

NLIHC's Analysis of Court Dismissal of Advocates' Challenge to HUD Withdrawing AFFH Tool

August 17, 2018

Chief Judge Beryl Howell of the U.S. District Court for the District of Columbia dismissed a motion by advocates for a preliminary injunction against HUD for withdrawing the Assessment Tool required to complete an Assessment of Fair Housing (AFH) under the July 16, 2015 Affirmatively Furthering Fair Housing (AFFH) rule. The plaintiffs are the National Fair Housing Alliance (NFHA), the Texas Low Income Housing Information Service (Texas Housers), and Texas Appleseed (see *Memo*, [5/14](#)). In the August 18 opinion, the judge found that the plaintiffs lacked standing to sue, and that even if they had standing the plaintiffs would not have been entitled to preliminary injunctive relief.

This ruling leaves HUD in a position to move forward with reconsidering and, potentially, rewriting the AFFH rule. Last week, HUD published an Advance Notice of Proposed Rulemaking (ANPR) to do just that. Plaintiffs and advocates are considering other options to ensure that HUD carry out its fair housing responsibilities.

Background

The judge wrote that the case was about two HUD notices issued on May 23, 2018 (see *Memo*, [5/21](#)), one of which withdrew the Local Government Assessment Tool (LG2017). The AFFH rule requires jurisdictions to use an Assessment Tool to draft an AFH. The second HUD notice directed jurisdictions to revert to the previous Analysis of Impediments (AI) to fair housing choice framework. (HUD conceded in court that using the LG2017 Tool and the AFH process laid out in the AFFH rule is superior to the AI process and agreed that the AI process was “terribly flawed.”) The plaintiffs asserted in their complaint that the May 23 notices constituted an unlawful action because the notices effectively suspended the AFFH rule without the notice and without comment procedures required by the Administrative Procedure Act, and because withdrawing the Tool was “arbitrary and capricious.”

Citing the second notice directing jurisdictions to revert to the AI process, the judge noted that the Consolidated Plan regulations from 1995 requiring jurisdictions to certify that they were affirmatively furthering fair housing still entails “taking appropriate actions” to overcome the effects of impediments to fair housing as well as maintaining records reflecting the analysis of impediments and actions taken to overcome them. The Court concluded, therefore, that the notice “effectively reminded program participants about the continuing effective parts of the AFFH rule,” and that “despite withdrawal of the LG2017 Tool, many components of the AFFH rule remain in effect.” The components that the opinion claims remain in effect are community participation and consultation, certification of AFFH compliance, and recordkeeping.

At the hearing, HUD stated that the revived AI process is not the same one operating before the AFFH rule because the revised and new definitions in the AFFH rule still apply and provide greater clarity. Among the definitions highlighted were “affirmatively furthering fair housing,” “[AFFH] certification,” and “recordkeeping.”

Do the Plaintiffs Have Standing?

For standing, plaintiffs must establish three elements:

1. An injury that is concrete, actual or imminent, not hypothetical.
2. A causal connection between the injury and the complained-about conduct.
3. Likelihood that a favorable decision will redress the injury.

Organizations, such as the plaintiffs, can rely on the theory of “organizational standing” by showing actual or threatened injury that is fairly traceable to the alleged illegal action and is likely to be redressed by a favorable court decision.

The D.C. Circuit Court has a two-prong test to assess injury. First, an organization must show that its services have been perceptively impaired; it must show that the defendant’s actions are a significant barrier to the plaintiff’s mission-driven activities. The second prong requires a plaintiff to show that it has used its resources to counteract the harm created by the defendant.

The decision asserts that the withdrawal of the Tool does not perceptibly impair the plaintiffs’ ability to carry out their missions because, the Court concluded, many aspects of the AFFH rule remain active even though the Tool was withdrawn. The judge writes that the AFFH rule’s revised and new definitions of “affirmatively furthering fair housing,” “community participation,” and “data” apply to AIs, and that the AFFH rule includes new community participation requirements that *remain active even without the use of the AFH process* and Assessment Tools (emphasis added). NLIHC observes that the new community participation requirements, both in 24 CFR part 5 and in the amended Consolidated Plan rules at 24 CFR part 91, all refer to the AFH not the AI.

The Court concluded the plaintiffs have also failed to satisfy the second prong, showing that they have had to divert resources to counteract the withdrawal of the LG2017 Tool by expending operational costs greater than those normally expended to carry out their advocacy missions.

Regarding the second and third elements needed to establish standing, causation and potential for redress, the Court claims that the plaintiffs’ arguments are entirely theoretical and too speculative because redress would be premised on the actions of third parties – the actions of local jurisdictions. Even if the Tool was in place, the Court reasoned, local governments might still not engage in all of the activities that the plaintiffs think necessary for the jurisdictions to affirmatively further fair housing.

Court Adds that Plaintiffs Would Not Be Entitled to Preliminary Injunction

The Court writes that even if the plaintiffs had standing, they would not be entitled to preliminary injunctive relief because they did not establish the likelihood of success. The plaintiffs claimed that withdrawing the LG2017 Tool effectively suspended the AFFH rule without the notice and comment process required under the Administrative Procedure Act (APA), and that the withdrawal of the Tool was “arbitrary and capricious.”

Regarding the APA, the judge reasoned that the APA applies to regulations, while the Tool is more appropriately considered an information collection device subject to the Paperwork

Reduction Act. Furthermore, the Court writes that withdrawing the LG2017 Tool did not suspend the AFFH rule because the revised and new definitions, and the community participation, AFFH certification, and recordkeeping provisions remain active.

Regarding the assertion that HUD acted in an arbitrary and capricious manner, the Court states that HUD provided adequate reasoning for its decision to withdraw the LG2017 Tool. The judge accepted HUD's argument, based on only the first 49 AHFs submitted, that the Tool had deficiencies that led to many of the jurisdictions having difficulties submitting an acceptable initial AFH. The background section of the opinion acknowledges that the AFFH rule contains a process by which HUD reviewers are obligated to indicate inadequacies with an initial AFH submission along with opportunities for jurisdictions to address inadequacies and resubmit an AFH. The opinion does not seem to give much weight, however, to the fact that 18 AFHs were accepted on initial submission and another 28 were accepted after employing the iterative review and acceptance process. The decision refers to HUD's notice withdrawing the Tool that listed seven broad categories of problems with the Tool. NLIHC has pointed out the grave weaknesses of the sole examples HUD presented in that notice (see *Memo*, [5/21](#)).

Read NLIHC's statement on the ruling at: <https://bit.ly/2nPnjPw>

Read National Fair Housing Alliance's statement here at: <https://bit.ly/2LbsMJx>

The Court Opinion is at: <https://bit.ly/2N2xTh0>

The Court Order is at: <https://bit.ly/2vV9kMo>

More information about the AFFH rule is on page 7-5 of NLIHC's *2018 Advocates' Guide* at: <https://bit.ly/2G2zU8q>

More information about the AI process is on page 7-17 of NLIHC's *2018 Advocates' Guide* at: <https://bit.ly/2IckAIB>