ABBREVIATED SUMMARY AND ASSESSMENT
HUD'S PROPOSED AFFH RULE

Ed Gramlich, NLIHC, January 9, 2020

Secretary Carson Proposes AFFH Rule That Is Not A Fair Housing Rule

HUD published a proposed affirmative furthering fair housing (AFFH) rule on January 14, 2020, intending to replace the 2015 rule. The proposed rule is not a fair housing rule; rather, it is a complete retreat from efforts to undo historic, government-driven patterns of housing segregation and discrimination. It considers housing that might be "affordable" to be the same as housing that is available to people in the Fair Housing Act's protected classes based on race, color, national origin, sex, familial status, disability, or religion. The proposed rule even deletes the words "segregation" and "discrimination." HUD proposes to substitute a supply-side ideology that misleadingly assumes that an overall increase in the supply of housing will trickle down to become "affordable" housing without any consideration of the effects of jurisdictions' policies and practices on race and other protected classes or on overcoming patterns of housing segregation.

The proposed rule would be worse than the minimal AFFH process that existed from 1994 that the Government Accountability Office (GAO) found to be ineffective. In the meantime, until a final rule is published or until HUD reinstates the 2015 rule, jurisdictions and public housing agencies (PHAs) must continue to follow the 1994 process that called for an Analysis of Impediments (AI) to fair housing choice.

The proposed rule eliminates the 2015 rule's statement of purpose: to have an effective planning approach to aid jurisdictions and PHAs in taking meaningful actions to "overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination." It also deletes a detailed definition of "affirmatively furthering fair housing" that among other features included "taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics." Also eliminated is a detailed definition of "segregation." The proposed rule would also only use the word "discrimination" on a few occasions.

HUD prematurely suspended implementation of the 2015 rule based on only 49 initial Assessment of Fair Housing (AFH) submissions, 32 of which were ultimately accepted by HUD. The 2015 rule anticipated that a new and meaningful approach to AFFH would entail a learning curve, so provided for a back-and-forth process for jurisdictions and HUD to interact.

Replacing the Assessment of Fair Housing (AFH) With a Beefed Up AFFH Certification

The proposed rule discards a genuine means to affirmatively further fair housing as required by the Fair Housing Act of 1968. It would scrap the 2015 rule's Assessment of Fair Housing (AFH) that was the product of nearly four years' of diligent consultation and broad public engagement on the part of HUD starting in late 2009. The AFH was developed in response to jurisdictions' requests for uniform guidance in order to reduce uncertainty regarding how to meet their AFFH obligation. The AFH is the document to be used by jurisdictions and public housing agencies (PHAs) to demonstrate their compliance with the Fair Housing Act's obligation to affirmatively further fair housing (AFFH). The AFH provides a standardized road map that jurisdictions and PHAs could use, eliminating the lack of guidance and subsequent uncertainty that many jurisdictions and PHAs complained about regarding the Analysis of Impediments (AI) process.

In place of the AFH, HUD proposes to rigorously tie AFFH compliance to a significantly altered meaning of AFFH "certification." The 2015 AFFH rule defined AFFH certification to mean that a jurisdiction "will take meaningful actions to further the goals of the AFH…and that it will take no action that is materially inconsistent with the obligation to affirmatively further fair housing."

HUD proposes to essentially eliminate a genuine assessment of affirmatively furthering fair housing, one which identified and addressed harmful patterns of segregation, discriminatory practices, and disinvestment, replacing it with a supply-side assessment. HUD equates an increased supply of housing with fair housing choice. However, simply increasing the supply of housing will not necessarily result in housing that is affordable to low-income (much less extremely low-income) people, and it is even less likely to reduce or eliminate discriminatory attitudes, policies, practices or entrenched segregation. Affirmatively furthering fair housing will seldom trickle down from a supply side strategy. The proposed rule advances neither fair housing nor affordable housing.

