

PRELIMINARY OVERVIEW OF AFFH COMMUNITY ENGAGEMENT and COMPLAINT PROCESSES

National Low Income Housing Coalition

Ed Gramlich

(February 10, 2023)

All page numbers refer to HUD's [preview version](#) of the proposed AFFH rule

§5.158 Community Engagement

(a) General Provisions (page 199)

- (1) Program participants must engage the public **during the development** of the Equity Plan in order to identify fair housing **issues** and to help set fair housing **goals** to remedy the identified fair housing issues. Community engagement includes consideration of the views and recommendations received from the community and other interested parties.

[NLIHC will **urge HUD to add** that community engagement must also take place in the required **prioritization** of fair housing issues prior to setting fair housing goals. Without community engagement to inform priority setting, a program participant could just go through the motions of “listening” to fair housing issues raised by the community, but then ignore these when deciding which of the many issues to prioritize. Although the public must be engaged in the goal setting process, there is a danger that priorities will have already been set in the form of goals promoted by the program participant.]

Page 200

- (2) Program participants **must proactively** facilitate community engagement to ensure program participants receive and address information from the community.
- (3) Program participants **may combine** the AFFH community engagement requirements with the ConPlan's citizen participation requirements [§§91.100 and 105 for local jurisdictions, §§91.110 and 115 for states] or with the PHA Plan's resident participation regulations [§903.17]. However, program participants are required to explain the Fair Housing Act's affirmatively furthering fair housing duty and ensure engagement regarding that the Equity Plan **meets all the criteria set forth in this section** [§5.158].

[NLIHC is concerned about allowing such combinations. Will AFFH receive the attention it deserves given program participants' long history with the ConPlan processes (in particular) which can be overwhelmingly consumed by entities identifying housing and community development needs (during ConPlan's required “needs” public hearing), and by entities seeking Community Development Block Grant (CDBG) and HOME funds from a jurisdiction (during the draft Annual Action Plan public hearing)? Is the AFFH text “**meets all the criteria set forth in this section** [§5.158]” sufficient to ensure adequate AFFH community engagement? Either greater clarity is needed or HUD must modify the proposed changes to the ConPlan and PHA Plan regs in order for the AFFH community engagement provisions to mesh with the ConPlan and PHA Plan citizen and resident participation provisions – otherwise the positive attributes of the AFFH rule will be nullified. See pages 3-6 below for more discussion.

Likewise, in the PHA Plan public engagement process, will the single, required public “hearing” provide adequate time and attention regarding the PHA’s policies that might be barriers to AFFH, given the many other problems residents will raise (e.g. housing quality) during a hearing? See page 6-7 below for more.]

Page 200

- (4) “In accordance with program regulations,” the public must have a reasonable opportunity for involvement in the **incorporation** of the fair housing goals as strategies and meaningful actions into the ConPlan, Annual Action Plan, PHA Plan, and other required planning documents.

[NLIHC will be seeking clarification from HUD about “In accordance with program regulations”. It probably means following ConPlan and PHA Plan regulations. Does this mean, in the context of ConPlan regs, that the “public hearing” regarding the draft Annual Action Plan is the place for the required “reasonable opportunity”?

The answer seems to be in the proposed changes to the ConPlan regulations at §91.105(e) regarding ConPlan public “hearings”, which state that of the two required ConPlan public hearings, “Together, the hearings must address housing and community development needs, development of proposed activities, **proposed fair housing strategies and meaningful actions for affirmatively furthering fair housing based on the fair housing goals from the Equity Plan**...and a review of program performance.” But at the ConPlan Annual Action stage, the fair housing goals, strategies, and actions are “finalized” in the Equity Plan – they are no longer “proposed”. Rather, at the Annual Action Plan stage, those Equity Plan goals, strategies, and actions should strongly suggest – from an AFFH perspective – which proposed activities should be approved, and at what funding levels and at which locations.

Adding to the uncertainty, §91.105(e) adds that “If the jurisdiction has included the community engagement procedures for the development of the Equity Plan in its citizen participation plan, the requirements of §5.158 [community engagement that only describes requiring three “meetings” during the development of the Equity Plan] of this title shall apply.” The “if” in the provision seems to allow a program participant to choose to not follow §5.158 and thereby evade the better AFFH community engagement provisions.

