



New Frontiers in Affirmatively Furthering Fair Housing

by Michael Allen, Relman, Dane & Colfax, PLLC

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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.”



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).



HUD Regulations

- Analysis of Impediments (1994-2015)
 - Broad Requirements
 - Details in *Fair Housing Planning Guide*
 - Enforcement Episodic
- AFFH Rule (2015)
 - Specific Requirements, Driven by Data
 - HUD Guidance Forthcoming
 - Front-End Review and Enforcement Robust
 - Stronger Public Participation Requirements



Old Rule



Reports Required by HUD from “Entitlement Jurisdictions”

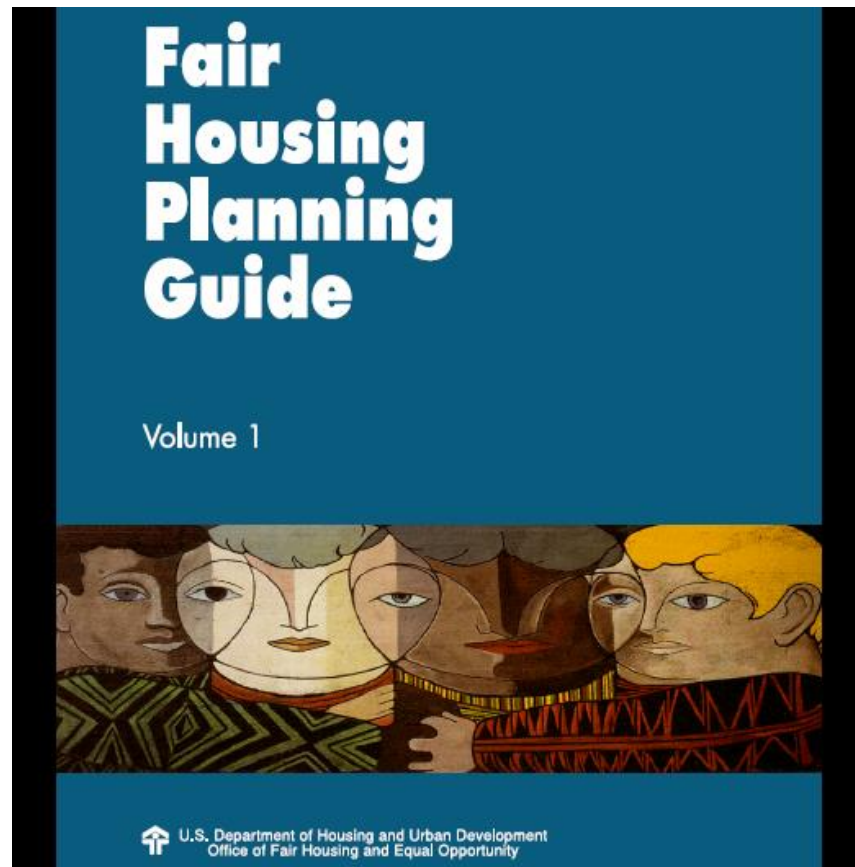
- Consolidated Plan
- Annual Action Plan
- Consolidated Annual Performance and Evaluation Report (CAPER)
- Analysis of Impediments to Fair Housing Choice (AI)



CDBG/Con Plan AFFH Regs

- A grantee is “required to submit a certification that it will affirmatively further fair housing, which means that it will (1) conduct an analysis to identify impediments to fair housing choice within the jurisdiction; (2) take appropriate actions to overcome the effects of any impediments identified through that analysis; and (3) maintain records reflecting the analysis and actions in this regard.”
 - 24 C.F.R. § 570.601(a)(2)
 - 24 CFR § 91.225(a).

HUD's Fair Housing Planning Guide





Obligations Apply to All Funds

- “Although the grantee’s AFFH obligation arises in connection with the receipt of Federal funding, its AFFH obligation is not restricted to the design and operation of HUD-funded programs at the State or local level. The AFFH obligation extends to all housing and housing-related activities in the grantee’s jurisdictional area whether publicly or privately funded.”
 - *Fair Housing Planning Guide* (1995), at p.1-3.



