

**Hearing on Bill 22-663, Comprehensive Plan Amendment Act of 2018 before the  
Council of the District of Columbia Committee of the Whole**

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**I. INTRODUCTION**

The Washington Lawyers' Committee for Civil Rights and Urban Affairs strongly opposes the Comprehensive Plan Amendment Act of 2018 because it expands the authority of and discretion given to the Zoning Commission to approve development projects without prohibiting the approval of any project that does not affirmatively further fair housing—a requirement under federal law. The self-described “foundation” of the Comprehensive Plan—the Framework Element—should not be amended without adequate consideration of the impediments to fair housing that exist in the District, including the affordable housing crisis, the displacement of African Americans from the city, particularly in gentrifying areas, and ensuing patterns of racial segregation which are becoming further entrenched. These impediments to fair housing arise, in great part, as a result of unchecked development that the Zoning Commission is helping facilitate, a pattern which will only be exacerbated if the Council passes the Act as written.

The 2012 District of Columbia Analysis of Impediments to Fair Housing Choice (“DC AI”), published by the Department of Housing and Community Development (“DHCD”), stated that failing to consider racial segregation and how to create racially integrated neighborhoods in the Comprehensive Plan or the city’s planning process is a major factor restricting housing choice for

African Americans.<sup>1</sup> In fact, the DC AI specifically highlighted that the Commission was approving proposed development projects without attempting to ensure such projects complied with fair housing laws. Further, a 2016 letter issued by the United States Department of Housing and Urban Development (“HUD”), warned that the District did not appear to be fulfilling its statutory obligation to affirmatively further fair housing. It pointed to approvals of several Planned Unit Developments (“PUD”) by the Zoning Commission as evidence that the District was failing to affirmatively further fair housing.

Research shows that real estate development and gentrification in the District between 2006 and 2015 has created a dire affordable housing shortage and rapidly intensified patterns of residential segregation by race, a trend which continues today. In order to respond to the dual affordable housing and racial segregation crises in a way that is consistent with the District’s duty to affirmatively further fair housing under federal law, the Comprehensive Plan must be amended to require the Zoning Commission to demand a greater number of subsidized units that are affordable to individuals and families making incomes at and below 30% of area median income (“AMI”)—which is roughly equivalent to the African American median income—when it grants developers exceptions to the height and density requirements imposed by the zoning maps. The proposed version of the Framework Element would grant the Zoning Commission broader discretion to provide developers with height and density exceptions to the zoning map without

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<sup>1</sup> Daniel Lauber, *District of Columbia Analysis of Impediments to Fair Housing Choice 2006-2011*, (2012), [hereinafter “2012 DC AI”], available at:

<https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/DC%20AI%202012%20-%20FINAL.pdf>.

sufficiently spelling out the specific amenities and public benefits that must be provided in return for these exceptions and despite these projects' likely negative impacts on fair housing choice.

Because the Zoning Commission has never rejected a PUD to date, the result of providing the Zoning Commission such broad authority will be fewer subsidized units that are affordable to very low-income residents, less housing choices for African Americans, additional displacement of families currently living in the District, and more concentrated racial segregation. For these reasons, the Council should vote against the Framework Element as amended under the Act and commit to amending the Comprehensive Plan as a whole in a way that will address the impediments to fair housing choice that have been identified in the current Comprehensive Plan

## **II. CHANGING DEMOGRAPHICS**

### **a. High End Real Estate Development Is Causing An Affordable Housing Shortage**

Since 2000, central D.C.<sup>2</sup> has experienced significant commercial and residential development that has caused rents to rise rapidly in areas surrounding this development.<sup>3</sup> During this time, rent for the bottom two quintiles of District renters rose by 14% and 35%, respectively, while their incomes remained stagnant.<sup>4</sup> Additionally, the number of affordably priced apartments in the District has rapidly decreased. The District lost nearly half of its affordable apartment stock between 2002 and 2013, with the number of apartments renting for \$800 a month—a rate that is affordable for a household earning \$32,000 a year—declining by 27,000 while the number of units

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<sup>2</sup> For the purposes of this testimony Central D.C. is defined as zip codes 20001, 20002, 20003, 20009, and 20010.

<sup>3</sup> 2012 DC AI at 3.

<sup>4</sup> Wes Rivers, *Going, Going, Gone: DC's Vanishing Affordable Housing*, A DC Fiscal Policy Report (March 12, 2015), at 2-3.

renting for more than \$1,600—rents affordable for households earning greater than \$64,000 annually—increased by nearly 37,000.<sup>5</sup> The current market rate rent for a two-bedroom apartment in D.C. is roughly \$2,600.<sup>6</sup> This phenomenon of rapidly rising housing costs and the elimination of affordable housing units has resulted in the dispersal of historic African American populations and has accelerated gentrification in certain District neighborhoods.

**b. The Affordable Housing Shortage Makes Neighborhoods Off Limits to African Americans and Intensifies Racial Segregation**

The affordable housing crisis disproportionately impacts African Americans because income inequality follows racial lines in the District where the white median income is approximately \$116,000 and the African-American median income is approximately \$41,000.<sup>7</sup> In other words, most white households can afford to pay nearly \$3,000 per month for housing while most African-American households can afford less than \$1,000 per month.

