

Affirmatively Furthering Fair Housing (AFFH), Part 2: Reverting to the Flawed Analysis of Impediments (AI) During AFFH Rule Suspension

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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” protected classes—race, color, religion, sex, national origin, disability, and familial status (in other words, households with children).

See Also: For related information, refer to the *Affirmatively Furthering Fair Housing (AFFH), Part 1: Secretary Carson’s Challenges to AFFH in 2018*, *Affirmatively Furthering Fair Housing (AFFH), Part 3: The Suspended 2015 AFFH Rule*, and the *Consolidated Planning Process, Public Housing Agency Plan* sections of this guide.

This article describes the pre-existing Analysis of Impediments (AI) process. All but 32 local governments that submit a Consolidated Plan (roughly 1,200 local governments) will not have to comply with the July 16, 2015, Affirmatively Furthering Fair Housing (AFFH) rule as a result of Secretary Carson indefinitely suspending implementation of the 2015 AFFH rule. Consequently, jurisdictions must, at a minimum, revert to the old, flawed AI process. Jurisdictions and public housing agencies (PHAs) may voluntarily follow the AFFH rule and use its Assessment of Fair Housing Tool in order to develop an Assessment of Fair Housing (AFH) as outlined in the suspended AFFH rule. See the previous *Advocates’ Guide* article *Affirmatively Furthering Fair Housing (AFFH), Part 1: Secretary Carson’s Challenges to AFFH in 2018* to learn more about what led up to this reversion to the AI. See also, *Affirmatively Furthering Fair Housing (AFFH), Part 3: The Suspended 2015 AFFH Rule* to learn what

might be lost and what advocates can attempt to convince their jurisdiction and PHA to voluntarily follow.

By reverting to the old Analysis of Impediments (AI) process, states and local governments merely have to certify that they are affirmatively furthering fair housing in their Consolidated Plans (ConPlans), and public housing agencies (PHAs) must certify that that they are affirmatively furthering fair housing in their 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 local governments, states, and PHAs to certify in writing that they are affirmatively furthering fair housing. States must ensure that units of local government receiving CDBG or HOME Investment Partnerships Program 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

AFFH is defined in CDBG regulations [24 CFR 570.601(a)(2)] and ConPlan regulations [24 CFR 91.225(a)(1)] as:

- Having an Analysis of Impediments (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 [24 CFR 903.7(o)].

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 the construction of properties with more than two bedrooms, inadequate multilingual marketing, zoning that limits group homes, and insufficient public transportation to areas with affordable housing.

The contents of an AI are not prescribed by HUD, which has led to uncertainty on the part of some jurisdictions and has led to inadequate AIs from many jurisdictions. 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 HUD Regional Fair Housing and Equal Opportunity Office (FHEO).

AIs are their own separate documents. AIs are not submitted to HUD and they are not a formal piece of the ConPlan's Annual Action Plan or Five-Year Strategy, both significant shortcomings in the AI process. However, a HUD policy memorandum (no longer featured on the HUD webpages) dated September 2, 2004 stated 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 did not know that this policy memorandum existed. 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

There is no specific guidance to suggest when an AI should be updated, another shortcoming of the AI process. However, 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 HUD policy memorandum dated September 2, 2004 stated 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 should 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, yet one more substantial weakness of the AI process. 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 ConPlan Annual Action 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 policy memorandum dated September 2, 2004 gave 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, according to the policy memorandum dated September 2, 2004, 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 [24 CFR 570.904(a)(1)(ii)]. PHA Plan regulations also claim that a certification can be challenged [24 CFR 903.2(d)(3)].

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 [joint memorandum](#) (no longer directly found on HUD webpages) dated February 9, 2007 from the Assistant Secretaries for HUD's FHEO and Office of Community Planning and Development (CPD), which administers CDBG and HOME, suggested 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.

TIPS FOR LOCAL SUCCESS

Even though HUD has indefinitely suspended the AFFH rule, unless the courts override the suspension, advocates can still organize to convince their local jurisdictions and PHAs to follow the lead of the AFFH rule and use the Assessment Tool to create an AFH.

FORECAST FOR 2019

When a presidential candidate, HUD Secretary Ben Carson wrote that the 2015 AFFH 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 expressed a commitment to implement the law. In July 2017, in response to a letter from Senator Mike Lee (R-UT) asking that the July 15, 2015, AFFH rule be rescinded, Secretary Carson indicated that he would move to reinterpret the rule, according to an article in the *Washington Examiner*.

Jurisdictions will continue to only be required to use the flawed AI process in 2019 because the 2015 AFFH rule was indefinitely suspended by Secretary Carson’s HUD. In addition, on August 16, 2018 HUD published an Advanced Notice of Proposed Rulemaking (ANPR) for comment. That ANPR sought public comment on eight sets of questions that reflected HUD’s desire to substantially re-write an AFFH rule (see *Affirmatively Furthering Fair Housing (AFFH), Part 1: Secretary Carson’s Challenges to AFFH in 2018*). As of the date this *Advocates’ Guide* went to press, a proposed rule has not been published for comment. Consult NLIHC’s AFFH webpage to learn whether anything new has transpired in the subsequent months.

WHAT TO SAY TO LEGISLATORS

Remind your congressional delegation that the new approach in the AFFH rule did not mandate specific outcomes; rather, it established basic parameters to help guide public sector housing, community development planning, and investment decisions. The rule encouraged a more engaged and data-driven approach to assessing fair housing and planning actions. The rule established a standardized fair housing assessment and planning process to give jurisdictions and PHAs a more effective means to affirmatively further the purposes of the “Fair Housing Act.”

FOR MORE INFORMATION

NLIHC, 202-662-1530, <https://nlihc.org/explore-issues/policy-priorities/fair-housing>.

National Housing Law Project, 415-546-7000, <https://www.nhlp.org/initiatives/fair-housing-housing-for-people-with-disabilities/affirmatively-furthering-fair-housing>.

National Fair Housing Alliance, 202-898-1661, <http://nationalfairhousing.org/affirmatively-furthering-fair-housing>.

Poverty & Race Research Action Council, <https://prrac.org/fair-housing/affirmatively-furthering-fair-housing>.

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.

AFFH on HUD’s Policy Development and Research (PD&R) website containing its AFFH data and mapping tool https://www.huduser.gov/portal/affht_pt.html.

HUD’s *Fair Housing Planning Guide*, Vol. 1 (#HUD-1582B-FHEO), <https://www.hud.gov/sites/documents/FHPPG.PDF>.

HUD’s Office of Affordable Housing once had a good chapter summarizing the *Fair Housing Planning Guide*, “Affirmatively Furthering Fair Housing” (page 18) in Fair Housing for HOME Participants. Although no longer directly indicated on the HOME webpages, it remains available at http://portal.hud.gov/hudportal/documents/huddoc?id=19790_200510.pdf.

September 2, 2004, Memorandum from HUD’s CPD (no longer directly found on HUD webpages), <http://nlihc.org>.

February 9, 2007, Joint Memorandum from Assistant Secretaries for CPD and FHEO (no longer directly found on HUD webpages), <http://portal.hud.gov/hudportal/documents/huddoc?id=fairhousing-cdbg.pdf>.