

Affirmatively Furthering Fair Housing

By Ed Gramlich, Director of Regulatory Affairs, National Low Income Housing Coalition

Administering agency: HUD's Office of Fair Housing and Equal Opportunity (FHEO)

Year started: 1968

Population targeted: The Fair Housing Act's protected classes: race, color, religion, sex, national origin, disability and familial status (in other words, households with children).

See also: *Consolidated Planning Process, Public Housing Agency Plan*

States and local governments must certify that they are affirmatively furthering fair housing (AFFH) in their Consolidated Plans (ConPlans) and Public Housing Agency Plans (PHA Plans). In order to comply, these jurisdictions must have an Analysis of Impediments to Fair Housing Choice, also known as an AI.

While these requirements have historically been overlooked, affirmatively furthering fair housing took on new importance in the wake of a court decision on an AFFH case in Westchester County, NY and renewed attention from HUD under the Obama administration. Significant new regulations were proposed on July 19, 2013; final regulations are expected late 2014.

HISTORY

Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act) requires HUD to administer its programs in a way that affirmatively furthers fair housing. The laws that establish the Community Development Block Grant (CDBG) program, the Comprehensive Housing Affordability Strategy (CHAS), and the PHA Plan each require jurisdictions to certify in writing that they are affirmatively furthering fair housing. States must assure that units of local government receiving CDBG or HOME funds comply. Further, HUD's *Fair Housing Planning Guide* states that the obligation to affirmatively further fair housing applies to all housing and housing-related activities in a jurisdiction, whether publicly or privately funded.

SUMMARY

Affirmatively furthering fair housing is defined in CDBG and ConPlan regulations as:

- Having an Analysis of Impediments to Fair Housing Choice (AI).
- Taking appropriate actions to overcome the effects of impediments.
- Keeping records reflecting the analysis and showing actions taken.

The regulations for public housing and vouchers are similar.

Analysis of Impediments (AI). In the context of an AI, an impediment to fair housing can be an action or an inaction that restricts housing choice or that has the effect of restricting housing choice. Some policies or practices might seem neutral but in fact can deny or limit the availability of housing. Obvious impediments include outright discrimination based on race or ethnicity, refusing to rent to families with children, or insurance practices that reinforce segregated housing patterns. Less obvious impediments include lack of large rental units, inadequate multilingual marketing, zoning that limits group homes, and insufficient public transportation to areas with affordable housing.

AIs are their own separate documents, the contents of which are not prescribed by HUD. There is no specific term for a PHA's analysis of impediments. They are available to the public. HUD's *Fair Housing Planning Guide* defines an AI as:

1. A comprehensive review of a jurisdiction's laws, regulations, and administrative policies, procedures, and practices.
2. An assessment of how those laws, regulations, and practices affect the location, availability, and accessibility of housing.
3. An assessment of conditions, both public and private, affecting fair housing choice for all protected classes. The protected classes are race, color, religion, sex, national origin, disability, and familial status (in other words, households with children).
4. An assessment of the availability of affordable, accessible housing in a range of unit sizes.

The *Fair Housing Planning Guide* explains that analyzing fair housing impediments and taking appropriate actions means:

- Eliminating housing discrimination in the jurisdiction.
- Promoting fair housing choice for all.
- Providing housing opportunities for people of all races, colors, religions, genders, national origins, disabilities and family types.
- Promoting housing that is structurally usable by all people, particularly those with disabilities.
- Fostering compliance with the nondiscrimination features of the Fair Housing Act.

The name of the agency or department that will have an AI varies from locality to locality. Generally, the office that manages the Consolidated Planning (ConPlan) process program should be able to provide a copy, and the public housing agency (PHA) should have a copy of its own analysis. In addition, advocates can contact the Fair Housing and Equal Opportunity (FHEO) staff at their HUD Regional Office.