Thus, as rents rise in gentrifying neighborhoods, these neighborhoods become economically off limits for the majority of the District's African-Americans households. It is the real estate development aimed at satisfying the demand for housing generated by high-income earners and the subsequent rise in rents that has largely caused the African-American population to decrease by approximately 27,000 since 2000.<sup>8</sup>

Gentrification in central D.C. is also exacerbating existing patterns of racial segregation. In areas where the African-American population increased, there was already a disproportionately

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<sup>5</sup> *Id.* at 4.

<sup>6</sup> Zillow Real Estate Research, Zillow Rental Index; Summary (current month), Zip Code, Accessed 8/1/2015 (\$2,751 is the average of market rents in 20001, 20002, 20003, 20009, 20010).

<sup>7</sup> *See* U.S. Census Bureau, American Community Survey 2011-16, 5 year estimates, <https://www.census.gov/programs-surveys/acs/news/data-releases/2015/release.html>.

<sup>8</sup> *Id.* Specifically, zip codes 20006, 20008, 20015, 20020, 20032, 20036, 20037 experienced increases in the number of African Americans.

high concentration of African-American residents. For example, during 2000-2013, while the African-American population declined by tens of thousands city-wide, it increased by 3,500 in Wards 7 and 8, which are already the most segregated areas of the city.<sup>9</sup>

**c. Areas with the Greatest Development Activity Have Had the Greatest Decreases in African-American Population**

Publicly available data from the United States Census shows that the majority of the real estate development in the District during the past 10 years took place in central D.C. This is also the area that experienced the overwhelming majority of the African-American population decline. In the coming decade, the Upper Northeast, Lower Anacostia Waterfront and Near Southwest, and Far Northeast and Southeast’s areas of planned development will experience the greatest household growth. The District must be deliberate about addressing segregation by preserving and expanding affordable housing options in areas projected to experience further development. Otherwise, we should expect the kind of displacement that accompanied redevelopment in the central parts of the city to follow in the areas of projected development.

**III. THE PROPOSED FRAMEWORK ELEMENT UNDERMINES THE DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING**

As a Community Development Block Grant (“CDBG”) recipient, the District of Columbia is required to certify that the grant is being used in conformity with the federal Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and that it is affirmatively furthering fair housing, as is any consortium of local government units receiving such funds.<sup>10</sup> As part of these obligations, the District is required to identify what impediments to fair housing choice exist by conducting an Analysis of Fair Housing (“AFH”) (formerly known as an Analysis of Impediments), taking meaningful actions to

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<sup>9</sup> American Community Survey 2013 (5 year estimates) & 2000 United States Census, Social Explorer, University, June 2015. African American population increased by 4,671 across 7 zip codes, but the overwhelming majority of the increase was in 20020 and 20032—hyper segregated zip codes.

<sup>10</sup> 42 U.S.C. §§ 3608 (d) & (e)(5); 24 CFR § 91.225 (a)(1); 24 CFR § 91.425 (a); *see also* 24 CFR § 91.236.

overcome the effects of those impediments and further the goals identified in the AFH, and ensuring it will “*take no action that is materially inconsistent with its obligation to further fair housing.*”<sup>11</sup>

The duty to AFFH requires CDGB recipients to consider the impact of their actions on patterns of racial segregation, including considering the effects of zoning-related policies.<sup>12</sup> The objectives of the duty are to eliminate housing discrimination and provide for inclusive patterns of housing occupancy regardless of race, religion, sex, national origin, religion, disability and familial status.<sup>13</sup> A jurisdiction must review and assess both public and *private* conditions that affect fair housing choice for all protected classes when analyzing impediments to fair housing.<sup>14</sup> “Any actions, omissions, or decisions,” taken because of a protected trait or *that has the effect of restricting housing choice on the basis of a protected trait* should be considered an impediment to fair housing.<sup>15</sup> In this case, the proposed amendments to the Framework Element in the Act would contravene the District’s duty to affirmatively further fair housing by granting the Zoning Commission greater discretion to approve exceptions to the zoning map without enacting corresponding requirements to ensure exceptions are only granted in exchange for amenities and

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<sup>11</sup> 42 U.S.C. §§ 3608 (d) & (e)(5); 24 CFR § 91.225 (a)(1); 24 CFR § 91.425 (a); *see also* 24 CFR § 91.236; *see also* *MHANY Mgmt. v. County of Nassau*, 843 F. Supp. Ed 287 (E.D.N.Y. 2012), *affirmed in part and vacated on other grounds*, 819 F.3d 581 (2d Cir. 2016) (noting a further duty to maintain records of the analysis used to determine the jurisdiction’s impediments and the actions taken to overcome them).

<sup>12</sup> *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973); *see also* 24 C.F.R. § 570.601(a)(2) (Public Law 90–284, which is the Fair Housing Act (42 U.S.C. 3601–3620); 24 C.F.R. §570.601(a)(2); *See also* U.S. Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity, *Fair Housing Planning Guide* [hereinafter *FHPG*], <http://www.hud.gov/offices/fheo/images/fhpg.pdf>.

