

Affirmatively Furthering Fair Housing (AFFH), Part 3: Secretary Carson's Challenges to AFFH in 2018

By Ed Gramlich, Senior Advisor, NLIHC

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 Proposed Rule Would Gut AFFH, Affirmatively Furthering Fair Housing (AFFH), Part 2: Reverting to the Flawed Analysis of Impediments (AI) During AFFH Rule Suspension, Affirmatively Furthering Fair Housing (AFFH), Part 4: The Suspended 2015 AFFH Rule, and Consolidated Planning Process, Public Housing Agency Plan sections of this guide.

THE AFFIRMATIVELY FURTHERING FAIR HOUSING REGULATION IS INDEFINITELY SUSPENDED

On May 23, 2018, HUD published three notices in the *Federal Register* indefinitely suspending implementation of the 2015 Affirmatively Furthering Fair Housing (AFFH) rule. (See *Affirmatively Furthering Fair Housing (AFFH), Part 4: The Suspended 2015 AFFH Rule*). On August 16, HUD published an Advanced Notice of Proposed Rule Making (ANPR) inviting public comment regarding amending the AFFH rule. While the AFFH rule is suspended, jurisdictions are obligated to revert to using the flawed Analysis of Impediments (AI). See *Affirmatively Furthering Fair Housing (AFFH), Part 2: Reverting to the Flawed Analysis of Impediments (AI) During AFFH Rule Suspension*. Secretary Carson published a proposed rule on January 14, 2020 that is not an

AFFH rule; in fact it would gut fair housing by, among other means, falsely equating increasing the housing supply with fair housing choice. See *Affirmatively Furthering Fair Housing (AFFH), Part 1: Secretary Carson's Proposed Rule Would Gut AFFH*.

This article, AFFH Part 3, explains HUD's recent attempts under Secretary Carson to undermine fair housing, especially the AFFH Rule.

UNDER SECRETARY CARSON, HUD SEEKS TO UNDERMINE TWO FAIR HOUSING RULES IN ADDITION TO THE AFFH RULE

Not only has HUD sought to undermine the AFFH rule, attacks on two other fair housing rules demonstrate the breadth of HUD's approach under Secretary Carson to weakening fair housing protections.

Small Area Fair Market Rents

The first attack on fair housing was HUD's attempt in the fall of 2017 to suspend the final rule implementing Small Area Fair Market Rents (SAFMRs) in 24 metropolitan areas. This was an attack on fair housing because the use of SAFMRs would help households with Housing Choice Vouchers use vouchers in areas that did not have concentrations of poverty and racial or ethnic populations. However, after fair housing advocates filed a lawsuit, the U.S. District Court for the District of Columbia issued a preliminary injunction in December 2017. Consequently, HUD began implementing SAFMRs in those 24 metropolitan areas in April of 2018.

Disparate Impact

A June 20 *Federal Register* Advance Notice of Proposed Rule Making (ANPR) was another HUD attack on fair housing. The ANPR requested public comment on whether HUD's February 15, 2013 disparate impact regulation was consistent

with the U.S. Supreme Court decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities*. For more than 45 years, HUD and courts interpreted the Fair Housing Act to prohibit housing practices that seem to be neutral or do not appear to have an overt intent to discriminate, but nonetheless have a discriminatory effect. The 2013 regulation was issued to establish uniform standards for determining when a housing practice with a discriminatory effect violates the Fair Housing Act.

HUD acknowledged that the Supreme Court upheld the use of disparate impact theory, but HUD argued that the Court did not directly rule on the disparate impact regulation. Therefore, HUD wanted public input regarding whether the regulation is consistent with the Court's ruling in *Texas v. Inclusive Communities*.

Formal, proposed changes to the disparate impact rule were published on August 19, 2019. The proposed rule would shift the burden of demonstrating disparate impact entirely to people in the Fair Housing Act's protected classes. Among other obstacles, the proposed rule would require those alleging discrimination to guess what justifications a housing provider, government, or business might invoke as a legitimate practice and also preemptively counter those justifications. Nearly 47,000 comments were submitted by the October 18, 2019 due date. As of the date this *Advocates' Guide* went to press, a final disparate impact rule has not been published. See the *Disparate Impact* article in this *Advocates' Guide*.

THE LEAD UP TO INDEFINITELY SUSPENDING THE 2015 AFFH RULE

Before he was HUD Secretary, Ben Carson criticized the 2015 AFFH rule in a 2015 *Washington Times* op-ed, claiming that the AFFH rule was a mandated social-engineering scheme that repeated a pattern of failed socialist experiments in this country. This was just a prelude to future attacks on fair housing a little after he became HUD Secretary.

