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Office of the General Counsel
Rules Docket Clerk
US Department of Housing & Urban Development
451 Seventh Street, SW
Room 10276
Washington, DC 20410-0001

Submitted electronically via www.regulations.gov

RE: Docket No. FR-6123-A-01

Dear Assistant Secretary Farias:

We write on behalf of the Fair Housing Justice Center (FHJC) to express our strong opposition to any amendment to HUD's Affirmatively Furthering Fair Housing rule (Rule). We submit this letter in response to HUD's August 16, 2018, Federal Register Advance Notice of Proposed Rulemaking (ANPR) "Affirmatively Furthering Fair Housing: Streamlining and Enhancements," which seeks public comment on amendments to HUD's affirmatively furthering fair housing (AFFH) regulations in view of perceived inefficiencies in the process established in 2015. The ANPR also states that HUD is seeking public comments on possible changes that would alter the AFFH process to minimize burden on participants, provide increased local control, increase housing supply, and efficiently utilize HUD resources.

The FHJC, a nonprofit civil rights organization, is dedicated to eliminating housing discrimination, promoting policies that foster open, accessible, and inclusive communities, and strengthening enforcement of fair housing laws. The FHJC serves all five boroughs of New York City and the seven surrounding New York counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester, a geographic area containing over 3% of the United States' population.

As an initial comment, this ANPR appears to be another unfortunate attempt by HUD to subvert or weaken the Fair Housing Act's (FHA) requirement to affirmatively further fair housing. Since the appointment of HUD Secretary Carson, HUD has been chipping away at federal fair housing policy. The process began when HUD initially decided to illegally withdraw the AFFH rule altogether. That process was challenged, and HUD shifted to an approach that would instead

render the AFFH rule meaningless by withdrawing the Assessment Tool from the HUD website. Additionally, HUD has frozen high-priority fair housing investigations and enforcement actions and is questioning the 2013 discriminatory effects rule. With this new ANPR, HUD is again questioning the 2015 rule and considering engaging in a rulemaking process to undermine the objectives of its AFFH obligation. Regardless of the views of the current administration, the duty to affirmatively further fair housing is a long-standing statutory obligation that Congress has bound HUD to implement under the Act.

The Fair Housing Act Requires AFFH

The FHA does more than prohibit public and private housing discrimination. When the Act was originally enacted in 1968, Congress recognized that government policies had played a significant role in creating and sustaining the entrenched patterns of residential segregation that persist throughout the nation. Consequently, Congress required that HUD take affirmative steps to undo the harm that these government policies had created. Explicitly, Congress required all federal executive agencies to “administer their programs and activities relating to housing and urban development... in a manner affirmatively to further the purposes of this [Act].”¹ The language of the Act that instructs HUD to administer its programs in a manner that would affirmatively further the Act’s fair housing policy requires something more of HUD than simply to refrain from discriminating itself.² In fact the Act “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.”³ For more than four decades, HUD failed to formally implement this part of the Act by not engaging in formal rulemaking. This lack of clear guidance from HUD effectively allowed grantees to abstain from taking any meaningful action to advance fair housing.⁴ The 2015 AFFH Rule and Assessment Tool (“Tool”) developed by HUD attempted to remedy this error and provide a framework for HUD grantees to legitimately engage in AFFH activities.

1. What type of community participation and consultation should program participants undertake in fulfilling their AFFH obligations? Do the issues under consideration in affirmatively furthering fair housing merit separate, or additional, public participation and consultation procedures than those already required of program participants in preparing for their annual plans for housing and community development? Conversely, should public input on AFFH be included as part the Consolidated Plan/PHA Plan public involvement process?

HUD has previously answered this question when issuing the 2015 rule. HUD determined that a separate fair housing analysis would enable participants to give the required and undivided attention to fair housing issues. Merging this process with the Consolidated Plan/PHA Plan would not result in meaningful AFFH activities and would represent another failed attempt by HUD to implement the AFFH mandate. The current

¹ Fair Housing Act, 42 U.S.C. § 3608(d) (2012).

² NAACP v. Sec’y of HUD, 817 F.2d 149, 154 (1st Cir. 1987).

³ *Id.* at 155.

⁴ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS (2010).

rule establishes a robust process for community engagement and involves diverse stakeholders whose voices need to be included if the process is going to yield an inclusive and thorough fair housing analysis and meaningful activities.

2. How should the rule weigh costs and benefits of data collection and analysis? Should the proposed rule allow program participants to develop or use the data of their choice? Alternatively, should HUD require the use of a uniform data set by all program participants in complying with their AFFH obligation? Should it vary by the nature of the program participant? Instead of a data centric approach, should jurisdictions be permitted to rely upon their own experiences? If the latter, how should HUD assess this more qualitative approach?