The proposed rule would require a jurisdiction to identify a minimum of three goals it aims to achieve and explain how meeting the goals over the course of the next five years would affirmatively further fair housing. However, 16 goals on a proposed HUD list would not need to be described because HUD misleadingly asserts that they are inherent obstacles to fair housing choice. The effect of the exemptions is to steer a jurisdiction toward choosing the obstacles, 13 of which have nothing to do with fair housing; rather, they are factors that might have some marginal effect on the cost of building new housing and perhaps thereby inhibit growth of the supply of housing. They also reflect the current administration's intent to drastically reduce regulations, even if those regulations provide valuable protections for people and the environment.

Increasing the overall supply of housing, however, does not address the many obstacles to fair housing choice for people in the protected classes under the Fair Housing Act; it might not even have a measurable impact on developing housing that is affordable. An augmented housing supply will not necessarily trickle down to low-income (much less extremely low-income people), nor will it necessarily reduce or eliminate discriminatory attitudes and practices.

The proposed rule does have three conditions that could pertain to fair housing choice:

- Concentration of substandard housing stock in a particular area.
- Source of income restrictions on rental housing.
- Unnecessary manufactured housing regulations and restrictions.

While the first item does potentially address undue concentrations of substandard housing in a particular area, it does not directly address racial or ethnically concentrated housing, whether substandard or even standard.

A fourth condition is not a fair housing obstacle but is a problem that must be addressed – high rates of housing-related lead poisoning in housing. Even this otherwise meritorious item is inadequate; it ought to address lead hazards, not lead poisoning. Congress, HUD, and local jurisdictions must do much more to identify and mitigate or eradicate lead hazards before children become poisoned by lead hazards.

That leaves 12 irrelevant supply-side conditions (word-for-word):

- Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable.
- Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable and accessible to people with disabilities.
- Not in derogation of applicable federal law or regulations, inflexible or unduly rigorous design standards or other similar barriers which unreasonably increase the cost of the construction or rehabilitation of low-to-mid price housing or impede the development or implementation of innovative approaches to housing.
- Lack of effective, timely, and cost-effective means for clearing title issues, if such are prevalent in the community.
- Administrative procedures which have the effect of restricting or otherwise materially impeding the approval of affordable housing development.
- Artificial economic restrictions on the long-term creation of rental housing, such as certain types of rent control.
- Unduly prescriptive or burdensome building and rehabilitation codes.
- Arbitrary or excessive energy and water efficiency mandates.
- Unduly burdensome wetland or environmental regulations.
- Cumbersome or time-consuming construction or rehabilitation permitting and review procedures.
- Tax policies which discourage investment or reinvestment.
- Arbitrary or unnecessary labor requirements.

Among the above, depending on how they are designed and implemented, some of the “inherent obstacles” could protect protected class people as well as others, for example rent control and labor requirements. Energy and water efficiency standards, as well as wetlands and environmental regulations are essential components of addressing human-made climate change. “Tax policies” might be interpreted in a way that inhibits the creation or growth of local and state housing trust funds.

Ironically the list of 16 conditions does not explicitly include zoning policies. However, the preamble to the proposed rule states that jurisdictions can consider zoning or land-use policies as one method of complying with their AFFH obligation, but if they do not, HUD will not question their AFFH certification. Combating restrictive zoning or land-use policies that inhibit housing production is an important goal given the deep racial disparities created by some local zoning laws and land-use policies. Any AFFH rule must treat restrictive zoning laws and land-use policies as potential obstacles to AFFH.

A New Way for HUD to Evaluate and Rank AFFH Compliance

Continuing HUD's proposed emphasis on a supply-side approach to affirmatively furthering fair housing, HUD would create an "evaluation" component focusing on measuring the adequacy of a jurisdiction's supply of affordable housing throughout the jurisdiction as well as the quality of the affordable housing. The 2015 rule did not have an evaluation.

Each year, HUD proposes to conduct an analysis and ranking of jurisdictions to determine which jurisdictions are succeeding at affirmatively furthering fair housing and which should be subject to an enhanced review by HUD and that may need additional assistance. Yet, HUD adds that this ranking will not determine whether a jurisdiction has complied with the Fair Housing Act.