AIs are not submitted to HUD and they are not a formal piece of the ConPlan's Annual Action Plan or Five-Year Strategy. However, a September 2, 2004 HUD policy memorandum says that a jurisdiction may include in its Annual Action Plan the actions it plans to take in the upcoming year to overcome the effects of impediments to fair housing. Note that this is only a may, not a must; in addition, many jurisdictions do not know this policy memorandum exists. Also, some jurisdictions point to a part of their ConPlan or Action Plan called "barriers to affordable housing" and claim that to be the AI. The law creating the CHAS (the statutory root of the ConPlan) requires such a discussion, but this is not an AI. Examples of barriers to affordable housing in that law include tax policies and building fees.

Timeframe. According to the *Fair Housing Planning Guide*, AIs must be updated on the same timeframe as the ConPlan updates. So, theoretically, if a jurisdiction has to come up with a new ConPlan every five years, then it should also revise its AI on a five-year cycle in time to inform revisions to the ConPlan. However, the September 2, 2004 HUD policy memorandum states that a jurisdiction "should update, where appropriate, its AI... to reflect the current fair housing situation in their community," and that "each jurisdiction should maintain its AI and update the AI annually where necessary." That policy memorandum also implies that jurisdictions that do not make appropriate revisions to update their AIs could face problems. Because much can change before a five-year ConPlan update, advocates might want to be sure that their jurisdiction's AI is up-to-date and reflects all impediments.

Public participation. Unfortunately, the regulations do not directly tie public participation in CDBG, the ConPlan, or the PHA Plan with the AI. However, the *Fair Housing Planning Guide* offers a few words that advocates might be able to use: "Since the FHP [Fair Housing Plan] is a component of the Consolidated Plan, the citizen participation requirements for the Consolidated Plan apply." The introduction to the *Fair Housing Planning Guide* stresses that "all affected people in the community must be at the table and participate in making those decisions. The community participation requirement will never be more important to the integrity, and ultimately, the success of the process."

The *Fair Housing Planning Guide* also suggests that, before developing actions to eliminate the effects of impediments, a jurisdiction "should ensure that diverse groups in the community are provided a real opportunity" to take part in the process of developing actions to be taken. HUD "encourages jurisdictions to schedule meetings [for public comment and input] to coincide with those for the Consolidated Plan."

Monitoring compliance. In order to get CDBG, HOME, or public housing money, jurisdictions must certify that they are affirmatively furthering fair housing before the start of the CDBG, HOME, or public housing program year. All annual plans have this written certification, signed by the authorized official. There must be evidence that supports this pledge, and such evidence must be available to the public.

HUD can disapprove a PHA Plan or a ConPlan (and therefore block receipt of CDBG and HOME dollars) if a certification is inaccurate. The September 2, 2004 policy memorandum gives examples of an inaccurate certification:

1. There is no AI.
2. The AI is substantially incomplete.
3. No actions were taken to overcome the impediments.
4. The actions taken were “plainly inappropriate” to address impediments.
5. There are no records.

Another situation that could cause HUD to look more carefully at an AI is the failure to make “appropriate revisions to update the AI.” This can be an important advocacy tool in years between new five-year ConPlans and PHA Plans. If there are major changes in conditions for people who are members of protected classes, advocates should make sure the AI is revised to show those changed conditions.

In general, if advocates think that a jurisdiction’s AI is inadequate or that the jurisdiction has not taken reasonable actions to overcome impediments to fair housing, they should write a complaint to the FHEO Regional Office.

CDBG regulations also allow a certification to be challenged if there is evidence that a policy, practice, standard, or method of administration that seems neutral really has the effect of significantly denying or adversely affecting fair housing for persons of a particular race, color, religion, sex or national origin. PHA Plan regulations also claim that a certification can be challenged.

In the Annual Performance Report related to the ConPlan, called the CAPER, a jurisdiction must describe the actions taken in the past year to overcome the effects of impediments in the CAPER template report CR-35.

If advocates think that the actions taken to overcome impediments to fair housing were inadequate, it is important to write a complaint to the jurisdiction and to send a copy to the FHEO Regional Office.