Municipalities should not be allowed to choose their own data and collection methods. This was one of the central problems with the former Analysis of Impediments (AI) process. There was little or no consistency. For data to be useful, it must be uniform. Without uniformity it is difficult to compare or evaluate AFFH activities. Stakeholders will not be able to participate effectively or evaluate whether the municipality is responding effectively to fair housing obstacles. Further, HUD reiterates throughout recent notices that its current resources do not permit it to provide the kind of support that is required by the current AFFH process. The use of uniform data creates an ease of review that is absent in other types of qualitative analyses and should help reduce the need for additional staffing and resources.

3. How should PHAs report their AFFH plans and progress? Should jurisdictions be required to provide a detailed report of the analysis performed or only summarize the goals? How often should program participants be required to report on their AFFH efforts? Should the proposed rule retain or revise the current timeframes for required AFFH submissions? Should program participants continue reporting annually on their AFFH actions and results in their program plans and annual performance reports or, given the long-term nature of many AFFH goals, should the reporting period be longer? Should planning and/or results be integrated into existing report structures, such as Consolidated Plans and Consolidated Annual Performance and Evaluation Reports (CAPERs) or utilize an alternative structure?

Much of the answer to this question is addressed in the prior question regarding data reporting. For the previously mentioned reasons of accountability and review, participants should continue to report on their progress annually. Without this yearly review, it will be extremely difficult for HUD and local fair housing groups to adequately assess the progress and actions of participants. Using uniform data to produce a comprehensive analysis with input from the community establishes a useful base line. Annual reports make it possible for HUD and the community to assess and monitor progress in implementing activities that affirmatively further fair housing.

4. Should the proposed rule specify the types of obstacles to fair housing that program participants must address as part their AFFH efforts, or should program participants be able to determine the number and types of obstacles to address? Should HUD incentivize program participants to collaborate regionally to identify and address obstacles to affirmatively furthering fair housing, without holding localities accountable for areas outside their control? Should HUD incentivize grantees and PHAs to collaborate in the jurisdiction and the region to remove fair housing obstacles? What are examples of obstacles that the AFFH regulations should seek to address? How might a jurisdiction accurately determine itself to be free of material obstacles?

Under the 2015 AFFH rule, participants could identify their own obstacles or barriers to fair housing. HUD has produced a list of Contributing Factors that is a helpful reference for participants; but it does not require that only those factors are used. However, a standardized template and method of evaluation is necessary. Prior to its abrupt removal, the Assessment Tool had potential to both allow participants the ability to identify their own obstacles and to have a uniform system. HUD could have elected to provide additional technical assistance, constructive guidance, and engaged with recipients to perfect the Assessment Tool. Instead, HUD elected to remove it, leaving many communities to flounder without any meaningful guidance.

As a fair housing organization that serves a large region of New York, we have been able to witness firsthand what happens when local jurisdictions and housing authorities have little or no oversight by HUD and no impetus to review their own policies and programs through a fair housing lens. This passive oversight and emphasis on local control not only encourages these localities and housing authorities to disregard their AFFH responsibilities, but it permits unlawful housing discrimination to flourish. Over the past fourteen years, FHJC investigations have uncovered and documented discriminatory land-use and zoning policies, illegal residency preferences, and other discriminatory barriers to housing choice by multiple jurisdictions throughout the New York City region. If participants were incentivized to collaborate regionally, use uniform data for their analysis, and encourage community engagement, many of these issues could be remedied more efficiently without the need for protracted litigation to obtain compliance.

5. How much deference should jurisdictions be provided in establishing objectives to address obstacles to identified fair housing goals, and associated metrics and milestones for measuring progress?

Under the 2015 rule, jurisdictions are given significant deference to identify their own objectives and metrics that function in their area. This deference, however, exists within the parameters of requiring jurisdictions to engage in meaningful AFFH activities. As such, jurisdictions must engage stakeholders and welcome insight from fair housing groups. In prior iterations of this process, most notably, the AI process, jurisdictions were largely left to their own creative devices to identify and evaluate barriers to fair housing as they saw fit, which led many communities to simply disregard the segregation that resulted from local policies and practices. As a result, many exclusionary policies and

discriminatory barriers were never addressed and were left unchecked for fifty years. Addressing this continuing discrimination has consumed much of the FHJC's work.

Over the past fourteen years, the FHJC has conducted investigations that have led to federal lawsuits in the New York City region with a goal of eliminating illegal housing discrimination and ameliorating ongoing segregation. Our enforcement work has not been solely focused on landlords, real estate brokers, banks, or other private housing providers. We also conducted investigations that led to litigation against the following suburban communities and/or housing authorities: Town of Smithtown in Suffolk County; the Town of Oyster Bay, Village of Great Neck Plaza, and Village of Garden City in Nassau County; and the Town of Yorktown, Town of Bedford, and Town of Eastchester in Westchester County. All but one of these suburban communities received federal housing funds. Even though these communities reported to HUD about their program activities, their segregative policies and practices went largely unnoticed, unchecked, and the discrimination continued unabated for years and, in some cases, decades.