If a jurisdiction only relies on the ConPlan public “hearing” regarding “development of proposed activities and program performance”, will there be enough time during the hearing for public input regarding proposed fair housing goals, strategies, and actions that ought to influence “proposed activities” and associated allocation of federal funds? Will it be too late because a jurisdiction might be reluctant to make major changes to a draft Annual Action Plan based on AFFH goals’ strategies and actions?

Similar uncertainty applies to PHAs. The changes to the PHA resident/community participation requirement is reflected at §903.7(o)(3)(iii)&(vi), §903.13(c)(1), and §903.19(d).]

- (5) Program participants must use communication methods designed to reach the broadest possible audience, and should make efforts to reach members of protected class groups and underserved communities. Communications may include but are not limited to publishing a summary of each document on the program participant’s website and in one or more newspapers of general circulation, and by making copies of each document available on the Internet (including free web-based social bulletin boards and platforms), as well as at libraries, government offices, and public places.

[NLIHC will suggest HUD include publications, websites, blogs, neighborhood newsletters, and radio stations oriented to protected class populations.]

Page 201

- (6) Program participants must actively engage a wide variety of diverse perspectives within their communities and use available information in a manner that promotes setting meaningful fair housing goals that will lead to material positive change.
- (7) All aspects of community engagement must be conducted in compliance with fair housing and civil rights requirements, including title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act.

[NLIHC strongly urges HUD to include providing language assistance to ensure meaningful access to participation by LEP residents.]

- (8) Program participants may combine the requirements of this section [§5.158] with the ConPlan or PHA Plan public participation requirements, subject to the following requirements:

i. For ConPlan Program Participants

The jurisdiction may combine the requirements of this section [§5.158] with its applicable ConPlan citizen participation plan requirements.

However, for purposes of developing an Equity Plan, community engagement must allow for sufficient opportunity for the community to have the in-depth discussions about fair housing **issues** required by this section [§5.158]. Therefore, to the extent the citizen participation plan does not provide for this opportunity, program participants must undertake separate public engagement activities.

[As remarked above at (3), NLIHC is concerned about allowing such combinations. Paragraph (8)(i) seems to only apply to fair housing **issues**, which in the scheme of ConPlan regs, would seem to apply to the ConPlan public participation requirement to have a “public hearing” regarding “housing and community development needs”. There does not appear to be parallel text applying to public engagement in setting fair housing goals (or establishing priorities of fair housing issues).

Public hearings are “official” proceedings; for local jurisdictions that means a hearing before a city council or a county council. The ConPlan process is “political” because it involves elected officials deciding which projects to fund, how much to allocate to them, and where to locate projects. For this reason, public hearings might have more “weight” than a “meeting” conducted by local government staff because there is a chance that advocates can sway the elected officials. The disadvantages of a public hearings are that: they might not be at a time convenient for many AFFH stakeholders; the city or county council chambers might be too intimidating for some AFFH stakeholders or too difficult to get to, especially in the evening when many smaller communities lack reliable public transportation; and public hearing time limits for speaking might not provide sufficient time for some individuals to express their comments. Meetings have the advantage of enabling more relaxed (less intimidating) engagement outside of the formality of the city/council chambers, at locations easier for underserved populations to reach, and on days and at times more accommodating to their work and family schedules.

A key concern might be whether there will be adequate time for public comment about both AFFH’s fair housing issues and the ConPlan’s housing and community development needs. Will a jurisdiction comply with the proposed AFFH’s requirement that “to the extent the citizen participation plan does not provide for this opportunity, program participants must undertake separate engagement activities”? Again, there does not appear to be parallel text applying to public engagement in setting fair housing goals (or establishing priorities of fair housing issues).]

Concerns Regarding Proposed Changes to the ConPlan Citizen Participation Regs

HUD proposes amending the ConPlan “citizen” participation requirements to adjust to the proposed AFFH rule.