<u>Evaluating AFFH Performance by Looking at Factors Unrelated to Fair Housing</u>

As with the proposed AFFH certification that, with two or three exceptions, would not address genuine fair housing choice issues, HUD proposes to evaluate jurisdictions looking at nine factors, only two of which relate to fair housing choice. The remaining seven will not address genuine obstacles to meeting the obligation to affirmatively further fair housing, and therefore will in no way provide a genuine analysis of a jurisdiction's success at achieving AFFH.

Using the nine factors, HUD will give each jurisdiction a baseline score that HUD thinks indicates the adequacy of the supply of quality affordable housing. The nine factors are:

Two actually address fair housing choice:

- The availability of housing accepting vouchers
- The availability of housing accessible to persons with disabilities

Another two factors relate to "affordability":

- Median home value and contract rent
- Household cost burden
  (Does HUD consider "cost burden" to mean the standard of a household paying no more than 30% of adjusted income for rent and utilities or homeowner payments plus utilities?)

Three factors relate to housing quality:

- Percentage of dwellings lacking complete plumbing or kitchen facilities
- Rates of lead-based paint poisoning
- Rates of subpar public housing conditions.
  (Note that HUD has a very bad track record of enforcing Uniform Physical Inspection Standards for both public housing and private, HUD-assisted multifamily housing.)

Two factors relate to supply:

- Vacancy rates
- The existence of excess housing choice voucher reserves
  (This is a function of PHAs playing accounting games given the Annual uncertainty of congressional appropriations for voucher renewals.)

Relying on these nine factors does not even provide a meaningful indication of HUD's purported desire to use an increased supply of housing as a substitute for affirmatively furthering fair housing. Only two factors indicate anything regarding supply, and most PHAs do not horde vouchers. Regarding the three quality factors, all housing should be free of lead hazards (not just lead poisoning) and have complete plumbing and kitchen facilities. HUD should enforce Uniform Physical Condition Standards. Affordability indicators such as cost burden and rents and home prices (as well as vacancy rates) are affected by much greater market forces. For example, in areas of high demand those affordability indicators will only be addressed if the housing supply is vastly increased and people are paid living wages, while areas that are losing sources of employment will "look good" because rents will decline and vacancy rates will increase.

Ranking Jurisdictions

Based on each jurisdiction's baseline score using the nine factors above, HUD proposes ranking all jurisdictions. Arbitrarily ranking jurisdictions, especially using the nine factors makes no sense. In addition, it is contrary to HUD's frequent refrain that each jurisdiction's situations are unique – on that NLIHC agrees. Therefore, to establish a ranking system solely to compare jurisdictions contradicts HUD's own view of jurisdictions' relative fair housing choice needs, while proposing to undertake a meaningless exercise that cannot truly assess the success of any jurisdiction's compliance with its AFFH obligations.

Providing Incentives for Jurisdictions Ranked as "Outstanding"

Jurisdictions that HUD ranks as "outstanding" based on the nine-factor evaluation would be eligible for preference points when competing for grants through Notices of Funding Availability (NOFAs), as well as for receiving funds from HUD programs that are reallocations of recaptured funds. HUD apparently views these as incentives for jurisdictions to better perform their AFFH obligations. But there are relatively few HUD programs that operate via NOFAs, and most of these are relatively small programs.

Jurisdictions that HUD ranks as “outstanding” are likely to be jurisdictions that readily strive to genuinely comply with their obligation to affirmatively further fair housing. Jurisdictions that attempt to avoid complying with AFFH are not at all likely to be motivated by the marginal benefits of points awarded in a NOFA competition.

Residents of low-ranking jurisdictions should not be “punished” if their jurisdictions lose out to “outstanding” jurisdictions that receive added points in a NOFA competition; they might be the residents who could benefit the most from the program tied to a NOFA.

Program funds that are reallocations of recaptured funds might be of marginal value to jurisdictions due to the potentially modest sums and/or due to the fact that the reallocated funds will be limited to a given program, one that a jurisdiction does not need more of or does not value highly.

