

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500
Via regulations.gov [<http://www.regulations.gov/#!submitComment;D=HUD-2013-0066-0001>]

and

Shaun Donovan, Secretary
Department of Housing and Urban Development
451 7th Street S.W.
Washington, DC 20410
Via email at: Secretary.Donovan@hud.gov

September 17, 2013

Re: Re: Comments to [Docket No. FR-5173-P-01] RIN No.2501-AD33
Proposed rule Affirmatively Furthering Fair Housing

Te: Regulatory Division:

The New Jersey Housing and Community Development Network, Fair Share Housing Center and Monarch Housing Associates are active in the field of housing and community development in New Jersey, some for over forty years. Collectively we represent and work with thousands of lower income New Jersey residents. We share the strong belief, expressed through decades of commitment in our work, that the revitalization of our urban neighborhoods, the access of low-income people and people of color to high-opportunity communities, more sustainable and resilient development patterns, and the access of people with special needs to homes in the communities of their choice are all issues that must be addressed together in order to provide true fair housing choice.

New Jersey has been a leader in providing access to opportunity through the Mount Laurel doctrine and New Jersey Fair Housing Act, implementing innovative programs for urban revitalization, developing supportive housing, and planning for walkable, transit-oriented development. Yet we also face strong challenges as one of the nation's most economically and racially segregated states, where many of the nation's wealthiest communities and poorest cities both sit. These challenges have been greatly exacerbated by the devastation of Superstorm Sandy, which hit people of all incomes, races, and backgrounds, but to date has seen, much as with Hurricane Katrina, unequal patterns of recovery.

We support the proposed improvements to regulations that carry out the Fair Housing Act's requirement to ensure that all federal agencies administer their programs relating to housing and community development in a manner that affirmatively furthers fair housing. We commend HUD for undertaking a multi-year effort to obtain the views of a wide range of stakeholders. The proposed rule changes are an important step forward toward the goal of equal opportunity.

We applaud the many proposed regulatory improvements, such as replacing the ambiguous Analysis of Impediments (AI) with an Assessment of Fair Housing (AFH) that will have defined elements and that will spell out specific fair housing “issues” that fund recipients must identify, prioritize, and take proactive steps to address. Rather than drafting an AI in a vacuum only to sit on a shelf, we welcome the proposed rule’s requirement to develop the AFH with input from the community and from stakeholder organizations for submission to HUD. The obligation to affirmatively further fair housing will be strengthened by a clearer and more direct inclusion of affirmatively furthering fair housing considerations and the AFH in the Consolidated Plan and PHA Plan processes for establishing fund allocation priorities.

While there are a number of other features of the proposed rule that we endorse, we take this opportunity to offer suggestions necessary to strengthen a final rule.

1. The proposed rule has no procedure for local advocates to challenge a city or town’s fair housing plan at HUD (except through a formal fair housing complaint addressing specific local actions or policies). Without the ultimate threat of enforcement to ensure compliance with the AFFH rule, the role of community based organizations and advocates in the planning process will be less meaningful. The final rule should have an explicit provision for submission of comments and objections to HUD after the jurisdiction’s submission of the AFH to HUD, and an ongoing complaint mechanism to trigger compliance reviews by HUD where local jurisdictions are alleged to be violating their AFFH certification, or failing to follow their AFH plans. There must be a mechanism in the final rule enabling community based organizations and advocates to appeal to HUD Headquarters Office of Fair Housing and Equal Opportunity (FHEO) a decision by the local HUD office to accept an AFH or a certification that a program participant is affirmatively furthering fair housing choice.

Furthermore, the proposed rule suggests that HUD will review all AFHs submitted by local jurisdiction within 60 days or the AFH will be “deemed accepted.” HUD does not have the capacity to undertake such reviews, and such a process will not be meaningful without adequate budget or staffing. In spite of HUD disclaimers to the contrary, routine approval will create the impression of a “safe harbor” for jurisdictions that may be violating the Act on an ongoing basis. This provision should be removed, and replaced with an audit-type review.

2. The proposed rule requires program participants to: identify and prioritize fair housing issues; identify the most significant fair housing determinants that cause the fair housing issues; and, then “set and prioritize one or more goal(s)” for mitigating or addressing the determinants.

The final rule should not allow program participants to set only one goal, and should ensure that all barriers identified for all protected classes are addressed. Compliance with AFFH must recognize that while barriers for people of diverse racial and ethnic groups, disabilities, and familial status often overlap, they are not interchangeable and all need to be addressed comprehensively to truly further fair housing.

3. The final rule should require program participants to establish benchmarks in the AFH. For each goal, the AFH rule must require program participants to list specific actions that will be taken toward achieving the goal, a timetable for each action, and the entity

responsible for taking each action. This will enable the public and HUD to measure annual progress toward realizing fair housing goals, and to assess the extent to which Consolidated Plan and PHA Annual Action Plans comply with the obligation to affirmatively further fair housing choice.

4. The proposed rule does not modify the Consolidated Plan and PHA Plan performance reporting regulations. The final rule should require annual performance reports to indicate actions carried out to mitigate or address each of the goals in the AFH, describe the results of those actions, and specify which fair housing issues were impacted and how they were impacted.
5. In the preamble and §5.150 of the proposed rule, HUD appears to treat the residential integration goal and the community improvement goal as equally acceptable alternatives for a state or local government to pursue:

A program participant's strategies and actions may include strategically enhancing neighborhood assets (e.g., through targeted investment in neighborhood revitalization or stabilization) or promoting greater mobility and access to areas offering vital assets such as quality schools, employment, and transportation, consistent with fair housing goals.