In a surprise move, HUD published a notice in the *Federal Register* on January 5, 2018 suspending until 2025 the obligation of about 900 out of 1,200 local jurisdictions to submit an Assessment of Fair Housing (AFH) as required by the AFFH rule. HUD's suspension was based on a review of the first 49 AFH initial submissions. Eighteen of the 49 submissions were not accepted when first submitted. However, according to HUD, 32 AFHs were ultimately accepted using the AFFH rule's back-and-forth review process that provides for HUD field staff to identify issues with an AFH that a local jurisdiction can address.

On May 8, 2018, the National Fair Housing Alliance, Texas Low-Income Housing Information Services (Texas Housers), and Texas Appleseed filed suit against HUD for that suspension. The plaintiffs asserted that HUD violated the "Administrative Procedure Act" (APA) in three ways:

1. HUD failed to provide public notice and comment.
2. HUD acted in an arbitrary and capricious manner because it did not provide a reasoned basis.
3. HUD abdicated its duty under the Fair Housing Act to ensure that recipients of HUD funds affirmatively further fair housing.

HUD Indefinitely Suspended the AFFH Rule

On May 23, 2018, HUD published three notices in the *Federal Register* affecting the AFFH rule. The [first notice](#) withdrew the January 5, 2018 notice that delayed until 2025 the obligation of about 900 local jurisdictions to submit an AFH. The [second notice](#) claimed that there were significant deficiencies in the Assessment Tool that jurisdictions were required to use in order to complete an AFH. Consequently, HUD withdrew the Assessment Tool. HUD again based this drastic action on the experience of only the first 49 AFH submissions, 18 of which were accepted on initial submission and, according to HUD, 32 were ultimately approved. The [third notice](#) acknowledged that without the Assessment Tool there can be no AFH. Therefore, HUD reminded jurisdictions that they must revert to using the

flawed Analysis of Impediments (AI) to fair housing process.

The second notice stated that HUD identified seven categories of problems that led to the decision to withdraw the Assessment Tool. The second notice elaborated on those problems. Based on the examples offered, most problems could have been addressed very easily by using the AFFH rule's provision for a back-and-forth process requiring HUD to offer suggestions to a jurisdiction for curing a deficiency in an AFH.

One of the problems HUD referred to was "insufficient use of local data and knowledge" as required by the AFFH rule. HUD claimed a jurisdiction's failure to use local data resulted in an inability to address an issue in that community because HUD-provided data did not include all issues. HUD's sole example was a jurisdiction that did not identify multiple Superfund locations when discussing environmental health issues. HUD blamed this on the fact that the HUD-provided maps did not include Superfund sites. However, identifying Superfund sites should be easy. It would be simple for HUD to request and for the jurisdiction to include a discussion of the impact of Superfund sites on people living in racial/ethnic areas of concentrations of poverty.

Another problem claimed by HUD related to the identification of "contributing factors" to "fair housing issues," two technical terms in the AFFH rule. The example in the notice was of a jurisdiction that had three pages of detailed analysis of "Home Mortgage Disclosure Act" (HMDA) information outlining lending discrimination. The jurisdiction did not take the logical step of identifying lending discrimination as a "contributing factor" in its AFH. Again, the back-and-forth HUD review process provided for in the AFFH rule could have readily corrected this shortcoming.

Yet another example HUD pointed to in the notice entailed inadequate community participation, which HUD blamed on the wording of the Assessment Tool. HUD wrote, "The questions vaguely incorporate by reference the existing community participation requirements in

HUD's Consolidated Plan regulations." However, jurisdictions should be experts at providing meaningful public participation because it has been a requirement since the Community Development Block Grant (CDBG) program was authorized in 1974 and elaborated on in subsequent CDBG and Consolidated Plan regulations. The sole example HUD gave was of one community posting a draft AFH for public comment on a Friday and submitting the final AFH to HUD the following Monday. Clearly this single example was of an egregious violation of the public participation requirements by a jurisdiction; a violation that warranted rejection of the AFH until adequate public participation was provided.

HUD SEEKS TO HAVE A STREAMLINED AFFH RULE

HUD published an [Advance Notice of Proposed Rulemaking](#) (ANPR) in the *Federal Register* on August 16, 2018 inviting public comment regarding amending the AFFH rule. The opening summary of the ANPR lists five changes that HUD sought to make:

1. Minimize regulatory burden,
2. Create a process that is focused primarily on accomplishing positive results rather than on performing an analysis of community characteristics,
3. Provide for greater local control,
4. Encourage actions that lead to greater housing supply, and
5. Use HUD resources more efficiently.

