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## Questions and Answers from the Webinar on the Proposed AFFH Rule

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Ed Gramlich, National Low Income Housing Coalition  
Debby Goldberg, National Fair Housing Alliance

### **Q: How are the public participation requirements for Con Plan jurisdictions under the AFH different from what is currently in place under the AI framework?**

**Ed:** The ConPlan public participation regs are the foundation upon which the proposed AFFH rule incorporates the AFH. For the most part, the proposed AFFH rule would amend the ConPlan public participation regulations by simply inserting AFH where appropriate.

There are three other significant additions:

1. One is in the “consultation” portion. See page 13 of my Summary (<http://bit.ly/13SOA6n>) or pages 39 and 40 of the slides.
2. Another requires procedures for assessing language needs (page 10 of my Summary, last bullet, or page 35 of slides).
3. The third is in the public hearings section, specifically mentioning that the public hearing before the proposed ConPlan is published must seek public comments about the proposed ConPlan’s strategies and actions for affirmatively furthering fair housing (see page 12 of my Summary, second bullet, or page 38 of the slides, last bullet).

The existing ConPlan public participation regulations do not mention the AI at all. It is as if it doesn’t exist. (The only place in the existing ConPlan regulations that mentions an AI is in the “certification” section.)

There is a bit of public participation guidance in the 1996 *Fair Housing Planning Guide*.

"Since the FHP [Fair Housing Plan] is a component of the ConPlan, the citizen participation requirements for the ConPlan apply."

[*Fair Housing Planning Guide* pages 2-5, 3-3, and 4-3]

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 decisions [about the problems and their solutions].

The community participation requirement will never be more important to the integrity, and ultimately, the success of the process."

[*Fair Housing Planning Guide* page i]

Later, the *Fair Housing Planning Guide* 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".

[*Fair Housing Planning Guide* page 2-21]

HUD "encourages jurisdictions to schedule meetings [for public comment and input] to coincide with those for the ConPlan."

[*Fair Housing Planning Guide* page 2-26]

**Q: Can you discuss how interest groups representing municipalities and local governments have initially responded to the proposed rules? Are there any particularly contentious issues that advocates should be aware of?**

**Ed:** I'm sorry, I don't know. However, over the next week I will try to find out, and if I learn anything I will post it on our new AFFH webpage, <http://nlihc.org/issues/affh>.

**Q: Can we sign on to existing letters, e.g. NFHA's letter?**

**Ed:** NLIHC has not anticipated creating a sign on letter for our members, although if I get a deluge of requests we might reconsider. NLIHC now has a preliminary sample comment letter that will be in *Memo to Members* next Tuesday, and that we will send via email alert to our members; hopefully this preliminary sample comment letter is simple enough for organizations to use to modify and turnaround with their own letterhead. The NLIHC sample comment letter is attached.

I know there will be a sign on letter pertaining to PHA-specific issues. NLIHC will post it to our AFFH webpage, <http://nlihc.org/issues/affh>.

Other fair housing groups might also be developing a sign on letter, and we will post any to our AFFH webpage.

**Debby:** Similarly, NFHA is planning on creating a model letter for our members to use to submit their own comments, modifying/adding language as appropriate for their local experience and putting it on their own letterhead. We are not planning on doing a sign-on letter for our members or other local organizations.

**Q: How would a jurisdiction that has a significant amount of its area covered by reservations or housing owned and managed under the NAHASDA program account for these areas in the AI?**

**Ed:** Short temporary answer – I don't know. The proposed rule does not address that situation. I will try to get an answer from HUD.

**Q: If certain CDBG-eligible activities (e.g., public services, or community facility related) activities are to benefit low-/mod-income persons in low-/mod-income area (low-/mod-income area benefit) isn't setting fair housing EACP goals in a Con-Plan slightly redundant?**

**Ed:** “Low income” does not equate with race or ethnicity. Westchester was building “affordable” housing, but concentrated it all in RCAPs and ECAPs (to get you used to the terms of the day).