Records to be kept. CDBG regulations require jurisdictions to keep three types of records:

1. Documents showing the impediments and the actions carried out by the jurisdiction with CDBG and other money to remedy or lessen impediments.
2. Data showing the extent to which people have applied for, participated in or benefited from any program funded in whole or in part with CDBG. HOME regulations require similar data reporting. The CDBG and HOME data is in the CAPER template report CR-10.
3. Data indicating the race, ethnicity and gender of those displaced as a result of CDBG use, plus the address and census tract of the housing to which they were relocated.

A February 9, 2007 joint memorandum from the Assistant Secretaries for HUD’s Office of Fair Housing and Equal Opportunities (FHEO) and Office of Community Planning and Development (CPD), which administers CDBG and HOME, suggests that a jurisdiction keep for the record: (1) copies of local fair housing laws and ordinances, (2) the full history of the development of its AI, (3) options available for overcoming impediments, (4) a list of those consulted, (5) planned actions and actions taken, and (6) issues that came up when actions were carried out.

The *Fair Housing Planning Guide* also suggests that jurisdictions keep transcripts of public meetings or forums and public comments or input, a list of groups participating in the process, and a description of the financial support for fair housing, including funds or services provided by the jurisdiction.

DEVELOPMENTS IN RECENT YEARS

Since 2009, the Administration has significantly increased its AFFH enforcement activity, much of it quietly behind the scenes and some of it openly. HUD has challenged Westchester County, NY, the State of Texas, Houston, TX, Dallas, TX, Marin County, CA, Joliet, IL, Sussex County, DE, and Dubuque, IA.

FORECAST FOR 2014

The long-awaited proposed rule intended to improve the obligation to affirmatively further fair housing was published for comment on July 19, 2013. Some of the key features of the proposed rule are summarized here.

The proposed rule would provide an expansive definition of “affirmatively furthering fair housing” to mean taking proactive steps beyond simply combating discrimination. It would mean fostering more inclusive communities and access to community assets for all protected classes. Specifically it would mean taking proactive steps to:

- Address significant disparities in access to community assets.
- Overcome segregated living patterns.
- Support and promote integrated communities.
- End racially and ethnically concentrated areas of poverty.

The Assessment of Fair Housing (AFH). The proposed rule would replace the current Analysis of Impediments (AI), for which no format or standards exist, with a standardized Assessment of Fair Housing (AFH) requiring it to:

- Have a fair housing analysis based on HUD-provided data and community input.
- Identify fair housing issues across the protected classes within the jurisdiction and region, such as:
 - Integration and segregation patterns and trends;
 - Racially or ethnically concentrated areas of poverty;
 - Significant disparities in access to community assets; and
 - Disproportionate housing needs.
- Identify the most significant factors influencing fair housing issues.
- Determine fair housing priorities and justify those priorities.
- Set goals for mitigating or addressing the most significant factors causing fair housing disparities.

HUD provided data. HUD intends to provide each “program participant” with nationally uniform local and regional (or state-level) data on: patterns of integration and segregation; racial and ethnic areas of concentrated poverty (to be known as RCAPs and ECAPs); disproportionate housing needs based on the protected classes; people with disabilities; and, families with children. HUD also intends to provide data related to education, poverty, transit access, employment, exposure to environmental health hazards, and other important community assets. Additional or better local or regional data could be used to supplement HUD data. HUD has a prototype fair housing data mapping tool. The proposed rule does not mention such a tool, but it does indicate that additional guidance and information will be provided later.

Public participation. The proposed rule would require the public participation provisions of the ConPlan and PHA Plan be followed in the process of developing the AFH, obtaining community feedback, and addressing complaints. ConPlan jurisdictions would have to consult with community and regionally-based (or state-wide) organizations that represent protected class members, organizations that enforce fair housing laws, and fair housing organizations and nonprofits. Consultation would have to occur throughout the fair housing planning process, and would have to seek input regarding how the AFH goals inform the priorities and objectives of the ConPlan.