<sup>13</sup> *See* *FHPG*.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 2-7.

public benefits that affirmatively further fair housing, such as the creation of greater affordable housing distributed across the District, particularly in projects in gentrifying neighborhoods.

**a. The Proposed Amendments to the Framework Element Ignore Recommendations Made in the District of Columbia’s 2012 Analysis of Impediments to Fair Housing**

The proposed amendments to the Framework Element, specifically Section 227, increase the Zoning Commission’s discretion to grant height and density exceptions to the zoning map despite the fact that the DC AI recommended restraining the discretion of the Zoning Commission and the Office of Planning. The DC AI found income inequality along racial lines coupled with the high cost of housing,<sup>16</sup> and approval of developments “without any effort to promote compliance with fair housing laws,” primarily through the PUD<sup>17</sup> process, to be significant barriers to housing choice.<sup>18</sup> The DC AI warned that because of vast income inequality between the city’s African-American and white residents, rising rents were making gentrifying neighborhoods economically inaccessible to African Americans and threatening to re-segregate these neighborhoods as wealthy and virtually all white unless affordable housing was preserved and expanded.<sup>19</sup>

If the Zoning Commission is granted even more discretion to grant height and density exceptions, it is likely that projects will be approved with even less affordable housing and the ability of the public to hold the Zoning Commission accountable will be eroded. The result will be

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<sup>16</sup> 2012 DC AI, Impediment 4 at 185.

<sup>17</sup> District of Columbia Office of Zoning, *Zoning Handbook* [hereinafter *Zoning Handbook*], Planned Unit Development, <http://handbook.dcoz.dc.gov/zoning-rules/general-procedures/planned-unit-developments/> (“The purpose of the PUD process is to provide for higher quality development through flexibility in building controls, including height and density, provided that the resulting development is superior to what would result from a matter-of-right development, offer a commendable number or quality of meaningful public benefits, and protect and advance the public health, safety, welfare, and convenience, and is not inconsistent with the Comprehensive Plan. The Applicant has the burden of proof to justify the granting of a PUD application.”).

<sup>18</sup> 2012 DC AI at 188.

<sup>19</sup> *Id.* at 179.

further upward pressure on housing costs and continued displacement of numerous African-American households. If sufficient affordable housing to accommodate impacted households is not preserved or created either in gentrifying neighborhoods or parts of the city that have historically been disproportionately white, displaced households will be forced into areas where they are already over-represented. The private market will not correct these inequities, and accordingly the Council must take action to reduce the impacts of unchecked development projects on African-American households.

**b. A 2016 HUD-Issued Letter Warned the District that It Did Not Appear to be Complying with its Duty to Affirmatively Further Fair Housing**

In November 2016, HUD issued a letter to the Mayor's office warning that the District did not appear to be fulfilling its duty to affirmatively further fair housing despite certifying having done so in its Consolidated Plan submission. Key to HUD's concern was the fact that the 2012 DC AI identified 13 impediments to fair housing and 34 recommended actions, none of which were specifically addressed by the 2016-2020 Consolidated Plan or 2016 Annual Action Plan. HUD pointed out that the District had acknowledged the issues of racial segregation and displacement of African Americans in the Plans, but further indicated that there were "no specific activities identified to address these issues."

To highlight the problem, HUD cited a handful of decisions that indicated the District was "squandering opportunities to stem the tide of gentrification" through decisions by the Zoning Commission. For example, the District approved the removal of 100 inclusionary zoning units from the Peebles Development at 5<sup>th</sup> & I ST NW to Anacostia. Also mentioned were the Zoning Commission approvals of the Temple Courts, Sursum Corda, and Brookland Manor developments where HUD explained "the city should have done more to preserve existing affordable housing." These examples and the 2012 DC AI make clear that the city must exercise greater control over



zoning decisions, not expand the authority and discretion of an unelected body that has been criticized by local and federal agencies for failing to comply with federal fair housing laws. Any amendments to the Comprehensive Plan, including, its Framework Element, must be made in such a way as to ensure that the Zoning Commission’s actions affirmatively further fair housing rather than lead to results which are “materially inconsistent with [the District’s] obligation to further fair housing.”

#### **IV. CONCLUSION**

On the year that marks the 50<sup>th</sup> anniversary of the Fair Housing Act, we urge the Council to commit to fulfilling its obligation to affirmatively further fair housing by refusing to grant the Zoning Commission greater authority to approve height and density exceptions to the zoning map through this Comprehensive Plan Amendment Act. Instead, we urge the Council to propose legislation that strengthens the language of the Comprehensive Plan as it relates to housing requirements that seek to preserve and expand access to affordable housing wherever exceptions to the zoning map are granted to developers. The Council must work to ensure that the racial impacts of development are meaningfully understood and considered by the Office of Planning and the Zoning Commission. Doing so will be consistent with the recommendations outlined by DHCD in the 2012 D.C. Analysis of Impediments to Fair Housing. The city’s obligations under federal law require that the Council Vote NO on the proposed amendments to the Framework Element of the Comprehensive Plan before the Council.