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CHANGES IN THE AFFH APPROACH—NEW FOCUS ON SEGREGATION AND CHOICE

Opportunity Everywhere: Affirmatively Furthering Fair Housing to Transform Communities

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AFFH Statutory Authority

- FHA requires HUD to “administer [housing] programs...in a manner affirmatively to further the policies of [the Fair Housing Act],” including the general policy to “provide, within constitutional limits, for fair housing throughout the United States.”
 - 42 USC §3608(e)(5).



“No Certification, No Money”

- 42 U.S.C. §5304(b)(2): “Any grant under [the CDBG program] shall be made only if the grantee certifies to the satisfaction of the Secretary that ... the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 [42 U.S.C. 2000a et seq.] and the Fair Housing Act [42 U.S.C. 3601 et seq.], and the grantee will affirmatively further fair housing.”



Preventing the Increase of Segregation

- "...the affirmative duty placed on the Secretary of HUD by § 3608(d)(5)... requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. **Action must be taken to fulfill, as much as possible, the goal of open integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.**"
 - *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973).



Refraining From Discrimination is Not Enough

- “...every court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating (and from purposely aiding discrimination by others)...This broader goal [of truly open housing] ... reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”
 - *NAACP v. Sec’y of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987).



Westchester Litigation: A Cautionary Tale

- County received \$52 million+ in CDBG, HOME, ESG funds from 2000-2006
- Receipt of funds required repeated AFFH certifications
- Litigation brought under the False Claims Act: AFFH certifications were false because County did not consider race-based impediments to fair housing choice
 - Treble Damages
 - Share available to “relator”



Court Decision—2009

- “[T]he central goal of the obligation to AFFH [is] to end housing discrimination and segregation.” *U.S. ex rel. Anti-Discrimination Center v. Westchester County*, 668 F.Supp.2d 548, 564 (S.D.N.Y. Feb. 24, 2009).
- “[A] determination that affordable housing is the greatest impediment does not absolve the County from its requirement to analyze race-based impediments to fair housing.” *Id.* at 562.



Court Decision—2009

- “As a matter of logic, providing more affordable housing for a low income racial minority will improve its housing stock but **may do little to change any pattern of discrimination or segregation**. Addressing that pattern would at a minimum necessitate an analysis of where the additional housing is placed. *Id.* at 564.



Progeny of *Westchester*

- *Texas Low Income Housing Information Service, et al. v. State of Texas*, Conciliation Agreement (May 25, 2010):
https://portal.hud.gov/hudportal/documents/huddoc?id=DOC_4305.pdf



Progeny of *Westchester*

- *Diamond State Community Land Trust v. Sussex County, Delaware*, Voluntary Compliance Agreement (November 28, 2012): <http://housingforall.org/wp-content/uploads/2015/10/2012-11-28-voluntary-compliance-agreement.pdf> Consent Decree (November 28, 2012): <https://www.justice.gov/opa/pr/justice-department-settles-lawsuit-against-sussex-county-delaware-blocking-affordable-housing>



Progeny of *Westchester*

- *Latino Action Network*, Conciliation Agreement (May 30, 2014):
<http://www.relmanlaw.com/docs/NewJerseyAgreementsigned5-30-2014.pdf>



Westchester Redux

- *County of Westchester v. HUD*, 802 F.3d 413 (2d Cir. 2015)
 - HUD decision to reject Analysis of Impediments was not arbitrary and capricious under APA
 - Congress may further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.



AFFH: Change is Coming

- HUD'S new rule was published on July 16, 2016
 - https://www.huduser.gov/portal/affht_pt.html#final-rule
- New Assessment of Fair Housing ("Assessment" or "AFH") templates replacing old Analysis of Impediments
 - Jurisdiction template published December 2015
 - State template published for comment March 2016
 - Public Housing Agency template published March 2016
- New Guidebook to the AFH published December 2015
 - <https://www.hudexchange.info/resource/4866/affh-rule-guidebook/>
- New Data and Mapping Tool now available for jurisdictions
 - <https://www.hudexchange.info/resource/4867/affh-data-and-mapping-tool/>



AFFIRMATIVELY FURTHERING FAIR HOUSING

- ***Affirmatively furthering fair housing*** means:

[T]aking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics

One size does not fit all: Every community will define what its own pro-integration efforts look like.



AFFIRMATIVELY FURTHERING FAIR HOUSING

- Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.
- The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development.



