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HUD's New AFFH Rule: The Importance of the Ground Game

by Michael Allen | September 2015

On July 13, 2015, the U.S. Department of Housing and Urban Development (HUD) promulgated a Final Rule on Affirmatively Furthering Fair Housing. (2) Coming nearly six years after the ground-breaking Westchester litigation, (3) which exposed the county's flagrant violations of its civil rights obligations, many advocates expected HUD to adopt a "law enforcement" approach that would require State and local governments and public housing authorities to strictly comply with those obligations, on pain of losing their federal funds (which, in FY 2015 amounted to more than \$38 billion). (4)

What HUD produced is a Final Rule long on "carrots," but painfully short on "sticks." To compound that problem, HUD does not currently have—and is very unlikely to acquire—sufficient resources to police the compliance of 1200 block grant recipients and 3400 public housing agencies. As a consequence, the promise of the Affirmatively Furthering Fair Housing (AFFH) mandate is likely to be realized only in communities where grassroots and legal advocates mobilize and create their own enforcement strategies. 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."

When Congress passed the Fair Housing Act of 1968, it gave HUD the power to withhold, condition, or terminate federal funding to recipient state and local governments that engaged in discrimination or failed to "affirmatively further fair housing." (5) In its role as funder and regulator, HUD has what some federal courts have termed "immense leverage" to secure compliance with civil rights objectives. (6) This power is critical, because the Fair Housing Act does not give private litigants a right to enforce this obligation in court. As then-Judge Stephen Breyer

noted nearly 30 years ago, this AFFH mandate “imposes ... an obligation to do more than simply refrain from discriminating ... 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.” (7)

In part because HUD was a defendant in a number of AFFH cases early on, (8) and in part because of a general agency queasiness about withholding federal funds from local governments, HUD did not promulgate regulations until 1995. (9) Since then, as an explicit regulatory precondition to their eligibility for federal funds, recipients have been required to certify that they will comply with AFFH and other federal civil right laws. (10) Many have done so without a full understanding of what is required by these certifications and knowing that HUD would not challenge their validity. Many recipients simply ignored their civil rights certifications, and continued to receive and spend billions of dollars in federal funds to build affordable housing in disadvantaged neighborhoods where they faced less resistance and where families were often consigned to another generation of poverty, crime and failing schools. We have made precious little progress in ending discrimination and segregation over the past five decades, in part because HUD has generally refrained from using its “immense leverage” to secure those objectives. (11)

While HUD’s Final Rule plows some new ground, it does not revolutionize the field. The Final Rule sharpens a recipient’s obligations to identify and overcome segregation-based impediments, but its overall tenor is one of collaboration, rather than enforcement. In fact, while the Final Rule leaves in place HUD’s powers to withdraw funding in the face of non-compliance, (12) HUD’s media roll-out of the Final Rule repeatedly emphasized that “enforcement is a last resort.” (13)

On the positive side, the Final Rule makes explicit—for the first time—that every State and local government (and every public housing authority) that receives HUD funds must take “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.” (14) Those actions must “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.” (15) Now, theoretically at least, every community that receives federal grants for housing and community development will be required to have an honest conversation about segregation and devise a local plan to dismantle it.

The Final Rule replaces the long-ignored Analysis of Impediments with a new framework—the Assessment of Fair Housing, or AFH—through which Recipients must identify, analyze and overcome barriers to fair housing choice, and ties it to other planning processes through which federal, state and local resources are allocated. In other words, it creates a fair housing lens for all of a participant’s decisions about housing and community development needs. Beginning in April 2016, HUD grant recipients must submit AFHs to HUD, which can reject noncompliant AFHs, and impose a range of sanctions for noncompliance, up to and including withholding federal funds. As my firm has found since the Westchester decision, the prospect of losing federal funds because of civil rights noncompliance tends to bring recalcitrant recipients to the table, often more effectively than conventional civil rights litigation. (16)

The new framework requires greater reliance on data (which will be supplied by HUD), greater transparency and public participation in the development of the AFH, and greater accountability with respect to expanding housing choice. Most importantly, it will require recipients to initiate and follow through on jurisdiction-specific community conversations about race, segregation and access to opportunity areas.

While the Final Rule is not what many of us had hoped for, it does provide a foundation on which civil rights advocates can build anti-segregation campaigns at the local level. Local capacity-building will require community

education and organizing by the national fair housing advocacy organization; financial support from the philanthropic sector; and lawyers prepared to bring enforcement actions.

My firm stands ready to do its part. Anyone else with me?