Secondarily, not all public services and facilities need serve an “area”; there are other ways to show low income benefit (eg, only low income people can use the service, or elderly people and disabled people “presumed” to be low income...unless otherwise challenged). And, of course when “area” is used, only half of those in the “service area” need to be low income – and, they might not even be the primary beneficiaries. For example, to take another “area” example that reflects the most intensive use of CDBG money – public improvements such as roads – just because a road improvement runs through a low income neighborhood, that doesn’t mean people of color benefit (ask me about my Benton Harbor example some day). Unless that road is primarily helping low income people of color get to jobs at the Westinghouse plant in St. Joseph that wouldn’t really be enhancing access to community assets.

**Debby:** I would note that the reg reminds jurisdictions that their AFFH obligation does not apply solely to their CDBG and other HUD funds, but to any of their resources (financial and other – like zoning and other land use authorities) related to housing and community development. So jurisdictions have a much wider array of tools to use – not just CDBG funds – to promote inclusive communities and fair housing choice.

**Q: My question relates to the fact that HUD funding is only one piece of the "fair housing" puzzle. To what extent does the AFFH rule address other possible impediments to creating fair housing opportunities, such as local zoning regulations or ensuring that transportation funding is going to underserved areas.**

**Ed:** The proposed rule does address things such as zoning, but from Ed’s point of view the proposed rule is not nearly sufficiently explicit. Thank you for raising this question, it caused me to think about this more (...and thinking gives me a headache).

Consider the definition of AFFH, page 2 of my Summary, or page 7 and 8 of the slides (of which I unfortunately edited out “strategies” because of the pressure to keep power point text truncated). I don’t think it is possible to overcome segregation etc just with CDBG etc. funds. “Strategies”, while not explicitly meaning zoning regulations for example, are other means beyond funding that can address fair housing issues.

I don’t think “fair housing determinants”, the factors that create, contribute to, or perpetuate fair housing “issues” can be adequately addressed no matter how much money is used; policies are needed to address determinants. And it is the most significant “determinants” that must be used to set and prioritize goals for mitigating or addressing fair housing issues.

Also consider the purpose of the AFH, page 4 of my summary second paragraph, or page 13 of slides. The purpose is to also inform other plans, such as transportation plans. Related to that, there must be consultation with metro-wide transportation planning entities; to the extent jurisdictions have voting members on these bodies, they would have an obligation to make efforts to ensure transportation dollars are going to underserved areas.

The proposed rule's provisions regarding revisions to an AFH include as an example "Substantial policy changes such as those related to zoning, housing plans, or development plans or policies." (see my summary page 9 or slide page 31).

**Debby:** This question also underscores the need for HUD to provide illustrations of the varied strategies that jurisdictions may employ to address impediments, both in the text of the reg itself and through other guidance.

**Q: This rule may not be in place before an AI is due for a given jurisdiction. Is this being addressed?**

**Ed:** True, the rule might not be finalized for a year or more. There is nothing in the proposed reg addressing this. At the NHC forum regarding the proposed rule, a similar situation was posed to the key HUD staffer in charge, Patrick Pontius. He acknowledged the uncertainty. I am guessing that HUD will deal with this once the final rule gets closer to reality, either by making technical amendments to the final rule offering a transition period, or by providing sub-regulatory guidance.

**Debby:** This is one reason for encouraging HUD to move quickly to finalize the reg. If they don't have the regulation and whatever guidance, technical assistance, etc that they need in place in time to deal with my "pig in the python" group of AFHs that will be due in the fall of 2014, that would be extremely unfortunate. Who knows how the next Administration's HUD will deal with this?

**Q: Does HUD define actions that are "significantly inconsistent" with AFFH?**

**Ed:** My slides used "significantly" inconsistent in the definition of AFFH. I substituted the word "significantly" for "materially" thinking "significantly" was a more familiar word to the non-lawyer reader (I am not an attorney). Nonetheless the question is a good one, materially.

HUD does not define "materially inconsistent". In the preamble HUD writes:

"It is important to note, however, that neither the proposed rule nor the improved process that it will establish defines the strategies or actions program participants will take. In fact, the proposed rule emphasizes that there are diverse approaches that can be taken."

