HUD

Advocates Sue HUD over AFFH Rule Suspension

Three advocacy organizations filed suit against HUD for suspending until October 31, 2020, the obligation of jurisdictions to submit an Assessment of Fair Housing (AFH) as required by the Affirmatively Furthering Fair Housing (AFFH) rule. The January 5, 2018 suspension in effect suspends the entire AFFH rule for more than 900 jurisdictions (out of 1,200) until 2024 or 2025 (see *Memo*, 1/8). The National Fair Housing Alliance, Texas Low Income Housing Information Services (Texas Housers), and Texas Appleseed filed their legal complaint on May 8, 2018.

The plaintiffs assert that HUD violated the Administrative Procedure Act (APA) in three ways:

1. HUD failed to provide public notice and comment before suspending the AFFH rule's requirement for jurisdictions to submit an AFH.
2. HUD acted in an arbitrary and capricious manner because it did not provide a reasoned basis for the suspension.
3. HUD abdicated its duty under the Fair Housing Act to ensure that recipients of HUD funds affirmatively further fair housing.

Plaintiffs seek preliminary and permanent injunctive relief, including a ruling that the January 5, 2018 *Federal Register* notice constitutes unlawful agency action, and call for the courts to order HUD to rescind the notice, immediately reinstate the AFH process, and take all necessary steps to implement and enforce the AFFH rule.

Failure to provide notice and comment. The APA requires a federal agency to publish a notice of proposed rulemaking in the *Federal Register* before issuing a substantive rule. The APA also requires an agency to "give interested persons an opportunity to participate in the rule making through the submission of written data, views, or arguments." These requirements apply to "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."

HUD abruptly announced the immediate suspension of the AFH requirement in the *Federal Register* on January 5, 2018 without the APA-required notice and comment. In contrast, beginning with a listening session in July, 2009, HUD began the process of preparing an AFFH rule, leading to a proposed rule on July 19, 2013 and culminating with a final rule on July 16, 2015. In addition, HUD published a proposed AFH Assessment Tool on September 26, 2014 that was subject to the two-step public comment process required by the Paperwork Reduction Act (PRA). A revised Assessment Tool was published for the PRA two-step public comment process on July 16, 2015, and in order to renew the Assessment Tool, it was once again subjected to PRA public review and comment on March 23, 2016.

Citing three court decisions, the plaintiffs add that once a rule is final, the agency "is itself bound by [it] until that rule is amended or revoked," and the agency "may not alter such a rule without notice and comment." Also, because the "suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under [the] APA," such action requires compliance with the APA's procedural requirements. Otherwise, "an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date."

Acting in an arbitrary and capricious manner. The complaint raises three components. First, citing case law, the plaintiffs assert that the suspension was not based on a "reasoned analysis" that indicates the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." They state that HUD made no attempt to explain why it was problematic or unexpected that 17 of the first 49 AFH submissions were not initially accepted. The AFFH rule anticipated that HUD would not accept some AFHs on first submission, especially because the AFH was a new concept and tool. The rule requires HUD to provide feedback to a jurisdiction to use in revising its AFH.

Second, HUD did not consider significant evidence. The complaint notes that 32 of the submissions HUD initially rejected were subsequently improved through a collaborative process between HUD and the jurisdictions, and all but a few were accepted after revision. AFHs not approved were deemed "deeply flawed." Examples included failing to: recognize segregation in an entire section of a jurisdiction; include any metrics or milestones to measure improvements in fair housing; analyze HUD-provided data; or consider housing barriers for key constituents, such as people living in public housing.

HUD ignored the benefits of ongoing implementation of the AFFH rule. HUD's suspension notice claimed that another reason for the suspension was that jurisdictions' expended resources completing an AFH and HUD expended resources reviewing them. The notice did not, however, describe the magnitude of the expense or how the expense outweighed the benefits. The complaint refers to a study that found that AFHs submitted by 28 jurisdictions were a "striking improvement" over those jurisdictions' previous Analyses of Impediments (AIs). For example, Chester County, Pennsylvania committed to creating 200 new affordable rental units in high opportunity neighborhoods across the county by 2021. El Paso County, Colorado similarly promised to assist in the development of 100 publicly supported affordable housing units in areas of opportunity.