Impediment “Hot Spots”

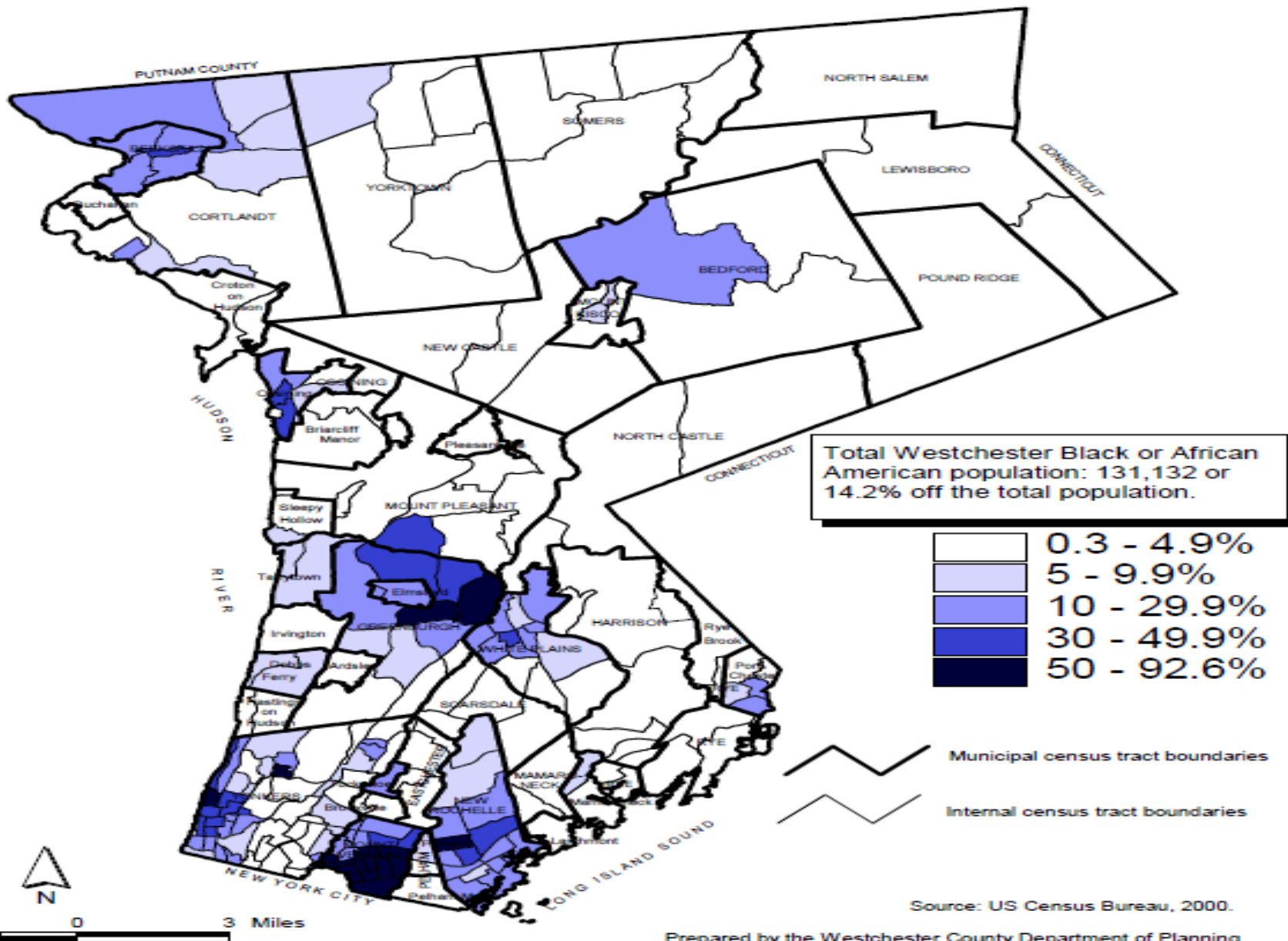
- Zoning/Land Use
- Low Income Housing Tax Credits
- Residency Preferences/Requirements
- Funding
- Section 8
- Source of Income



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”

WESTCHESTER COUNTY, NY



Percent Black Persons



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.