Endnotes

(1) Michael Allen is a partner in the civil rights firm Relman, Dane & Colfax, PLLC. He was co-counsel in the Westchester case and lead counsel in nearly a dozen other AFFH cases brought in federal courts or as HUD administrative complaints. Extensive AFFH enforcement and compliance materials are available at <http://www.relmanlaw.com/affh/index.php>

(2) See Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272-42371, July 16, 2015 (Final Rule), codified at 24 C.F.R. §§5.150 – 5.168, and amending 24 C.F.R. Parts 91, 92, 570, 574, 576 and 903.

(3) U.S. ex rel. Anti-Discrimination Center v. Westchester County, New York, 495 F.Supp.2d 375, 387-88 (S.D.N.Y. 2007)(“In the face of the clear legislative purpose of the Fair Housing Act, enacted pursuant to Congress's power under the Thirteenth Amendment as Title VIII of the Civil Rights Act of 1968, to combat racial segregation and discrimination in housing, an interpretation of ‘affirmatively further fair housing’ that excludes consideration of race would be an absurd result.”); U.S. ex rel. Anti-Discrimination Center v. Westchester County, New York, 668 F.Supp.2d 548, 564 (S.D.N.Y. 2009)(holding that “the central goal of the obligation to AFFH [is] to end housing discrimination and segregation.”). The author was co-counsel for the plaintiff-relator in the Westchester litigation.

(4) HUD’s final appropriations for Fiscal Year 2015 provide for approximately \$4.5 billion in HUD block grant funding for State and local governments and \$33.5 billion in public housing and rental assistance funding to public housing authorities and similar agencies.

(5) See 42 U.S.C. §3608(e)(5). See also 42 U.S.C. §§5304(b)(2), 5306(d)(7)(B)(Housing and Community Development Act of 1974, as amended); 42 U.S.C. §12705(b)(15) (consolidated planning); 42 U.S.C. §1437C-1(d)(16) (public housing). HUD has promulgated regulations implementing the AFFH requirements for entities receiving block grant and public housing funds. See 24 C.F.R. §§570.602; 91.225, 91.325, 91.425, 903.7(o).

(6) NAACP v. Sec’y of Housing and Urban Development, 817 F.2d 149, 156 (1st Cir. 1987).

(7) *Id.* at 155.

(8) See, e.g., NAACP v. Sec’y of Housing and Urban Development, 817 F.2d 149, 155 (1st Cir. 1987).

(9) 60 Fed. Reg. 1896 ff. (January 5, 1995).

(10) These include Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and Section 109 of the Housing and Community Development Act of 1974.

(11) To be fair, whether through the phenomenon of “industry capture” or because of a political reluctance to disrupt funding to State and local governments, most federal agencies have had a poor record of using funding leverage to secure. See, e.g., E. Pasachoff, Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off,

124 Yale. L.J. 248 (Nov. 2014); O. Johnson, Beyond the Private Attorney General: Equality Directives in American Law, 87 N.Y.U. Law Rev. 1339 (Nov. 2012). As this article was going to press, the Second Circuit affirmed HUD’s authority, pursuant to the “old” AFFH regulations—24 C.F.R. § 91.500(b)—to withhold block grant funds because Westchester County’s AFFH certification was “inaccurate” and without supporting evidence. County of Westchester v. U.S. Dep’t of Hous. & Urban Dev., et al. U.S. Court of Appeals for the Second Circuit, Case No. 15-2294-cv (September 25, 2015)(slip op. at 48).

(12) 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).

(13) PBS NewsHour, July 9, 2015. Transcript available at <http://www.pbs.org/newshour/bb/new-rules-require-cities-fight-housing-segregation/> (last viewed August 20, 2015).

(14) 24 C.F.R. §5.152 (definition of “Affirmatively furthering fair housing”).

(15) Id.

(16) See, e.g., Conciliation Agreement between Texas Low Income Housing Information Service, et al. and the State of Texas (May 25, 2010), available at <http://www.relmanlaw.com/docs/Texas-AFFH-Final-Conciliation-Agreement-signed-by-HUD.pdf> (resolution governing \$1.7 billion in disaster relief funding); Conciliation Agreement between Latino Action Fund, et al. and the State of New Jersey (May 30, 2014), available at <http://www.relmanlaw.com/docs/New-Jersey-Conciliation-Agreement-signed-5-30-2014.pdf>

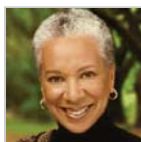


Michael Allen is a partner at the civil rights law firm Relman, Dane & Colfax.

More in Discussion 16: A New Approach to Affirmatively Furthering Fair Housing



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