

DISCUSSION 15

AFFIRMATIVELY FURTHERING FAIR HOUSING

HUD's New AFFH Rule: The Importance of the Ground Game

by Michael Allen

On July 13, 2015, the U.S. Department of Housing and Urban Development (HUD) promulgated a final rule on Affirmatively Furthering Fair Housing. Coming nearly six years after the groundbreaking *Westchester* litigation,¹ which exposed the county's flagrant violations of its civil rights obligations, many advocates expected HUD to adopt a "law enforcement" approach that would require state and local governments and public housing authorities to strictly comply with those obligations, on pain of losing their federal funds (which, in fiscal year 2015, amounted to more than \$38 billion).²

What HUD produced is a final rule long on "carrots," but painfully short on "sticks." To compound that problem, HUD does not currently have—and is very unlikely to acquire—sufficient resources to police the compliance of 1,200 block-grant recipients and 3,400 public housing agencies. As a consequence, the promise of the Affirmatively Furthering Fair Housing (AFFH) mandate is likely to be realized only in communities where grassroots and legal advocates mobilize and create their own enforcement strategies. The success of the final rule will depend on this grassroots mobilization, on a community-by-community basis, all over the country. This means that advocates, collectively, need to step up to the plate and provide the tools and resources for a sustained "ground game."

When Congress passed the Fair Housing Act of 1968, it gave HUD the power to withhold, condition, or terminate federal funding to recipient state and local governments that engaged in discrimination or failed to “affirmatively further fair housing.”³ In its role as funder and regulator, HUD has what some federal courts have termed “immense leverage” to secure compliance with civil rights objectives.⁴ This power is critical, because the Fair Housing Act does not give private litigants a right to enforce this obligation in court. As Judge Stephen Breyer noted nearly thirty years ago, this AFFH mandate “imposes . . . an obligation to do more than simply refrain from discriminating. . . . This broader goal [of truly open housing] . . . reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”⁵

In part because HUD was a defendant in a number of AFFH cases early on,⁶ and in part because of a general agency queasiness about withholding federal funds from local governments, HUD did not promulgate regulations until 1995.⁷ Since then, as an explicit regulatory precondition to their eligibility for federal funds, recipients have been required to certify that they will comply with AFFH and other federal civil right laws.⁸ Many have done so without a full understanding of what is required by these certifications, knowing that HUD would not challenge their validity. Many recipients simply ignored their civil rights certifications and continued to receive and spend billions of dollars in federal funds to build affordable housing in disadvantaged neighborhoods, where they faced less resistance and where families were often consigned to another generation of poverty, crime, and failing schools. **We have made precious little progress in ending discrimination and segregation over the past five decades, in part because HUD has generally refrained from using its “immense leverage” to secure those objectives.**⁹

While HUD’s final rule plows some new ground, it does not revolutionize the field. The final rule sharpens a recipient’s obligations to identify and overcome segregation-based impediments, but its overall tenor is one of collaboration rather than enforcement. In fact, although the final rule leaves in place HUD’s powers to withdraw funding in the face of noncompliance,¹⁰ HUD’s media rollout of the final rule repeatedly emphasized that “enforcement is a last resort.”¹¹

On the positive side, the final rule makes explicit—for the first time—that every state and local government (and every public housing authority) that receives HUD funds must take “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.”¹² Those actions must “address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially

and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.¹³ Now, theoretically at least, every community that receives federal grants for housing and community development will be required to have an honest conversation about segregation and devise a local plan to dismantle it.

The final rule replaces the long-ignored Analysis of Impediments with a new framework—the Assessment of Fair Housing, or AFH—through which recipients must identify, analyze, and overcome barriers to fair housing choice, and ties it to other planning processes through which federal, state, and local resources are allocated. In other words, it creates a fair housing lens for all of a participant's decisions about housing and community development needs. Beginning in April 2016, HUD grant recipients must submit AFHs to HUD, which can reject noncompliant AFHs and impose a range of sanctions for noncompliance, up to and including withholding federal funds. As my firm has found since the *Westchester* decision, the prospect of losing federal funds because of civil rights noncompliance tends to bring recalcitrant recipients to the table, often more effectively than conventional civil rights litigation.¹⁴

The new framework requires greater reliance on data (which will be supplied by HUD), greater transparency and public participation in the development of the AFH, and greater accountability with respect to expanding housing choice. Most important, it will require recipients to initiate and follow through on jurisdiction-specific community conversations about race, segregation, and access to opportunity areas.