78 Fed. Reg. at 43716. The use of “or” rather than “and” is a distorted reading of the Fair Housing Act, and disserves both the need for increased access of protected classes to high opportunity communities and comprehensive investment in segregated, higher poverty communities, including the critical need to address involuntary displacement in gentrifying areas and other situations. In the final rule, the “or” must be an “and”.

Especially in a racially and economically segregated state such as New Jersey, any AFFH strategy must include substantial and meaningful mechanisms to increase fair housing choice in high opportunity communities. A jurisdiction's AFFH obligation will likely not be satisfied if it directs most of its low income housing resources into existing racially or poverty concentrated areas, especially in a heavily suburban state such as New Jersey.

On the other side of the current “or” language, involuntary displacement of protected classes through gentrification, eminent domain, and similar mechanisms is not consistent with the AFFH obligation. Nor is the failure to provide a broad based approach to community revitalization – in which economic and community assets like enhanced school resources, economic development, job training, improved parks, full service grocery stores, and community policing are part of a truly comprehensive approach to revitalization. To the degree the rule may suggest that a jurisdiction can involuntarily displace existing low-income populations and/or fail to invest in comprehensive community revitalization, and still AFFH, that language must be changed.

6. The final rule should ensure that the definitions of “disproportionate housing needs” and “segregation” at §5.152 need to be more clearly focused on regional housing needs and segregation, rather than conditions “within the jurisdiction.” In much of New Jersey, CDBG funds go to particular jurisdictions whose housing markets are integrally connected to the surrounding region. HUD should require a regional analysis – for example, ensuring that an urban area does not ignore the barriers to fair housing choice just beyond its borders, and

conversely a suburb that has excluded people from a nearby city does not get to further exclude them by ignoring them in their analysis.

7. The final rule should be far more explicit that all of a program participant's housing and community development resources, as well as its policies, practices, and procedures (such as zoning which inhibits development of permanent supportive housing or multifamily housing) must be assessed in the AFH and in any certification that it is affirmatively furthering fair housing. As written, the proposed rule could be misunderstood to only consider use of HUD funds.
8. The proposed and final AFH, as well as related information used to create the AFH, should be posted on a readily apparent webpage of the program participant.

As with other aspects of the proposed rule, the provisions requiring jurisdictions to make information available to the public are correct in their direction. We believe, however, that it is crucial to expand both their breadth and depth. One of the primary stated improvements is the proposed rule's provisions for "community participation as an integral part of [] AFHs."¹ Sections 91.100 through 91.115, provide that non-HUD provided information made public by the participants would be limited to information a participant elects to incorporate into its AFH. This directive potentially excludes from public view a vast array of data and information, notwithstanding that such data or information is relevant or even critical to a respectful and responsible collaborative process.

Secondly, these sections provide that the 'publishing' requirement may be met by providing a summary of each document in one general circulation newspaper and hard copies of such summaries in specified public places.

The proposed forms of publication continue to be necessary to reach many interested people. However, in an age of virtually unlimited internet capacity, the final rule should, in addition, require that documents related to the AFH, the Consolidated Plan and all Performance Reports, including addenda, attachments and all supporting or explanatory data and information from which the document is derived, be posted, in full length, in searchable format, on a dedicated webpage directly accessible from such jurisdiction's home page, sufficiently in advance of public hearing, comment periods and submission dates to allow proper review and analysis by the public.

We propose that equivalent publication requirements be incorporated into rules governing the development and implementation of Strategic Plans and Action Plans under Section 91.200 et sec.

9. Proposed rule §5.164 laudably requires updating the AFH after a disaster and other significant events, however, the rule does not integrate such updating with the timeline for the Action Plan recovery expenditures under CDBG-DR. We ask that HUD establish a

¹ "The rule promotes these objectives and responds to the GAO's observations by: ... e. Bringing people historically excluded because of characteristics protected by the Fair Housing Act into full and fair participation in decisions about the appropriate uses of HUD funds and other investments, through a requirement to conduct community participation as an integral part of program participants' AFHs;" 78 FR 43711

requirement that, as part of the Action Plan process under CDBG-DR, grantees be required to discuss how the AFFH related data that the CDBG-DR Notice requires be provided in that Action Plan already impacts the barriers identified in the AFH and/or creates any new barriers, and how the Action Plan's programs address those barriers. Comments submitted under separate cover by several of the undersigned groups and groups from other states further address the need for more specific treatment of the disaster recovery context in greater detail.

10. The final rule should explicitly state that, after consulting with other HUD program staff, HUD's Office of Fair Housing and Equal Opportunity (FHEO) staff have full authority over the AFH review and acceptance function, as well as the certification that a program participant is affirmatively furthering fair housing.

We believe that with modifications necessary to ensure enforcement of participants' AFFH commitments, provide concrete goals and benchmarks through the AFH, address the multiplicity of causes and solutions on both local and regional levels, and ensure a transparent collaborative process in the development of AFHs and Consolidated Plans, the rule can become an effective tool to address discrimination. Thank you for your consideration of our thoughts and recommendations.

Very truly yours,

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