

Affirmatively Furthering Fair Housing (AFFH): For Jurisdictions and Public Housing Agencies Not Yet Required to Comply with the 2015 AFFH Rule

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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).

Also see: *Consolidated Planning Process*, *Public Housing Agency Plan*

This article describes the pre-existing Analysis of Impediments (AI) process. See the previous *Advocates' Guide* article *Affirmatively Furthering Fair Housing (AFFH): For Jurisdictions Required to Comply in 2016 and 2017 with the 2015 AFFH Rule* regarding the July 16, 2015 rule.

Most cities, counties, states, and public housing agencies (PHAs)—all of which HUD is now calling program participants—will not have to comply with the July 16, 2015, Affirmatively Furthering Fair Housing (AFFH) rule until 2019. Until then, program participants must continue to comply with the pre-existing minimal rules associated with the Analysis of Impediments (AI) to fair housing choice. However, program participants may begin using the new rule if they so choose. A list of program participants and an estimate of when they are required to comply with the July 2015 rule is on NLIHC's AFFH webpage, at http://nlihc.org/issues/affh/afh_dates. Do not rely on this list because some smaller program participants might have decided to partner with others, resulting in a later start date for complying with the 2015 rule.

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 AI.

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, the statutory basis of the Consolidated Plan, ConPlan), and the PHA Plan all require jurisdictions to certify in writing that they are affirmatively furthering fair housing. States must ensure that units of local government receiving CDBG or HOME funds from the state comply. Further, HUD's 1996 *Fair Housing Planning Guide* declares 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 AI to Fair Housing Choice.
- 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. 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 development

policies that discourage properties with more than two bedrooms, 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 AI. AIs must be 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 under the Fair Housing Act 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 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 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, national origin, familial status or disability. 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 the 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.
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. This is not reported in the CAPER template.

A February 9, 2007, joint memorandum from the Assistant Secretaries for HUD’s 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) actions taken and planned, 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.

The CAPER template report CR-10 requires a description of the race and ethnicity of families and persons assisted.

- For CDBG, local jurisdictions must maintain data on the extent to which each racial and ethnic groups and single-headed households (by gender of household head) have applied for, participated in, or benefited from, any program or activity funded in whole or in part by CDBG funds. States must maintain records for CDBG-funded projects that include data on the racial, ethnic, and gender characteristics of persons who are applicants for, participants in, or beneficiaries of the program.
- HOME grantees are required to maintain equal opportunity and fair housing documentation, including data on the extent to which each racial and ethnic group and single-headed households (by gender of household head) have applied for, participated in, or benefited from, any program or activity funded in whole or in part with HOME funds.

DEVELOPMENTS IN RECENT YEARS

Since 2009, the Obama administration significantly increased AFFH enforcement activity, much of it quietly behind the scenes and some of it openly. HUD has challenged Westchester County, N.Y.; the State of Texas; Houston, Texas; Dallas, Texas; Marin County, Calif.; Joliet, Ill.; Sussex County, Del.; and Dubuque, Iowa.

FORECAST FOR 2017

There are serious concerns about continued implementation of the AFFH rule in 2017. Attempts by a few in Congress in 2016 appropriations bills to prevent HUD from using staff funds to implement the new rule were defeated, but are likely to emerge

again in 2017. Furthermore, Dr. Ben Carson, HUD Secretary wrote that the rule “relies on a tortured reading of the Fair Housing law” and is “social engineering” akin to other “failed socialist experiments.” He later amended these comments with a statement before the Senate Banking committee that fair housing is “the law of the land” and stated a commitment to implement the law.

It is likely that we will see attacks on AFFH implementation—whether through appropriations bills or by the administration.

FOR MORE INFORMATION

NLIHC, 202-662-1530, <http://nlihc.org/issues/affh>

HUD Office of Fair Housing and Equal Opportunity, <http://1.usa.gov/VFQ4Nk>, with a page titled Affirmatively Furthering Fair Housing providing general background information, http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/16affh_home_page

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://portal.hud.gov/hudportal/documents/huddoc?id=19790_200510.pdf

September 2, 2004, Memorandum from HUD’s 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>