While the final rule is not what many of us had hoped for, it does provide a foundation on which civil rights advocates can build antisegregation campaigns at the local level. Local capacity building will require community education and organizing by fair housing advocacy organizations, financial support from the philanthropic sector, and lawyers prepared to bring enforcement actions.

My firm stands ready to do its part. Anyone else with me?

A Call to Action to Embrace and Enforce the AFFH Rule

by Angela Glover Blackwell

As a Black girl growing up in St. Louis in the 1950s and 1960s, I experienced segregation firsthand. Though segregation controlled where I could live, learn, play, and pray, I was fortunate enough to live in a mixed-income Black neighborhood, with a good school, safe streets, prospering Black-owned businesses, and civic engagement. Many other Black St. Louis residents were not as fortunate. Discrimination forced them into very poor segregated neighborhoods

that were cut off from opportunity. My experience illustrates how, even in the face of adversity (in this case, the demoralizing, destructive policy of segregation), all communities have the potential to thrive if they have access to certain basic ingredients for opportunity.

Segregation has long been abandoned as official federal policy, but this has not been enough to create greater opportunity for most communities of color. Instead, the footprint of segregation—and the selective government disinvestment that persisted for decades—are painfully visible today. Most of the economically integrated Black neighborhoods of my childhood have disappeared, becoming areas of concentrated poverty. Today, a child born in primarily Black north St. Louis can expect to die sixteen years earlier than a child born in an affluent, predominantly White suburb just one zip code away. This startling disparity, though not uncommon in many American cities, is a testament to the depth of the problem, and the complexity of the solutions required to address it.

That is why the newly released AFFH rule is so important. It recognizes that successful housing policy cannot exist in a vacuum; it must be part of a larger vision for connecting residents to opportunity.

Overcoming decades of discriminatory policies and practices that created and perpetuated today's racial inequities requires housing policies that do more than seek to prevent ongoing segregation. **We must also proactively counteract segregation's legacy by linking struggling communities to the basic resources—quality housing, good schools, healthy environments, living-wage jobs—that any community needs to thrive.** The Fair Housing Act (FHA) of 1968 was written with this intention in mind, but has repeatedly fallen short. The arrival of the AFFH rule injects new awareness, tools, and momentum into fair housing policy—and it is crucial that the federal government use its full authority to embrace and enforce the rule.

Michael Allen's main contention is that this rule is “long on ‘carrots,’ but painfully short on ‘sticks,’” necessitating grassroots mobilization on a community-by-community basis to police the rule locally, where HUD will likely lack the resources to do so itself. As a result, the new rule, in Allen's words, leans toward “collaboration rather than enforcement” and “plows new ground . . . but does not revolutionize the field.”

While Allen is undoubtedly right that HUD's willingness to enforce this new rule will be crucial to its success, the power of the spirit of collaboration should not be underestimated. The “stick,” while necessary, is not sufficient for enacting meaningful change if it is wielded without collaboration with local leaders and communities. Moreover, **while the mere existence of the rule may not revolutionize housing practice, the tools it provides to local leaders—the Assessment of Fair Housing and the local, disaggregated data—have immense potential to revolutionize those leaders' ability to push for equity in housing, transportation, education, and other areas of community life.** Without HUD as

a careful watchdog, the AFFH rule may fail to reform housing practice among reticent grantees (and civil rights litigation will likely play a key role here), but **for the rising generation of local leaders who are eager to address inequity in their jurisdictions, this rule can be a game changer.**

I have seen firsthand the potential of a collaborative AFFH process play out in rural towns, midsize and large cities, and tribal reservations across the country. In the five years preceding the release of the AFFH rule, my organization worked with HUD and seventy-four regions to test out the assessment and data tools that have now been incorporated into the final rule. As under the current rule, local leaders and advocates were provided with tools to measure which neighborhoods lacked key resources (proximity to transit, good schools, job opportunities, clean air, etc.) and a framework through which these findings could be incorporated into city planning processes. In Seattle, this translated into a new regional food-distribution hub in the Rainier Valley to bring new jobs and healthy-food access to neighborhoods where both were lacking. In New Orleans, the framework resulted in public-transit service hours that would better meet the needs of lower-income shift workers in the health-care and hospitality industries.