Regarding the proposed change to encourage actions that increase the supply of housing, HUD claimed that the AFFH rule was ineffective at addressing the lack of adequate housing supply. A HUD media release asserted that the AFFH rule was "suffocating investment." However, the AFFH rule could not have had much, if any, effect because the AFFH rule had only been in effect for very few local jurisdictions and for only a very short period of time. The supply of housing is affected by various factors such as the

cost of land and building materials, local zoning restrictions, and the loss of construction labor due to the great recession. The supply of housing affordable to extremely low- and very low-income households is due to declining federal financial support for gap financing and operating costs.

With perhaps one exception, it is difficult to imagine how an AFFH rule could address the failure of the private market to build affordable multifamily housing. That one exception relates to local zoning and land-use ordinances. While the AFFH rule does not require jurisdictions to change their zoning codes or land-use ordinances, the Assessment Tool considers land-use and zoning laws to be a potential “contributing factor” leading to a lack of racial integration that jurisdictions could consider.

Seemingly contradicting his pre-HUD days when he echoed others’ fears that the AFFH rule would force localities to change their zoning codes, Secretary Carson said he wanted to “focus on restrictive zoning codes” in a *Wall Street Journal* interview on August 13, 2018. In addition, indirectly referring to the CDBG program, Secretary Carson said he “would incentivize people who really would like to get a nice juicy government grant to take a look at their zoning codes.”

However, increasing the supply of housing does not address the core of the Fair Housing Act obligations to affirmatively furthering fair housing based on the protected classes. A robust AFFH rule is essential to ensuring that any increased supply of housing is in fact available to people in the protected classes.

HUD ASKS QUESTIONS IN PREPARATION FOR STREAMLINING THE AFFH RULE

HUD’s Advanced Notice of Proposed Rule Making posed eight sets of questions, six of which are discussed here.

Question Set 1

HUD asked whether issues considered in the context of affirmatively furthering fair housing merit public participation procedures separate

from the public participation procedures already required by the Consolidated Plan’s Annual Action Plan process. In other words, HUD wanted to know whether public input about affirmatively furthering fair housing could be included as part of the Annual Action Plan process.

NLIHC Response: A separate AFFH community participation process is essential. Under the flawed AI protocol, there was no public input and no opportunity to identify fair housing issues or to suggest reasonable actions and policies to address those fair housing issues. The AFFH rule had a fairly robust community participation process for the first time and also required public engagement and consultation with fair housing organizations for the first time.

Identifying and assessing priorities among many fair housing issues and recommending fair housing goals entail very different concepts and sometimes even different stakeholders than those considered in the Annual Action Plan process. Consequently, separate public participation procedures are warranted. The AFFH rule designed the AFFH public participation process in order to draft an AFH that preceded and informed the decision making associated with the Consolidated Plan and its Annual Action Plan system.

Question Set 2

Question 2a: Should local governments be allowed to choose which data to consider instead of using uniform data provided by HUD?

NLIHC Response: A uniform standard set of data for all jurisdictions to use is important. One of the hallmarks of the system underlying the AFFH rule was that HUD provided data from national sources and a free mapping tool to make it easier for jurisdictions to prepare an AFH. This was intended, in part, to lessen if not totally eliminate dependency on procuring expensive outside consultants, as was done under the AI protocol. The publicly available data and mapping tool also enabled the public to verify a jurisdiction’s analysis and/or to offer additional analytical input. The AFFH rule also required jurisdictions to use local information and knowledge, including

that suggested during the public input process, to complement the standard data provided by HUD.

There must be a minimum, uniform standard set of data that jurisdictions should use. All recipients of federal housing and community development assistance should be required to attempt AFFH analysis based on the same data considerations. Allowing a jurisdiction to selectively choose which data to use can lead to jurisdictions creating overly optimistic AFHs and/or establishing easy-to-achieve fair housing goals and accomplishments.

Question 2b: HUD also asked whether jurisdictions should be allowed to rely on their experiences instead of relying on what HUD calls a “data-centric approach.”

NLIHC Response: Data is essential for rational analysis of fair housing issues. Data can reveal situations that might not otherwise be obvious, can help overcome unconscious bias, and can help discern degrees of severity (or lack thereof) associated with fair housing issues. The AFFH rule’s requirement to use local information and knowledge, which is often not quantitative, can complement a “data-centric approach.” Question Set 2 seems to be related to HUD’s second proposed amendment to the AFFH rule, “to create a process that is focused primarily on accomplishing positive results, rather than on performing analysis of community characteristics.” But, how can a jurisdiction accomplish appropriate results without first conducting, within a broad but standardized framework, a reasoned analysis of underlying conditions and the factors and forces that cause those conditions? How else can jurisdictions set priorities for deciding which results to strive for, in what order, and in what timeframe?