THE FOCUS

- The rule identifies categories of analysis that contain fair housing issues that program participants will assess:
 - Patterns of integration and segregation
 - Racially or ethnically concentrated areas of poverty
 - Disparities in access to opportunity
 - Disproportionate housing needs
 - Publicly supported housing analysis
 - Disability and access analysis
 - Fair housing resources



Regional Approaches

- Assessment requires consultation with local and regional government agencies with metropolitan-wide planning and transportation responsibilities.
 - Who are these in California?
- Groups of jurisdictions/PHAs may join and produce a regional assessment
 - A lead entity is responsible for overseeing the submission of a regional Assessment and obtaining the express consent of all other participants
 - A regional Assessment must include goals for each participating entity



Timing of an Assessment

- The initial Assessment is due 270 days (9 months) before a jurisdiction's Consolidated Plan is due; planning for the Assessment process should likely start 9-12 months before its due date and 18 to 24 months before the Consolidated Plan is due
- For a regional Assessment, the due date is tied to the due date of the lead jurisdiction.
- For most PHAs submitting alone the Assessment is due 270 days before the end of the PHA's fiscal year that begins on or after January 1, 2018 and when a new 5-year plan is due



Connecticut AFH Due Dates

Connecticut Assessment of Fair Housing (AFH) Due Dates					
State	City	AFH Due Date	Next Consolidated Plan Due Date on or After 11/17/2016	Program Year Start Date	FY 15 CDBG Grant
CT	Bridgeport	10/4/2017	5/17/2018	7/1/2018	\$2,761,302
CT	Danbury	11/4/2017	6/17/2018	8/1/2018	\$596,398
CT	Waterbury	1/4/2018	8/17/2018	10/1/2018	\$1,888,634
CT	Greenwich	4/6/2019	11/17/2019	1/1/2020	\$736,509
CT	Hamden Town	10/5/2019	5/17/2020	7/1/2020	\$393,751
CT	Bristol	10/5/2019	5/17/2020	7/1/2020	\$551,304
CT	Stratford	10/5/2019	5/17/2020	7/1/2020	\$553,843
CT	West Haven	10/5/2019	5/17/2020	7/1/2020	\$628,322
CT	New London	10/5/2019	5/17/2020	7/1/2020	\$708,565
CT	West Hartford	10/5/2019	5/17/2020	7/1/2020	\$846,863
CT	Meriden	10/5/2019	5/17/2020	7/1/2020	\$851,343
CT	Stamford	10/5/2019	5/17/2020	7/1/2020	\$864,525
CT	Norwalk	10/5/2019	5/17/2020	7/1/2020	\$870,316
CT	New Britain	10/5/2019	5/17/2020	7/1/2020	\$1,459,410
CT	Hartford	10/5/2019	5/17/2020	7/1/2020	\$3,253,503
CT	New Haven	10/5/2019	5/17/2020	7/1/2020	\$3,486,858
CT	Connecticut	10/5/2019	5/17/2020	7/1/2020	\$11,990,905
CT	Nonentitlement				
CT	Middletown	12/6/2019	7/18/2020	9/1/2020	\$405,851
CT	East Hartford	12/6/2019	7/18/2020	9/1/2020	\$521,306
CT	Norwich	12/6/2019	7/18/2020	9/1/2020	\$796,995
CT	Milford Town	1/5/2020	8/17/2020	10/1/2020	\$434,013
CT	Fairfield	1/5/2020	8/17/2020	10/1/2020	\$460,148
CT	Manchester	1/5/2020	8/17/2020	10/1/2020	\$542,387



Required Community Participation Process

- HUD's rule contains robust community participation provisions; a failure to meet them may result in rejection of an Assessment by HUD because it is substantially incomplete or inconsistent with civil rights requirements
- Should update existing citizen participation plans BEFORE beginning the community engagement process
- Standard is reaching the broadest audience
 - Post on the internet and in public places
 - Make accessible and in language as necessary



Community Participation Process

- Community participation must involve a robust group of interested groups
 - Especially those who have been historically under represented, including racial and ethnicity minorities, people with limited English, and people with disabilities
- Key process steps
 - Make data available to the public and agencies
 - Publish the proposed Assessment and accept comments
 - Have at least one public hearing
 - Provide at least thirty days to receive comments



Community Participation: Assessment

- **Assessment must include**
 - A summary of the process and efforts to broaden community participation
 - A summary of comments and recommendations made
 - Summary of comments or recommendations not accepted with the reasons for not accepting them
- **Absence of one or more of these can result in rejection of the Assessment as incomplete**
- **Advocates will document recommendations and Assessment must consider them and provide a justification if they are not accepted**



Importance of the Ground Game

- Allen, *HUD's New AFFH Rule: The Importance of the Ground Game*, NYU Furman Center (September 2015): <http://furmancenter.org/research/iri/essay/huds-new-affh-rule-the-importance-of-the-ground-game>
 - “The success of the Final Rule will depend on this grassroots mobilization, on a community-by-community basis, all over the country. That means advocates, collectively, need to step up to the plate and provide the tools and resources for a sustained ‘ground game.’”