- **Town of Smithtown** – a predominantly white Long Island suburb that operated a Housing Choice Voucher (Section 8) program with a preference for Town residents. The preference worked to ensure that local white residents obtained federal housing assistance in a short time while hundreds of African American and Latino applicants waited for years with little hope of participating in the program. A class of African American and Latino applicants sued the Town alleging discrimination. The Town agreed to settle the case by changing its waiting list policies, providing vouchers to class members, taking certain steps to prevent future discrimination, and paying \$925,000 in damages and fees,
- **Town of Eastchester** - FHJC is currently suing the predominantly white Westchester County Town alleging both disparate impact and intentional housing discrimination in the administration of the Town's Housing Choice Voucher Program and senior housing special use permit. In both programs, the Town has incorporated a preference for local residents, most of whom are white.
- **Town of Bedford** – FHJC filed a federal lawsuit against the Town alleging that the residency preference in its middle-income housing program and zoning code perpetuated racial segregation in the overwhelmingly white Town. The Town settled the case in June 2018 by agreeing to eliminate the discriminatory preferences from its zoning code and to provide financial incentives to developers to build middle-income housing in the Town.
- **Town of Yorktown** – FHJC filed a federal lawsuit against the Town, a predominantly white community in northern Westchester County in 2010. The lawsuit alleged that the Town was discriminating on the basis of race and national origin in the administration of its Section 8 Rental Assistance Program and another affordable housing program by utilizing residency preferences that effectively excluded African Americans and Latinos from receiving housing

opportunities. The Town agreed to remove the preferences from its Section 8 program and zoning code, to reorder the Section 8 waiting list, and implement affirmative marketing for its programs, as well as other injunctive relief.

- **Village of Great Neck Plaza** – a predominantly white Long Island Village with an affordable housing program within its zoning code that gave a first preference to Village residents and a second preference to residents in contiguous villages, most of whom were white. In the first rental building constructed under the Village’s program, all of the affordable units were rented to white tenants. FHJC sued the Village, along with the Nassau County Industrial Development Agency (NCIDA), a County agency that provided financial assistance for affordable housing in the Village subject to the zoning code. The Village and NCIDA agreed to resolve the case by amending the Village’s zoning code to remove the preferences and expand the areas in which affordable housing could be built, providing incentives for developers to build affordable housing in the Village, changing the NCIDA’s financial assistance application requirements and process, and eliminating the challenged restrictions placed by the Village on the existing rental buildings subject to the code.
- **Village of Garden City** – FHJC assisted a local nonprofit organization in Nassau County to investigate allegations that the predominantly white Village created a new zoning classification for County-owned land to prevent affordable housing from being built at the site once the County sold it. Following a bench trial, a federal district court found that the Village’s rezoning was racially discriminatory and violated the Fair Housing Act. The decision was affirmed by the Second Circuit and the parties have entered into a settlement agreement for affordable housing to be built in the Village.
- **Town of Oyster Bay** – FHJC investigated the Town’s affordable housing zoning provisions that imposed local residency preferences on newly constructed senior housing. FHJC then turned over the evidence it obtained to the U.S. Department of Justice which filed a lawsuit against the predominantly white Town which is currently pending in federal court.

A robust and comprehensive AFFH process would compel local jurisdictions and housing authorities to identify, prevent, and eliminate policies and practices that continue to discriminate and perpetuate residential segregation. Many of these policies and practices have gone unchecked for decades despite alleged oversight by HUD and during a time when the AFFH mandate was not being implemented in a meaningful way. This explains in part why the New York City region retains its dubious distinction as being one of the most racially segregated areas in the nation.

6. How should HUD evaluate the AFFH efforts of program participants? What types of elements should distinguish acceptable efforts from those that should be deemed unacceptable? What should be required of, or imposed upon, jurisdictions with unacceptable efforts (other than potential statutory loss of CDBG, HOME, or similar funding sources)? How should HUD address PHAs whose efforts to AFFH are unacceptable?

Contrary to the view that this ANPR and prior notices have taken, the current AFFH review process has actually been successful in its goal to advance fair housing. As HUD itself described in this ANPR, during the initial round of submissions 63% of the submissions were not acceptable. After revisions and submission of additional information, at least 28% of those initially returned were eventually accepted. Clearly the review process is being taken seriously and the submissions from participants are being evaluated by HUD with the type of careful scrutiny that is warranted. Compared to the prior passive, uneven, and laissez-faire approach HUD had taken in monitoring AFFH activities, this process is a significant improvement. Both the participants and stakeholders benefit from the submission of more expansive information and a more rigorous review process. It requires that participants look more closely at the obstacles that impede housing choice or perpetuate segregation and it allows stakeholders increased access to relevant information about their community.