When promulgating the AFFH rule, HUD stated that when left to their own devices, localities do not take the necessary steps to effectively address segregation, concentrated poverty, and disparities in access to opportunity. HUD found that it needed a new and robust planning approach to ensure that local governments and other grantees take actions that are consistent with the Act. When suspending the rule, HUD did not acknowledge this benefit of the AFH tool.

The third component of the complaint's allegation that the suspension was arbitrary and capricious was that HUD claimed that better technical assistance was needed to improve jurisdictions' understanding of their obligations. However, HUD did not explain why such a need warranted the suspension.

The plaintiffs declare that, to the extent HUD's current technical assistance is inadequate, it is because under Secretary Carson HUD has cut back on technical assistance offerings to local jurisdictions and has stopped issuing technical guidance to its own staff. "It is not more time that HUD needs to offer enhanced technical assistance—it is the willingness to take the task seriously." Since at least FY 2012, Congress has appropriated significant funds for HUD's technical assistance efforts, and much of that money has been devoted to the implementation of the Affirmatively Furthering Fair Housing rule. Starting in 2017, HUD has forbidden its contractors or staff to engage in on-site technical assistance, failed to publish further guidance, and ceased to monitor and respond to questions about the AFFH rule submitted through the HUD Exchange Ask-A-Question portal.

HUD abdicated its duty under the Fair Housing Act to ensure that recipients of HUD funds affirmatively further fair housing. HUD promulgated the AFFH rule during the Obama administration in response to mounting evidence that the AI system, which was basically an honor system, resulted in jurisdictions accepting federal funds without taking meaningful steps to affirmatively further fair housing. By suspending the AFH, all but about 27 jurisdictions will revert to the very flawed AI system.

In 2008, the National Commission on Fair Housing and Equal Opportunity, a body co-chaired by former HUD Secretaries Jack Kemp (a Republican) and Henry Cisneros (a Democrat), reported: "The current federal system for ensuring fair housing compliance by state and local recipients of housing assistance has failed…HUD requires no evidence that anything is actually being done as a condition of funding and it does not take adverse action if jurisdictions are directly involved in discriminatory actions or fail to affirmatively further fair housing."

After the Westchester, NY legal case, HUD asked jurisdictions to produce their AIs for review. A 2009 study conducted by HUD's Office of Policy Development and Research (PD&R) found that more than one third of the jurisdictions could not or would not produce any AI at all. Of those that did produce an AI, HUD rated 49% as "needs improvement" or "poor." HUD found that only 20% of AIs committed jurisdictions to doing *anything* on a set timeframe.

A 2010 report by the Government Accountability Office (GAO) found that many jurisdictions, lacking any oversight or accountability, failed to make minimal efforts to comply with the lax requirements of the AI system. The GAO found that 29% of jurisdictions had not completed an AI within the last five years, that many could not produce a document labeled an AI, and that others produced perfunctory documents—or, in one case, an e-mail.

Co-counsel for the plaintiffs are the Lawyers' Committee for Civil Rights Under Law, the Poverty & Race Research Action Council, the NAACP Legal Defense and Educational Fund, the American Civil Liberties Union, the Public Citizen Litigation Group, and the law firm of Relman, Dane, and Colfax, PLLC.

The complaint and related materials are available on the website of the Policy & Race Research Action Council at: https://bit.ly/2KOfpzX

More about the July 2015 AFFH rule is on page 7-5 of NLIHC's *2018 Advocates' Guide* at: https://bit.ly/2G2zU8q

More about the Analysis of Impediments is on page 7-17 of NLIHC's *2018 Advocates' Guide* at: https://bit.ly/2IckAIB