At least one public hearing regarding AFH-related data and affirmatively furthering housing in a jurisdiction’s housing and community development programs would be required before the proposed AFH is published for comment. In addition, the required minimum of two ConPlan hearings for entitlement jurisdictions (and only one for states) would have to address the jurisdiction’s proposed strategies and actions for affirmatively furthering fair housing consistent with the AFH.

The proposed rule adds that jurisdictions must encourage participation by residents of public and assisted housing, including Resident Advisory Boards and resident councils, in developing and implementing the AFH. Also, jurisdictions would be required to describe their procedures for assessing residents' language needs, including any need for translation of notices and other vital documents. At a minimum, jurisdictions would have to take reasonable steps to provide language assistance to ensure meaningful access to participation by people with limited English proficiency.

AFH Timing. HUD would require program participants to submit their initial AFH to HUD at least 270 calendar days before the start of the program year prior to the start of a new Consolidated Plan or PHA Plan planning process. Future AFHs would have to be submitted at least 195 days before. The lead time emphasizes HUD's intent that the AFH should inform the Consolidated Plan and PHA Plan process.

Each ConPlan program participant and each PHA participating with a local government in developing an AFH would be required to submit an AFH at least once every five years. PHAs undertaking their own AFH would be required to have annual updates.

HUD review of the AFH. Unlike the AI, the AFH would be submitted to HUD for review and approval. HUD could decide not to accept an AFH, or a portion of one, if it is inconsistent with civil rights laws or if the assessment is substantially incomplete. For example:

- If the AFH was developed without community participation or consultation.
- If the AFH fails to satisfy the required elements of the regulation, such as priorities that are materially inconsistent with data and other evidence.

In order for a ConPlan or PHA Plan to be approved, and therefore a program participant to receive funds, an approved AFH would be necessary.

The AFH and the ConPlan. The ConPlan's "Strategic Plan" (five-year plan) would have to describe how a jurisdiction's priorities and specific objectives will affirmatively further fair housing by having strategies and actions consistent with the goals and other elements of the AFH. The ConPlan's Annual Action Plan would have to describe the actions a jurisdiction plans to carry out in the upcoming year to address fair housing issues identified in the AFH.

The proposed rule would refine the current definition of "certifying" that a jurisdiction will "affirmatively further fair housing" by stating that the jurisdiction "will take meaningful actions to further the goals identified in the AFH...and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing."

FOR MORE INFORMATION

- National Low Income Housing Coalition, 202-662-1530, www.nlihc.org
- NLIHC's Affirmatively Furthering Fair Housing webpage is, <http://nlihc.org/issues/affh>
- HUD Office of Fair Housing and Equal Opportunity (FHEO), <http://1.usa.gov/VFQ4Nk>
- HUD Affirmatively Furthering Fair Housing webpage, <http://1.usa.gov/VFQbbE>
- HUD's *Fair Housing Planning Guide*, Vol. 1 (#HUD-1582B-FHEO), www.hud.gov/offices/fheo/images/fhpg.pdf
- HUD's Office of Affordable Housing has a good chapter summarizing the *Fair Housing Planning Guide*, "Affirmatively Furthering Fair Housing" (page 18) in *Fair Housing for HOME Participants*, <http://1.usa.gov/OZsJTT>
- September 2, 2004 Memorandum from HUD's Community Planning and Development Office (CPD), www.hud.gov/offices/fheo/library/finaljointletter.pdf
- February 9, 2007 Joint Memorandum from Assistant Secretaries for CPD and FHEO, <http://portal.hud.gov/hudportal/documents/huddoc?id=fairhousing-cdbg.pdf>
- July 19, 2013 proposed rule, <http://1.usa.gov/1kVYnwe>
- HUD's Prototype AFFH mapping tool, www.huduser.org/portal/affht_pt.html#dataTool-tab