Settlement Terms

- County required to ensure development of 750 affordable housing units, within 7 years, in the whitest neighborhoods
 - 660 units must be built in municipalities with African-American population of less than 3% and Latino population of less than 7%
 - Additional integrative criteria at the census block group level



Settlement Terms

- County Returns \$30 Million to HUD
 - \$21.6 Million to Fund Integrative Units
 - \$7.5 Million to Pay “Relator’s Share” for Ferreting Out False Claims
- County Must Supply an Additional \$30 Million for Integrative Units
- County Pays \$2.5 Million in Attorneys’ Fees and Costs



Reviving AFFH Enforcement

- Deputy Secretary Ron Sims: “This is consistent with the president’s desire to see a fully integrated society.... Until now, we tended to lay dormant. This is historic, because we are going to hold people’s feet to the fire.”



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*

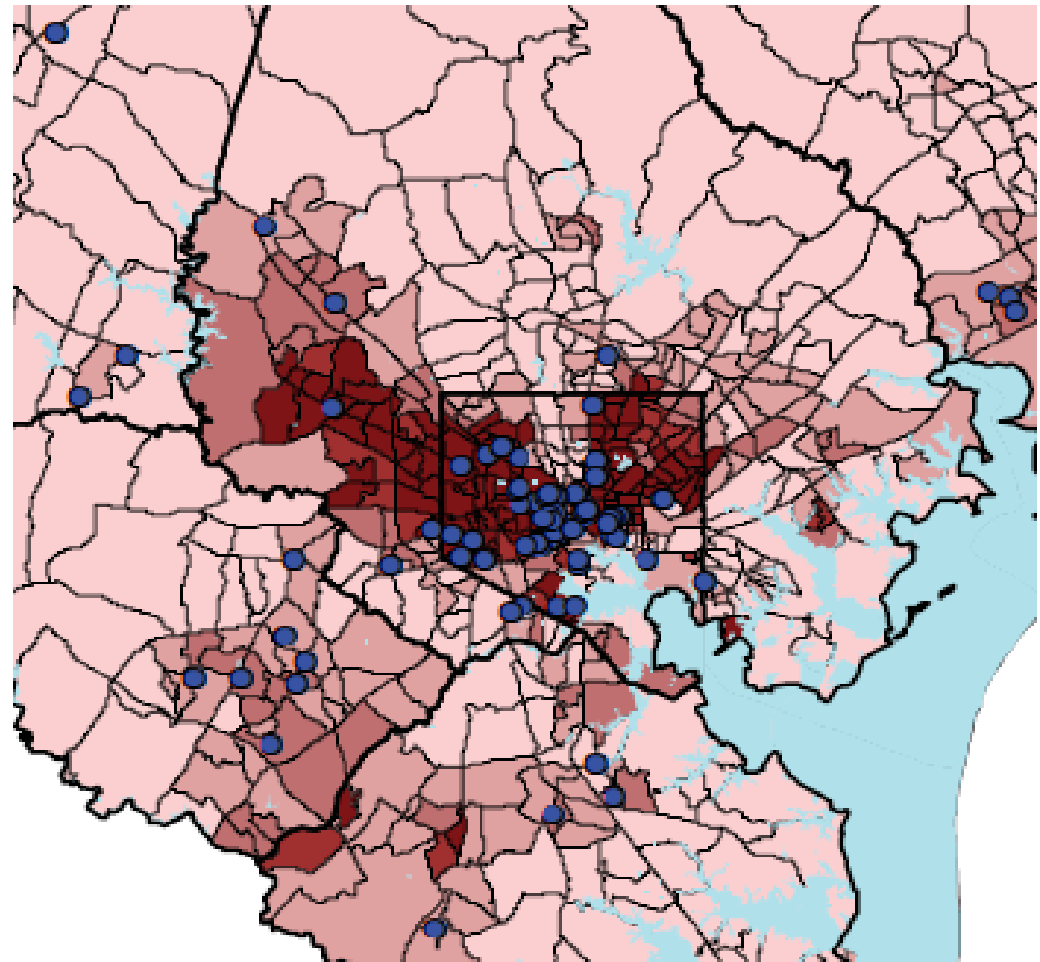
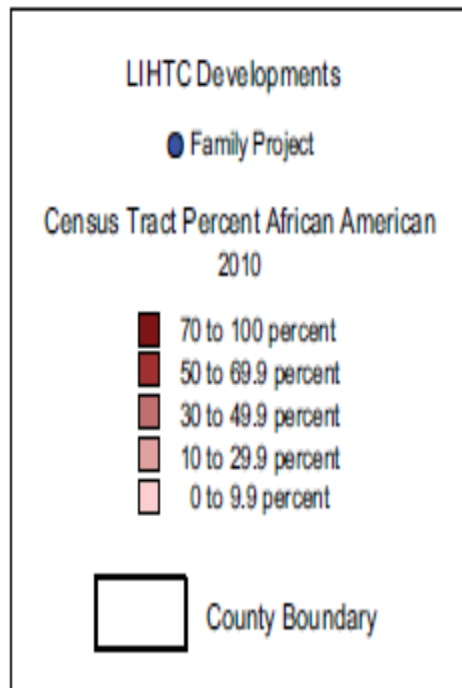
- *Latino Action Network*, Conciliation Agreement (May 30, 2014):
<http://www.relmanlaw.com/docs/NewJerseyAgreementsigned5-30-2014.pdf>