Question Set 3

Question 3a: HUD asked whether jurisdictions should be required to provide a detailed report of any AFFH analysis, or whether a summary of goals is sufficient.

NLIHC Response: Details are essential. Public officials who are responsible for complying with the Fair Housing Act need a thorough

presentation of the analysis to responsibly set policies, establish procedures, and fund activities that affirmatively further fair housing. A summary of general goal statements cannot provide the nuance essential for decision-making. The public also needs a detailed analysis to monitor AFFH compliance and progress and to keep public officials accountable.

Question 3b: HUD asked how often program participants should report on their AFFH efforts.

NLIHC Response: Annual reporting is essential. The AFFH rule required a jurisdiction to identify metrics and milestones for measuring the extent to which they were achieving fair housing results. The intent of this requirement would be less than effective if annual reporting was not required. Public officials and the general public need to have annual performance reports in order to detect difficulties in meeting metrics and milestones so that corrections or adjustments can be made on a timely basis.

Question 3c: HUD asked whether the rule should continue to require that a new AFH be submitted every five years in synch with the five-year Consolidated Plan cycle.

NLIHC Response: The five-year cycle makes sense. The AI protocol did not specify how often a new AI should be conducted. Consequently, some AIs were very out of date. The *Fair Housing Planning Guide* from March 1996 suggested that jurisdictions update their AI with the Consolidated Plan cycle. Because the *Guide* was not formal HUD policy it had little weight among most jurisdictions. In addition, HUD guidance in the form of a Memorandum dated September 2, 2004 suggested that a new AI be conducted in concert with the Consolidated Plan cycle. The AFFH rule, for the first time, required jurisdictions to undertake a new AFH process every five years, in synch with the five-year Consolidated Plan and PHA Plan cycle.

Question Set 4

One of the questions in this set asked whether the AFFH rule should be amended to allow program participants to determine the number and types of fair housing obstacles to address.

NLIHC Response: The AFFH rule did not specify, as is hinted at in Question Set 4, the number or types of fair housing obstacles a jurisdiction must address. The AFFH rule offered jurisdictions great latitude in assessing their communities, determining the number and types of fair housing obstacles to address, and setting their own goals.

Question 5

In a related vein, HUD asked how much deference jurisdictions should have in establishing objectives to address obstacles to identified fair housing goals and associated metrics and milestones.

NLIHC Response: Again, the AFFH rule did not prescribe how jurisdictions should set objectives, goals, metrics, or milestones.

Question Set 6

HUD asked what types of elements should distinguish acceptable efforts to address fair housing issues from those that should be considered unacceptable.

NLIHC Response: The AFFH rule, for the first time, required HUD field staff to review a jurisdiction's AFH and assess whether it should be accepted. If there were shortcomings or problems in an initial AFH submission, HUD was to specify the shortcomings or problems and jurisdictions would have 45 days to address them in order to have an AFH accepted. The criteria for HUD to decide to not accept an AFH were very general, consequently there was a lot of leeway.

That leeway could allow a jurisdiction to have an AFH accepted that fair housing advocates might consider very inadequate. On the other hand, that absence of "prescription" offered jurisdictions the opportunity to submit and HUD to accept an AFH that was appropriately tailored to a given community. The only consideration should be whether the public agrees that an AFH identified meaningful goals and activities that related to genuine fair housing issues.

THE COURT DISMISSES ADVOCATES' CHALLENGE TO HUD'S WITHDRAWAL OF AFFH ASSESSMENT TOOL

When the advocates first filed suit against HUD, it was based on HUD's January 5, 2018 delay of the obligation to submit an AFH until after 2025 for approximately 900 out of 1,200 local jurisdictions. The advocates modified their legal complaint after HUD withdrew use of the Assessment Tool on May 23, 2018. The plaintiffs asserted that the May notices constituted an unlawful action because the notices effectively suspended the AFFH rule without the public notice and comment procedures required by the "Administrative Procedure Act," and because withdrawing the Assessment Tool was arbitrary and capricious.

Unfortunately, on August 18, 2018 the U.S. District Court for the District of Columbia dismissed the advocates' motion for a preliminary injunction against HUD for withdrawing the Assessment Tool. The judge found that the plaintiffs lacked standing to sue.