Also, some stakeholders have wrongly suggested that progress made by a jurisdiction or housing authority to increase the supply of affordable housing should count as a meaningful indicator that a community is complying with the AFFH requirement. The AFFH analysis was never intended to merely refer to increasing the supply of affordable housing. Fair housing has more to do with the siting of that housing, whether the location of the housing will increase or reduce poverty concentration and segregation, who will get access to that housing, will the housing be built accessible to people with disabilities, and other vital questions that pertain to access, equity, and fairness.

7. Should the rule specify certain levels of effort on specific actions that will be deemed to be in compliance with the obligation to affirmatively further the purposes and policies of the Fair Housing Act (i.e., “safe harbors”), and if so, what should they be?

No. There can be no safe harbor, exception, substitute, or further delay for meeting the FHA’s obligation to affirmatively further fair housing. All communities need to fully implement activities that expand housing choice, promote equitable development, and reduce residential segregation.

8. Are there any other revisions to the current AFFH regulations that could help further the policies of the Fair Housing Act, add clarity, reduce uncertainty, decrease regulatory burden, other otherwise assist program participants in meeting their AFFH obligations?

Instead of revising the AFFH regulations, HUD should reinstate implementation of the 2015 rule. The rule was suspended before its full potential was realized. If HUD is truly concerned about inefficiencies or burdens, perhaps its time and resources could be better

spent on improving the quality and quantity of technical assistance and guidance available to local jurisdictions to meet their AFFH obligations under the rule instead of attempting to rewrite or weaken the rule.

Questions from the FHJC:

1. If jurisdictions are given increased deference and autonomy to address obstacles to fair housing, how will HUD ensure consistency within regions and from state to state?
2. What methodology or indicators of success will HUD use to evaluate the effectiveness of each local jurisdiction's activities?
3. Without data and reporting uniformity, how will HUD and fair housing advocates be assured that jurisdictions are engaged in meaningful AFFH activities as required by the Fair Housing Act?

Recommendations

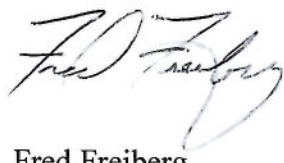
In view of HUD's continued efforts to undermine fair housing, it is the recommendation of the FHJC that HUD terminate the process to revise the Affirmatively Furthering Fair Housing rule. Instead, HUD should promptly reinstate the Assessment Tool and proceed with implementation of the 2015 rule. HUD should more strategically and wisely use its resources to provide the much needed technical assistance and guidance to participants in the AFFH process in order to address any inefficiencies or confusion. The recent "listening sessions" conducted by HUD and this ANPR process appears to be little more than a fishing expedition aimed at eliciting anecdotal reasons that HUD can use to justify abandoning or substantially modifying the 2015 AFFH rule and ultimately hobbling implementation of the Fair Housing Act. The FHJC supports continued implementation of the existing AFFH Rule.

It took extraordinary planning, immense resources, and a tremendous amount of coordination by government institutions at all levels and the private sector to enact policies and institute practices capable of creating the stark patterns of residential racial segregation that still exist today, particularly in our metropolitan regions. It was hard work that required intentionality, persistence, and political will. The job of dismantling that architecture of segregation, reducing residential segregation, promoting equitable development, and expanding housing choices for populations that historically and, to some extent, still have their housing choices limited is also going to be hard work. The same level of intentionality, persistence, and political will is required of us now. The harm caused by our shared history of discrimination and residential segregation, along with the myriad attendant intergenerational inequalities that continue to flow from it, will not be easy to repair. There will be significant burdens to bear and challenges to overcome. It should not surprise anyone that, after decades of delay, local jurisdictions, housing authorities, and HUD find it is a daunting task to implement a process to undo this damage and repair the harm that was inflicted on people and communities of color as well as other vulnerable and marginalized populations for so many years.

In 1968, the United States Congress, in the wake of the tragic assassination of Rev. Dr. Martin Luther King, Jr., decided it was time to enact a historic piece of legislation that would require our nation to change directions and reverse course by prohibiting housing discrimination and mandating that all housing and community development policies and programs be directed to affirmatively further fair housing. That is the unfulfilled mandate of the Fair Housing Act. Fair housing is the stated law of the land, but until we address that unfulfilled mandate by taking meaningful action to create more open, accessible, equitable, and inclusive communities, fair housing will not be a reality for many in our nation.

If you have any questions, please do not hesitate to contact the Fair Housing Justice Center Legal Director, Cooper Sirwatka, at csirwatka@fairhousingjustice.org or 212-400-8201.

Sincerely,



Fred Freiberg
Executive Director
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