

HUD's New Regulation Affirmatively Furthers Fair Housing

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It has been a fascinating fortnight for fair housing. First, in the waning days of June 2015, the [U.S. Supreme Court](#) issued its momentous decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project Inc.* (No. 13-1371), confirming, albeit with significant restrictions, that “disparate impact” — that is, liability for neutral policies and practices that have a unintended adverse effect on protected classes — is recognized by the Fair Housing Act. Then, less than two weeks later, HUD announced its long-awaited final regulation implementing the FHA’s “affirmatively furthering fair housing” (AFFH) provisions. 80 Fed. Reg. 42,272 (July 16, 2015). Either one of the developments is fraught with significance for the nation’s housing community, especially with respect to attacking persistent patterns of racial segregation in housing. Together, they represent the most significant expansion of fair housing rights — and burdens — in many years. Much will be written about the consequences of the Inclusive Communities decision. This article will focus on the questions raised by the new AFFH regulation.



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What is AFFH?

For many years, the FHA has required HUD to “affirmatively further” the law’s fair housing policies. 42 U.S.C. § 3608(e)(5). To carry out that duty, subsequent federal laws required public housing agencies (PHAs) and other state and local agencies that receive grants from HUD to certify that they are taking steps to affirmatively further fair housing in their jurisdictions. In other words, local agencies must not simply refrain from discriminating but are supposed to take affirmative steps to promote fair housing, including often controversial measures to reduce patterns of segregated housing.

In practice, HUD’s approach to affirmatively furthering fair housing amounts to encouraging — some would say, forcing — development of affordable multifamily housing in areas that have historically resisted such housing. Data consistently indicates that, almost 50 years after the enactment of the FHAct, housing in the United States remains racially and ethnically segregated. HUD’s approach assumes that segregation results from artificial barriers to development of affordable housing in non-minority areas. To implement this strategy, the AFFH regulation require PHAs and other grantees, as part of their planning process, to evaluate the factors that produce segregated housing and develop strategies to overcome them.

Past efforts to impose these obligations on local governments have yielded mixed results. HUD has long required local government agencies to analyze impediments to fair housing, but the existing policies have been criticized as incomplete, hard for local agencies to implement and lacking adequate enforcement teeth. For example, HUD has been embroiled in litigation with New York’s Westchester County, which has been accused, in connection with applications for various types of HUD assistance, of falsely certifying that it was taking

affirmative steps to reduce housing segregation. The litigation has persisted for many years, with much local resistance and very little by way of additional units of affordable housing to show for it. Perhaps responding to the frustrations of the Westchester litigation, the AFFH rule adopts more strict regulatory measures to force local governments to undertake controversial efforts to expand housing opportunities for persons protected by the AFFH.

What Does the New AFFH Rule Do?

Essentially, the AFFH rule requires that, in exchange for receipt of HUD financial assistance, PHAs and other agencies must make more detailed analyses of housing segregation in their jurisdictions and take steps to reduce the factors that cause that segregation. Among other things, the rule (1) requires local agencies to conduct an “assessment of fair housing” using HUD-developed “assessment tools,” statistical models developed by HUD to assist local agencies in identifying patterns of segregation, (2) makes additional databases available to implement those assessment duties, (3) ties the assessment process into the agencies’ existing planning processes, (4) encourages regional efforts to affirmatively further fair housing and (5) seeks to expand participation by community groups (including fair housing advocates) in that planning process. *Id.* at 42,273. In other words, HUD intends that in order to receive federal housing funds, local agencies will have to identify concrete — and often controversial — steps that they will take to meet the housing needs of protected classes in their jurisdiction.

Who is Affected by the New AFFH Rule?

The burden of the new rule falls primarily on state and local agencies that receive HUD funds, including PHAs and other participants in certain HUD grant programs, including the Community Development Block Grant and HOME Investment Partnerships programs. There are limits on the reach of the new rule. First, responding to criticisms that the assessment and planning processes would impose huge financial and administrative burdens on these agencies, HUD agreed to delay the implementation of the AFFH rule for smaller agencies that receive a limited amount of HUD housing funds. *Id.* at 42,277. Perhaps more important, the AFFH rule does not directly address the large group of private housing owners of HUD-insured properties and properties that receive Section 8 assistance that provide 100,000s of units of affordable housing around the nation.