In addition, the judge wrote that one of the May notices directed jurisdictions to revert to the AI process. The judge also noted that the Consolidated Plan regulations requiring jurisdictions to certify that they were affirmatively furthering fair housing still entailed "taking appropriate actions" to overcome the effects of impediments to fair housing as well as to maintain records reflecting the analysis of impediments and actions taken to overcome them. Therefore, the judge concluded that the notice "effectively reminded program participants about the continuing effective parts of the AFFH rule," and that "despite withdrawal of the Assessment Tool, many components of the AFFH rule remain in effect." The components the judge claimed remained in effect were: the definition of "affirmatively furthering fair housing," community participation and consultation, certification of AFFH compliance, and recordkeeping. However, the new community participation requirements in the AFFH rule and

in the Consolidated Plan rule (the most important feature of the four) as amended by the AFFH rule all refer to the AFH, not the AI.

The three advocacy organizations that sued HUD filed a motion on September 14, 2018 asking the court to set aside its judgement and to allow the plaintiffs to amend their legal argument. The plaintiffs asserted that the court misunderstood key elements of the AFFH and Consolidated Plan processes. They also asserted that because the provisions that the court mistakenly concluded remained active were never even raised by HUD (they were the judge's observations), the plaintiffs never had an opportunity to respond to such conclusions. The judge did not accept the plaintiffs' motion.

HUD's Next Move – A Proposed Rule That Is Not a Fair Housing Rule

Secretary Carson published a proposed rule on January 14, 2020 that is not a fair housing rule. It does not mention race or discrimination or segregation; it falsely equates increasing the housing supply with fair housing choice. If the proposed rule becomes effective, jurisdictions would no longer use the AFH or the AI; instead they would use a newly created "AFFH Certification" that would merely require jurisdictions to identify three fair housing goals they intend to address in an upcoming five-year period. If a jurisdiction chooses its three goals from a list of 16 HUD-presumed so-called "obstacles" to fair housing, then the jurisdiction would not have to provide a detailed description of the three goals. But 13 of the "obstacles" have nothing to do with fair housing. See *Affirmatively Furthering Fair Housing (AFFH), Part 1: Secretary Carson's Proposed Rule Would Gut AFFH*.

TIPS FOR LOCAL SUCCESS

Even though HUD has indefinitely suspended the AFFH rule and proposed a completely different rule, 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 2020

Jurisdictions will continue to only be required to use the flawed AI process in 2020, unless a final rule is issued late in 2020, because the 2015 AFFH rule was indefinitely suspended by Secretary Carson's HUD. Secretary Carson published a proposed rule on January 14, 2020 that is not a fair housing rule. It does not mention race or discrimination or segregation; it falsely equates increasing the housing supply with fair housing choice. If the proposed rule becomes effective, jurisdictions would no longer use the AFH or the AI; instead they would use a newly created "AFFH Certification" that would merely require jurisdictions to identify three fair housing goals they intend to address in an upcoming five-year period. If a jurisdiction chooses its three goals from a list of 16 HUD-presumed so-called "obstacles" to fair housing, then the jurisdiction would not have to provide a detailed description of the three goals. But 13 of the "obstacles" have nothing to do with fair housing. See *Affirmatively Furthering Fair Housing (AFFH), Part 1: Secretary Carson's Proposed Rule Would Gut AFFH*. Consult NLIHC's AFFH webpage to learn whether anything new has transpired in the subsequent months.

WHAT TO SAY TO LEGISLATORS

Ask your congressional delegation to register its opposition to Secretary Carson's proposal to gut the AFFH rule and to consider congressional avenues to prevent HUD from carrying out its harmful intent. Remind your congressional delegation that the 2015 AFFH rule did not mandate specific outcomes; rather, it established basic parameters to help guide public sector housing and 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,
<http://nlihc.org/issues/affh>

HUD's January 5, 2018 *Federal Register* notice,
<https://bit.ly/2A6lu5U>

HUD's three May 23, 2018 *Federal Register* notices,

- <https://bit.ly/2Bx38fu>
- <https://bit.ly/2GxJ1Uh>
- <https://bit.ly/2S65wkx>

HUD's August 16, 2018 Advanced Notice of
Proposed Rulemaking, <https://bit.ly/2BtSZ3k>

The Plaintiffs' Amended Complaint, https://prrac.org/pdf/Amended_complaint_AFFH.pdf

Memorandum in Support of Plaintiffs' Renewed
Motion for Preliminary Injunction and Summary
Judgment, https://prrac.org/pdf/Memo_of_law_-_new_AFFH_PI-SJ.pdf

Judge's Opinion, https://prrac.org/pdf/Opinion_US_District_Court_DC_8_17_18.pdf

Plaintiffs' Motion to Amend the Judgement, http://prrac.org/pdf/rule_59_motion.pdf