**Debby:** This is another place where some illustrations in (or in conjunction with) the reg could be useful. I'm sure HUD wants to preserve some wiggle room to use this in situations no one has thought of yet, but two examples that I think would fit this bill are the problems encountered in St. Bernard Parish (the blood relative ordinance and subsequent Parish actions to keep people of color out), and the situation in Sussex County, DE

where the county refused to approve a subdivision for a project that would serve mostly Latino agricultural workers, even though the project was otherwise consistent with zoning requirements.

**Q: Would simply ignoring, rather than actively implementing or actively working to discourage fair housing efforts meet the criteria for AFFH?**

**Ed:** I agree that there should be better guidance in the final regulation, making it clear that obvious “inaction” in the face of recognized fair housing issues or even a stated goal in the AFH would be “materially inconsistent”.

On a related note, regarding a “substantially incomplete” AFH, see page 9 of my summary or page 29 of the slides:

“Substantially incomplete”, examples of which include an AFH that:

- Was developed without the required community participation or required consultation with other entities.
- Fails to satisfy the required elements of this regulation; for example, an AFH with priorities materially inconsistent with the data and other available evidence.

[The language about “substantially incomplete” mirrors the existing ConPlan regulations.]

I think that this definition needs some beefing up and is thinking about what specifically to suggest (look for the NLIHC preliminary comments next week or soon thereafter)

**Q: What would make implementation of this rule easier for grantees would be allowing grantees to AFFH by using other than planning and admin dollars especially as healthcare costs are putting overwhelming pressure on PA expenditures. Any chance that HUD will allow grantees to do this?**

**Ed:** Affirmatively furthering fair housing is much greater than using limited CDBG planning and admin dollars to fund a fair housing organization. (Don’t forget, fair housing can also be funded as a “public service”, but of course those dollars are limited to 15% of a CDBG entitlement allocation.) **More importantly**, in order to affirmatively further fair housing, a jurisdiction must use its CPD dollars, other HUD funds, other resources (not just federal), and all other means under its control (such as planning, zoning, permitting, etc programs, policies, and practices) to affirmatively further fair housing.

**Debby:** I agree. This regulation is not just about ensuring that jurisdictions use some portion of their CDBG funds to support specific fair housing activities, but rather that they take a broad look at all of their housing and community development activities and relevant policies and practices to ensure that they are promoting inclusive communities, expanding fair housing choice, and not perpetuating segregation.

**Q: This is an enforcement issue. To incentivize program participants to submit an acceptable AFH, HUD's "acceptance" of an AFH does not mean that a program participant is meeting its obligation to AFFH; it means that they have submitted the "required" AFH needed to meet protocol. Will or can HUD withhold federal funding contingent upon program participants approval/acceptance of a participants AFH?**

**Ed:** HUD can withhold funding contingent upon an “acceptable” AFH. I didn’t cover that in my presentation, but Debby did. See my summary, page 8 under “Timing”, third bullet. Now, whether HUD *will* withhold CDBG funds is another question. It doesn’t mention other HUD or other federal funds (DOT’s Federal Highway Funds would get people’s attention!). A lot of course depends on the political appointees.

**Debby:** This is a power that HUD has currently, and although it has almost never used it, nothing in the reg changes that power as far as I can see. One issue I didn’t raise in the webinar, but which is a concern for us, is that HUD can approve funding based on acceptance of all or *part of* an AFH. That could provide a big loophole, especially in an Administration that is hostile to fair housing.

**Comment: HAC will submit comments to HUD. We may have issues on the data reliability for rural and non-metro areas. We also may have some concerns on communities' ability to meet public engagement requirement.**

**Ed:** Regarding communities’ ability to meet public engagement requirements – these are basically the same requirements that have been in CDBG law since 1987, so there ought to be some experience with public accountability. I am not all that familiar with rural and statewide practice (being a city boy whose advocacy work is 99% urban oriented) but understand it is not as simple as going down to city hall. However, I know that in 2000 or so, the State of North Carolina complied with its public participation obligations by having some sort of video events that enabled real-time engagement with advocates – and, the advocates liked the method because they didn’t have to drive for hours to go to meetings to weigh in.