Use of HUD Data and Maps

- HUD has provided maps and tables of data for grantees to use in their Assessments
- Data
 - There are seventeen tables of data; some contain data at the jurisdiction level and some also include region-wide data
- Maps
 - There are twelve types of maps and each may be run at the local, regional or state level



Segregation

■ Segregation

- “Segregation” “means a condition, within the program participant’s geographic area of analysis.... in which there is a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a type of disability in a particular geographic area when compared to a broader geographic area.” 24 C.F.R. § 5.152
- “Integration” “means a condition, within the program participants geographic areas of analysis, as guided by the Assessment Tool, in which there is not a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a type of disability in a particular geographic area when compared to a broader geographic area.”



Contributing Factors Affecting Patterns of Segregation

- Assessment asks to what extent these factors affect the patterns of general segregation:
 - Land use and zoning laws
 - Occupancy restrictions
 - Residential real estate steering
 - Patterns of community opposition
 - Economic pressures, such as increased rents, land/development costs
 - Major private investments
 - Municipal or State services and amenities
 - Foreclosure patterns, other



Data and Maps Describe R/ECAPS

- Map: Race and ethnicity for area showing R/ECAPS
- Map: Race and ethnicity trends for area showing R/ECAPS
- Map: Top five national origin groups for area showing R/ECAPS
- Map: Top five languages spoken for area showing R/ECAPS
- Table: R/ECAP demographics, including the percentage of racial/ethnic groups, families with children, and national origin groups for area showing R/ECAPS



Contributing Factors Affecting Patterns of R/ECAPs

- Assessment asks to what extent these factors affect the patterns of R/ECAPS:
 - Community opposition
 - Deteriorated and abandoned properties
 - Displacement of residents due to economic pressures
 - Lack of community revitalization strategies
 - Lack of private investments in specific neighborhoods
 - Lack of public investments in specific neighborhoods, including services or amenities
 - Lack of regional cooperation
 - Land use and zoning laws
 - Location and type of affordable housing
 - Occupancy codes and restrictions
 - Private discrimination



Goal-Setting

- Goals are established to overcome the significant contributing factors identified in the Assessment as creating, contributing to, perpetuating, or increasing the severity of one or more fair housing issues.
 - 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);
 - Identify the metrics and milestones for determining what fair housing results will be achieved, including the timeframes for achieving them; and
 - if the Assessment is a joint or regional AFH, identify the responsible party for each goal



HUD Guide to Goal Setting

- Consider:
 - The priority level assigned to the contributing factor
 - The extent to which the contributing factor has affected the fair housing issue
 - The ability to achieve the goals needed to effectively address the contributing factors and related fair housing issues
 - The disparities faced by different protected classes
 - The change that can be reasonably expected from a particular goal
 - A balanced approach: place based and mobility; creating investment and moving to opportunity



Goals Must Lead to Meaningful Actions

- States, jurisdictions and PHAs are responsible for taking meaningful actions to achieve each of the fair housing goals identified.
 - Meaningful actions are “significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity.”



What's Next?

- **Assessment is submitted to HUD**
 - The Assessment is deemed accepted after 60 calendar days after the date that HUD receives the AFH, unless on or before that date, HUD provides notice that HUD does not accept the Assessment
 - Written notice of deficiencies will be provided
 - Standard for non acceptance is that the Assessment is inconsistent with fair housing or civil rights requirements or is substantially incomplete (including community participation deficiencies)
 - 45 days or more to revise; HUD reviews revisions within 30 days.
- If the Assessment is not approved or submitted, HUD will disapprove the consolidated plan with associated funding consequences
- Enforcement of the AFFH obligation still remains an option at any time



Resources

- Relman, Dane & Colfax AFFH resources:
<http://www.relmanlaw.com/affh/index.php>
- HUD AFFH page:
http://www.huduser.gov/portal/affht_pt.html#affh
- Smyth, Allen & Schnaith, “The Fair Housing Act: the Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients,” 23 *Journal of Affordable Housing* 231 (Feb. 2015).
- Schwemm, “Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s ‘Affirmatively Further’ Mandate,” 100 *KY. L.J.* 125, 137–44 (2011–2012)