Local Governments §91.105 (page 239) (and State Government §91.115 (page 249))

In the ConPlan regs at §91.105(b) and §91.115(b) “Development of the ConPlan”, paragraph (3) regarding the requirement to provide at least one public “hearing” during the development of the ConPlan (local government) and regarding housing and community development “needs” before a proposed ConPlan is published for comment (states), the proposed AFFH change to paragraph (3) would direct jurisdictions to refer to §5.158(d) of the AFFH reg “for *public hearing* requirements for purposes of the Equity Plan”. However, §5.158(d) calls for at least three public “meetings” and does not use the term “public hearing”. (See page 8 of this outline for more about §5.158(d).) This seems to be an inconsistency that the final rule should correct or clarify.

The remainder of this discussion only applies to the local government ConPlan regs, §91.105.

Section §91.105 (e) of the local government ConPlan regs has long provided requirements regarding public hearings. To address the proposed AFFH rule, HUD proposes amending (e)(1)(i) of the ConPlan reg by adding “**for the purposes of the ConPlan**” to the existing ConPlan rule requiring at least two public hearings per year, conducted at a minimum of two

different stages of the [ConPlan] program year, in order to obtain residents' views and to respond to proposals and questions. Together, the two hearings must address housing and community development needs, development of proposed activities, [and] *proposed fair housing strategies and meaningful actions for affirmatively furthering fair housing* **based on the fair housing goals from the Equity Plan** [new in bold]...”

[As previously noted, at the ConPlan Annual Action stage regarding proposed activities, the fair housing goals, strategies, and actions are “finalized” in the Equity Plan – they are no longer “proposed”. Rather, at the Annual Action Plan stage, those Equity Plan goals, strategies, and actions should strongly suggest – from an AFFH perspective – which proposed activities should be approved, and at what funding levels and at which locations.

Given this regulatory instruction, jurisdictions typically have one hearing about “needs” and one about “proposed activities” (i.e., a hearing about a draft Annual Action Plan). What is HUD’s intent regarding the new text (in bold)? The text says “Must address”, which could mean public comment regarding proposed fair housing goals, strategies, and actions as previously presented in the Equity Plan – which might need to be amended in an Annual Action Plan several years after an Equity Plan is completed. Or, is it HUD’s intent to clarify and strengthen the proposed AFFH rule’s requirement to **incorporate** the Equity Plan’s fair housing goals, strategies, and actions in the ConPlan (“incorporate” refers to proposed §5.156, discussed in a separate NLIHC brief)? However, at this stage the jurisdiction is no longer addressing “proposed” fair housing goals, strategies, and actions.

Ignoring for a moment that an Equity Plan will already have final fair housing goals, strategies, and actions, at which of the two required hearings will the public be able to address “*proposed fair housing strategies and meaningful actions for affirmatively furthering fair housing*”? The unchanged ConPlan reg at (e)(1)(ii) seems to answer that question – presented on the next page.]

The proposed ConPlan change adds at the end, **“If the jurisdiction has included the community engagement procedures for development of the Equity Plan in its citizen participation plan, the requirements of §5.158 of this title shall apply.”**

[If a jurisdiction does not include the §5.158 community engagement procedures, does that mean its *proposed fair housing strategies and meaning full actions for affirmatively furthering fair housing* will only be subject to the sole ConPlan hearing? The proposed AFFH rule does not specifically require a public meeting about incorporating Equity Plan goals, strategies, and actions into the ConPlan; however, §1.158(a)(4) does call for a reasonable opportunity for public involvement (as presented above on page 2 above). Further HUD guidance would be helpful.]

The existing ConPlan public hearing provision at (e)(1)(ii) is unchanged. It requires jurisdictions to obtain community views regarding housing and community development needs, including priority non-housing community development needs, **and** affirmatively furthering fair housing during at least one of the two ConPlan required hearings *before a proposed ConPlan/Annual Action Plan is published for comment*.

[This suggests obtaining public input regarding the Equity Plan’s fair housing goals, strategies, and actions should occur during the required ConPlan “needs” hearing. Will the traditional needs hearing afford adequate room for additional discussions about the Equity Plan’s goals, strategies, and actions?