Adjudicated Fair Housing Violations

HUD proposes that no jurisdiction may be considered an outstanding AFFH performer if it or a PHA operating within the jurisdiction has in the past five years been found by a court or administrative law judge in a case brought by or on behalf of HUD or by the United States Department of Justice (DOJ) to be in violation of civil rights law.

Simply being free of any civil rights violations is not a measure of affirmatively furthering fair housing. The proposed text limits this “adjudication” provision to court or administrative judge decisions brought in response to complaints by HUD or DOJ. As the National Fair Housing Alliance (NFHA) notes, most complaints are settled out of court. In addition, year in and year out NFHA reports that most fair housing complaints are brought by private, nonprofit organizations. In 2018, 75% of all complaints were brought by nonprofits, while the other 25% were brought by local and state agencies as well as by the federal government.

In addition, local jurisdictions have little, if any, control over PHAs; therefore it does not seem appropriate to downgrade a jurisdiction for the fair housing findings attached to a PHA.

Also, what would having an “adjudicated” violation mean for a jurisdiction that was not otherwise at the “outstanding” level, but nonetheless measured somewhere in between “outstanding” and “low-ranking”?

PUBLIC PARTICIPATION

The proposed rule would eliminate a separate public participation process pertaining to AFFH that requires a public hearing and written comment period to inform a jurisdiction about its residents' fair housing concerns and priorities before any AFFH-related considerations might be reflected in a jurisdiction's Consolidated Plan (ConPlan). Instead HUD contends that AFFH will be adequately dealt with in the otherwise crowded ConPlan public participation process.

Because AFFH compliance in the proposed rule would hinge on the proposed, detailed AFFH certification (replacing the AFH), there is even less public involvement in the AFFH process because development of the AFFH certification is not subject to public input.

NLIHC welcomed the 2015 AFFH rule's requirement that there be genuine public participation in drafting an AFH. Under the flawed Analysis of Impediments (AI) protocol, there was no public input, no opportunity to identify fair housing issues or to suggest reasonable actions and policies to address those fair housing issues. The 2015 AFFH rule also introduced for the first time a requirement that jurisdictions consult with fair housing organizations in the development of the AFH, long before a ConPlan was to be drafted.

The Consolidated Plan's public participation process is designed to obtain input regarding housing and community development needs, assessing which needs among the many have the highest priority in the five-year ConPlan cycle, and which programs and activities ought to be funded and at what level. That is quite a bit to consider.

Identifying fair housing issues, assessing priorities among many fair housing issues, and recommending goals entail very different concepts and sometimes even different stakeholders, thereby warranting separate public participation procedures. The 2015 AFFH rule reasonably designed the AFFH public participation process to precede and inform the decision making associated with the ConPlan and its Annual Action Plan system.

As with public participation, HUD thinks that there is no need for special, separate consultation with fair housing organizations regarding AFFH issues and solutions in advance of the ConPlan process; that the ConPlan regulation's consultation provisions are adequate. However, it is important to obtain consultation regarding AFFH goals long before a jurisdiction begins thinking about its how those AFFH goals might fit in its ConPlan priorities and objectives.

CHANGES RELATING to PHAs

Public housing agencies (PHAs) would not have to submit an AFFH certification with goals. All a PHA would have to do is certify each year when it updates its PHA Plan that it has consulted with the jurisdiction in which it is located regarding their common AFFH obligations. This consultation and certification would fulfill a PHA's AFFH responsibility.

If the proposed rule is implemented as drafted, it would eliminate the 2015 rule's requirement to take "meaningful actions" rather than token actions, and to not take actions that are not consistent with the obligation to AFFH.

It is important for PHAs to develop and submit specific AFFH-specific goals and proposed actions unique to PHA operations, policies, and programs, such as project basing of vouchers, implementing required or voluntary Small Area Fair Market Rents (SAFMRs), proposals to develop mixed-finance projects, deciding which public housing projects to propose for demolition or disposition, and how the voucher program is administered (including portability).