State of Maryland

- Baltimore Regional Housing Campaign challenged State LIHTC “threshold criteria” requiring local approval/local contribution
 - Mapping demonstrates effect:
 - Lots of LIHTC family units in low-opportunity neighborhoods
 - Few LIHTC family units in high-opportunity neighborhoods

Map 1-2. LIHTC Family Projects by Census Tract Percent African American (2010) Baltimore Region, Maryland





BRHC v. Maryland: Settlement

- http://www.relmanlaw.com/docs/MarylandVCA_HUD_Material.pdf (9/28/17):
 - Eliminate local “pocket veto” provisions
 - Adopt policies supporting integration
 - Build 1500 family units in high opportunity areas
 - Higher LIHTC scores for larger bedrooms
 - \$225,000 in monetary relief



New Rule*

- *On January 5, 2018, HUD published a Federal Register notice indefinitely suspending the obligation of more than 1000 local governments to conduct an Assessment of Fair Housing.
- NFHA and other civil rights groups sued under the APA and sought a preliminary injunction.
- On May 23, 2018, HUD published Federal Register notices withdrawing the Assessment Tool and instructing recipients to go back to the AI.
- On August 17, 2018, Court dismissed complaint.
- On Sept. 14, 2017, Plaintiffs moved to amend and for reconsideration.



AFFH

- ***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.



AFFH

- 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



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



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



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



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.”



Honest Conversations About Race and Segregation

- AFH process requires Program Participants to initiate and follow through on jurisdiction-specific community conversations about race, segregation and access to opportunity areas.



Objections/Complaints from the Public

- By enhancing the public participation requirements in the AFH, HUD invites members of the public to hold Program Participants accountable
- Flawed AFHs (or lack of public participation) can give rise to complaints and HUD compliance reviews



New AFFH Rule Governs All Funds, Not Just Federal Funds

- Proposed Rule emphasizes that a participant's AFFH obligation is not bounded by what it can do with the HUD funds it has received. The strategies and actions “will be accomplished primarily by making investments with federal *and other resources....*” §5.152; 78 Fed. Reg. 43716.



All Enforcement Options Remain

- The proposed Rule leaves in place HUD's enforcement powers with respect to the AFH and compliance with participants' AFFH obligations. *See, e.g.*, 24 C.F.R. §§91.500(b)(HUD approval action); 570.304 (making of grants); 570.485(c)(making of grants); 570.601 and 570.602 (civil rights certification requirements); 570.904 (equal opportunity and fair housing review criteria); 570.910—570.913 (corrective and remedial actions).



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)