[Unless HUD clarifies how the AFFH community engagement provisions of §1.158 can seamlessly mesh with the ConPlan public hearing provisions, NLIHC urges HUD to remove all proposed provisions allowing the two sets of public participation provisions to be combined.]

Page 202

Continuation of §5.158(a)(8), now focused on community engagement for PHAs.

(8) Program participants may **combine** the requirements of this section [§5.158] with the ConPlan or PHA Plan public participation requirements, subject to the following requirements:

(ii) PHAs

PHAs may combine the requirements of this section (§5.158) when implementing the procedures in the PHA regs (Part 903.13, 903.15, 903.17, and 903.19) in the process of developing the Equity Plan, obtaining Resident Advisory Board and community feedback, and addressing complaints.

The community engagement for purposes of developing an Equity Plan must allow for sufficient opportunity for the community to have the in-depth discussions about fair housing **issues** required by §5.158. To the extent the regulations at Part 903 do not provide for this opportunity, PHAs must undertake separate engagement activities or incorporate such activities into the implementation of the specific, applicable program regulations.

[As remarked above regarding the ConPlan provisions, NLIHC is concerned about allowing such combinations. Paragraph (8)(ii) seems to only apply to fair housing **issues**, which in the scheme of the PHA Plan regs, would seem to apply to two features of the PHA Plan regs:

- The role of the Resident Advisory Board (RAB) at §903.13(a)(1) would be amended to add that the RAB’s role includes making recommendations regarding the development of the AFFH Equity Plan following the AFFH’s community engagement provisions at §5.158. Except for the spirit of §5.158, it is not clear which of its provisions could be combined with that of §903.13(a)(1).

- The public participation requirements at §903.17(a) and (c) require a PHA to conduct outreach to encourage broad public participation and to have a public “hearing” (at a location convenient residents served by the PHA) to discuss a PHA Plan. Nothing in §903 parallels a §5.158 meeting for engaging residents or the public regarding a PHA’s Equity Plan. The elements of a PHA Plan that is presented to residents and the general public by a PHA at the one and only “public hearing” to “discuss” a PHA plan could be fairly well baked in, making it difficult for residents and the public to secure AFFH improvements.

However, unlike in the ConPlan regs changes, the PHA Plan regs changes pepper the text with sentences such as “The requirements of §5.158 of this title shall apply for purposes of the Equity Plan.”]

While not strictly “community engagement”, the proposed AFFH changes to the PHA Plan regs a §903.7(o) [see page 276] adds paragraph (3) providing how a PHA must demonstrate compliance with the AFFH certification requirements of subsection (o) and §903.15. Paragraph (3) has eight provisions, in particular (vi) “Complies with the community engagement requirements set forth at §5.158 for the purposes of developing the PHA’s Equity Plan and the incorporation of the Equity Plan’s fair housing goals pursuant to §5.156.”

[Nevertheless, it remains unclear how the “regular” PHA plan public participation regulation could be combined with the more comprehensive AFFH community engagement provisions. NLIHC urges HUD to remove the “combine” provision or clarify how the AFFH §5.158 community engagement provisions can be combined with the limited §903 resident/public participation provisions without losing any of the positive features of §5.158. It seems the AFFH reg’s community engagement provisions should only be added to the PHA Plan resident/public participation provisions.]

Page 203

(c) Frequency

- (1) Program participants must engage the community “prior to” and during the development of an Equity Plan.

[It is not clear what is intended by “prior to”. The reg doesn’t otherwise have provisions relating to activities prior to “development” – unless “development” means identifying “issues”.]

- (2) While an Equity Plan is in effect, program participants must engage the community at least annually. (It bears reminding that an Equity Plan lasts five years.) This engagement **may be combined** with any citizen participation (ConPlan) or resident participation (PHA Plan) for the purposes of developing an Annual Action Plan (ConPlan) or Annual PHA Plan. This requires two public meetings, as stated at §5.158(d)(2) discussed below.

The purpose of the annual engagement must be to obtain community input whether a program participant is taking effective and necessary actions to implement its Equity Plan's fair housing goals, whether adjustments to goals are needed, or whether a change in circumstances calls for a revision of an Equity Plan.

