fair Housing and Equal Opportunity  
Fred Tombar, Senior Advisor for Disaster Recovery, Office of the Secretary