How Does the AFFH Process Work?

As noted, the new rule requires local agencies to undertake an assessment of fair housing (AFH) that assesses the factors that perpetuate segregation, racial and ethnic concentrations of poverty and “significant disparities in access to opportunity.” 24 CFR §5.154. To do this, agencies must use HUD-prescribed assessment tools to examine those factors and the impact their programs and policies have on fair housing. Where the AFH indicates that local housing is segregated, HUD expects agencies to identify specific goals to overcome those barriers to integrated housing. The results of the AFH will be incorporated into the local agencies’ planning process and — at least in theory — will guide those agencies in their program decisions. In other words, HUD intends that its AFFH rule will make PHAs and other grantees agents of change in reducing housing segregation.

When Does the AFFH Process Take Effect?

With the exception of smaller agencies that are granted additional time, most agencies must submit their AFHs to HUD no less than 270 days before the start of the program year that

begins on or after Jan. 1, 2017. That means that for some agencies, their first AFH is due less than a year from now.

What Response Did HUD Receive to its AFFH Proposal?

HUD's proposed AFFH rule, released in 2013, was extremely controversial, with almost 1,000 comments submitted. Many comments supported HUD's approach and urged HUD to push local agencies to more aggressively promote policies that reduced housing segregation.

Needless to say, many others criticized the proposed rule. Some commenters warned that, by co-opting decisions made by local agencies, the proposed rule improperly inserted HUD into local land use decisions. Others expressed concern that shifting development of new affordable housing to so-called "areas of opportunity" — meaning areas characterized by higher income and with greater access to employment, education, transportation, health services and other resources — means that families living in areas with higher concentration of poverty (and often, higher proportions of minority families) will lose housing resources. Many commenters also pointed out that the task of preparing AFHs imposes harsh burdens on agencies subject to the AFFH rule. Indeed, in the original rule proposed in 2013, HUD estimated compliance with the AFFH process would require more than 1,600,000 hours each year for the subject agencies. 78 Fed. Reg. at 43728 (July 19, 2013). These burdens would be added at a time when local agencies' budgets are extremely stressed. While the final rule reflects some steps to reduce the data-collection burdens that drove these costs upwards, there is no question that developing AFHs will be a significant burden on many PHAs and HUD grantees.

Is This Going to Work?

Good question. HUD readily acknowledges that its rules have required local agencies to take steps to further fair housing for many years and the track record is not good. If the new rule does not succeed, it won't be for a lack of trying: HUD has clearly invested enormous time and resources in developing the assessment tools and mining data to support local agencies' AFFH planning process.

Still, it is questionable whether forcing local agencies to incorporate more vigorous fair housing policies in their planning processes is likely to make a significant dent in segregation patterns that have endured for decades. Moreover, as noted above, the AFFH regulation assumes that current patterns of segregation are the product of artificial barriers that can be remedied by developing more affordable housing in "high opportunity" neighborhoods. Developing more affordable housing where there isn't any now makes sense, but it still reflects large scale social engineering whose success is by no means assured. This is especially so because, as HUD admits, its principal enforcement tool is withholding federal financial assistance to local agencies. Ultimately, withholding funds has the harshest impact on the very persons HUD was designed to serve — lower income families who desperately need good quality affordable housing. It is questionable whether HUD will put those families at risk in order to force local agencies to vigorously advance HUD's fair housing agenda.

Oddly, the one group that might benefit most from HUD's AFFH rule is private developers of affordable housing, who often face opposition from hostile neighborhood groups, city councils and zoning boards. If HUD's new rule has the desired effect, these developers may find new allies in PHAs and other HUD grantees who may seek out partners to help implement their fair housing agendas. If HUD's goal of reducing housing segregation is to be

met by expanding multifamily housing in high-opportunity areas, someone is going to have to develop that housing, and private developers will benefit from those initiatives — at least until HUD decides to focus its attention on strengthening those developers' affirmative fair housing marketing obligations. But that's a story for another day.

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