[Could the allowed combination apply, in a ConPlan context, to §91.105(e) regarding ConPlan public "hearings", which state that of the two required ConPlan public hearings, "Together, the hearings must address housing and community development needs, development of proposed activities, *proposed* fair housing strategies and meaningful actions for affirmatively furthering fair housing based on the fair housing goals from the Equity Plan...**and a review of program performance**"?]

With the exception of some states, most jurisdictions do not have a separate public hearing regarding program performance (about the Consolidated Annual Performance and Evaluation Report – CAPER). Unless there is a third, separate ConPlan-related hearing, the required AFFH annual community engagement about whether a jurisdiction is taking effective and necessary actions to implement the Equity Plan's goals, this crucial opportunity for AFFH accountability to the community will have to compete with the hearing focused on an Annual Action Plan's proposed housing and community development activities discussion.

(d) Methods

Program participants may choose any methods that are effective in engaging their communities, but at minimum they must use the following methods:

- (1) For the **development of an Equity Plan**, hold at least three public "meetings", at various accessible locations and at different times to ensure protected class groups and underserved communities have opportunities to provide input.

At least one of these meetings must be held at a location in the jurisdiction where "underserved communities" (defined on page 171) disproportionately live; in addition, the program participant must make efforts to obtain input from underserved populations who do not live in underserved neighborhoods.

[It is not clear whether the three required meetings must address different stages of developing an Equity Plan (e.g. one stage to gather input regarding fair housing issues, another stage regarding setting priorities among all of the identified fair housing issues, and a third stage to engage the community in setting fair housing goals, strategies, and actions. Or does HUD intend that the three required meetings take place at the required different locations and times? NLIHC would recommend the latter and add separate, additional required meetings, one for identifying fair housing issues, one for setting fair housing priorities, and one for deciding on fair housing goals, strategies, and actions.

A fourth separate community engagement meeting is also warranted because there is no explicit requirement within §5.158 calling for the public to have an opportunity to

comment on a “draft” Equity Plan before it is sent to HUD for review. However, the section of the AFFH rule describing the Equity Plan §5.154 [at subsection (j)(1) regarding “Publication”] does require program participants to make drafts of the Equity Plan available for the §5.158 community engagement process (page 196). NLIHC will urge HUD to add explicit language in §5.158 requiring draft Equity Plans to be subject to required public meetings before a program participant submits an Equity Plan to HUD for review.]

[The regulation (or subregulatory guidance) should include as an acceptable meeting format, hybrid meetings that allow virtual engagement as long as there is concurrent in-person engagement. Participating virtually may enable more protected class and underserved community persons to engage who have childcare or eldercare responsibilities, lack affordable or reliable transportation, or have other barriers to in-person participation.]

- (2) For the **annual engagement** (as described above for (c)(2)), a program participant must hold at least two public “meetings”, at different locations, one of which must be in an area of the jurisdiction where underserved communities predominantly live.

[The regulation should add that meetings must be at different times to increase the opportunity to participate, as is required in paragraph (1).]

§5.154 Equity Plan

(h) Additional Content

Although not a part of the community engagement section (§5.158), subsection (h) of the section of the AFFH rule describing the Equity Plan (§5.154) requires program participants to include as part of their Equity Plans:

- (i) Summary of community engagement activities;
- (ii) Description of how comments received through community engagement were addressed;
- (iii) Attachment of all written comments received and transcripts or audio or video of “hearings” held during the development of the Equity Plan. [NLIHC will ask HUD add “meetings” as well as “hearings”.]

(j) Publication

Although not a part of the community engagement section (§5.158), subsection (j) of the section of the AFFH rule describing the Equity Plan (§5.154) can foster greater community engagement because it requires Equity Plans, Annual Progress Evaluations, and HUD notifications related to Equity Plans to be posted on a HUD-maintained website.

§5.170 Compliance Procedures [Compliant Process]

Page 226

(a) Complaints.

- (1) Complaints may be submitted by an individual, association, or other organization that alleges that a program participant:
 - Has failed to comply with the AFFH regulation; or
 - Has not complied with the AFFH commitments it has made; or
 - Has taken action that is “materially” inconsistent with the obligation to affirmatively further fair housing (as defined in the regulation).
- (2) Complaints related to the Equity Plan and the program participant’s AFFH obligation may be submitted to the “Responsible Civil Rights Official” (defined on page 170) who is someone at HUD (the actual person or office will probably be identified by HUD notice. For this outline we will just say “HUD”).

HUD “shall” process the complaint following procedures set forth in this section (§5.170), and if HUD accepts the complaint, HUD will notify the “complainant” (the one making the complaint) and the program participant.

If HUD determines a complaint does not contain sufficient information, HUD will notify the complainant and specify the additional information needed to complete the complaint.

If the complainant fails to complete this complaint within a timeframe established by HUD, the complaint will be closed.

- (3) Complaints must be filed within 365 days of the last incident of the alleged violation, unless HUD extends the time for “good cause”.

Page 227

(b) Investigations and Compliance Reviews.

- (1) HUD “shall” investigate complaints and may periodically conduct reviews of program participants in order to determine whether there has been a failure to comply with the AFFH rule or the obligation to affirmatively further fair housing.
- (3) Where appropriate, HUD “shall” attempt to try to informally resolve any matter being investigated under this section. If voluntary resolution is not achieved and a violation is found, HUD “shall” issue a Letter of Findings to the program participant and complainant.
- (4) The Letter of Findings shall include: *see next page*

The Letter of Findings shall include:

- (i) Findings of fact and conclusions of law;
 - (ii) A description of a remedy for each violation found;
 - (iii) Notice of the program participants' rights and HUD procedures under this paragraph and §§ 5.172 and 5.174 (describing how HUD will enforce compliance and program participants' responsibilities and rights, see page 229); and
 - (iv) Notice of the right of a program participant or complainant to request review of the Letter of Findings. The request should provide supplemental information providing reasons why the Letter of Findings should be modified. A review request must be sent within 30 calendar days from the date the Letter of Findings was issued. The written review request must be sent to the Reviewing Civil Rights Official in the Office of Fair Housing and Equal Opportunity (FHEO) at HUD headquarters. The Reviewing Civil Rights Official (defined on page 170) will apparently be different than the "Responsible" Civil Rights Official (who might be at the FHEO Field Office or Regional Office).
- (5) Once HUD receives a request for review of the Letter of Findings, within 120 calendar days, HUD "shall" either keep the Letter of Findings unchanged, or modify it.

(c) Voluntary Compliance.

- (1) It is HUD's policy to encourage informal resolution of matters, and it is also HUD's policy to ensure appropriate actions are taken to remedy noncompliance and prevent future noncompliance in an effort to avoid more severe corrective actions.

In attempting informal resolution, HUD "shall" attempt to achieve a just resolution that will satisfactorily remedy any violations of any of the provisions of the AFFH regulation or the program participant's obligation to affirmatively further fair housing.

HUD may attempt to resolve a matter through informal means at any stage of processing. Any informal resolution shall include actions that will prevent future occurrences the violations.

A matter may be resolved by informal means by a program participant agreeing to a Voluntary Compliance Agreement (VCA) at any time. HUD may include in a Voluntary Compliance Agreement a requirement that a program participant take certain actions with respect to any aggrieved individual or class of individuals.

Instead of a Voluntary Compliance Agreement, HUD may seek assurances or special assurances of compliance.

If a Letter of Findings of Noncompliance is issued, HUD shall attempt to resolve the matter by informal means.

- (2) If a program participant fails to comply with a Voluntary Compliance Agreement or assurance, HUD shall provide prompt notice to the program participant of its failure to comply and provide a timeframe to cure the noncompliance. If HUD determines the program participant has failed to cure the noncompliance within the specified timeframe, any remedy provided by law may be used, including the procedures set forth in § 5.172 (on page 229).

(d) Intimidating or Retaliatory Acts Prohibited.

No program participant or other person shall intimidate, threaten, coerce, or discriminate against any person for the purpose of interfering with HUD's administration of the AFFH rule or the Fair Housing Act, or because they have testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the AFFH rule or the Fair Housing Act.