In these and other jurisdictions, the AFFH pilot served as the catalyst that spurred the assessments, discussion, and convening of local stakeholders. But the outcomes were only possible because of ongoing collaboration between local government, community leaders, private-sector partners, and intermediaries, such as nonprofits, local universities, and infrastructure agencies. While the AFFH rule requires that grantees take “meaningful actions . . . [to] foster inclusive communities,” it will always be these local partners, working in concert with HUD grantees, who help determine the nature of that meaningful action and provide the energy and dedication to put it in place.

Having watched these collaborations play out throughout the country, I am filled with hope that the next fifty years of the Fair Housing Act, fueled by this new rule, will be revolutionary. Allen is not wrong to point out that the United States has made “precious little progress in ending discrimination” since 1968, but **the AFFH rule is also being launched at a moment of great demographic, political, and economic change for America.** In the 1960s, America was 15 percent people of color. Today it is 37 percent, and a majority of children under five are of color. While the Fair Housing Act was born of a moral obligation to end discrimination, the AFFH rule arrives at a time when the United States can no longer ignore the economic imperative that accompanies the moral one. So long as people of color are a growing share of the workforce and population, America’s ability to build towns, cities, and regions where all children can reach their full potential will be a direct determinant of the success and prosperity of the entire nation. The AFFH rule is a crucial lever that advocates, local government, philanthropists, and the private sector can pull to make that vision

a reality. That is why my organization's response to Allen's call "Is anyone else with me?" is a resounding, enthusiastic "Yes!"

The Need for a Balanced Approach to Fair Housing

by Michael Bodaken and Ellen Lurie Hoffman

We appreciate Michael Allen's thoughts on the need for local organizing, education, and capacity building to ensure that the U.S. Department of Housing and Urban Development's (HUD) Affirmatively Furthering Fair Housing (AFFH) rule is implemented and enforced appropriately. We agree that local communities should identify barriers to fair housing and devise strategies to ensure that all residents can choose the housing that is best for themselves and their families.

Like Allen, we welcomed the Supreme Court's milestone ruling upholding the use of disparate impact as a legal argument in fair housing cases and HUD's release of the AFFH rule to help communities meet fair housing obligations. The National Housing Trust (NHT) works in partnership with civil rights organizations to support and protect fair housing laws. In the summer of 2015, we joined other advocates in opposing attempts in Congress to block funding necessary to implement the AFFH rule, and we will continue to urge Congress to fully fund its implementation.

As we reflect upon Allen's comments about enforcing the AFFH rule, we **urge careful consideration of precisely what we are enforcing. Many fair housing advocates promote mobility policies to help low-income minorities move out of inner cities and resettle in more affluent suburban communities.** Mobility strategies are an indispensable tool for providing opportunity, but they are not sufficient to meet the needs of all residents of distressed urban communities. Not all of these families can be relocated to affluent communities, and many would prefer not to leave their neighborhoods. **We favor a "mobility plus" strategy, providing residents the choice to move while also working with other residents to transform distressed urban neighborhoods into diverse, high-opportunity communities with access to transit and jobs.**

We believe preserving affordable housing is the obvious first step to addressing our nation's affordable rental housing crisis. For every new affordable apartment created, two are lost to deterioration, abandonment, or conversion to more expensive housing. **Without preserving existing affordable housing, we fall two steps back for every step we take forward.** In distressed neighborhoods, preserving affordable housing can catalyze the revitalization of an entire community. Saving decent, affordable housing means saving a critical community asset. It also signals the reversal of years of neglect and

disinvestment and can spark the public-private investment that is essential for community revitalization.

Both the Supreme Court decision and HUD's AFFH rule uphold a "balanced approach" to fair housing, which embraces both mobility strategies and housing preservation and community revitalization. Indeed, HUD's AFFH final rule specifically embraces "a balanced approach to fair housing." The rule highlights the value of preserving affordable housing in "high poverty" neighborhoods: "HUD's rule recognizes the role of place-based strategies, including economic development to improve conditions in high poverty neighborhoods, as well as preservation of the existing affordable housing stock, including HUD-assisted housing, to help respond to the overwhelming need for affordable housing." The rule also provides, "A program participant's strategies and actions . . . may include various activities . . . including . . . targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation."

NHT has worked for decades to renovate and preserve existing affordable rental homes so that low-income families can live in integrated neighborhoods with access to opportunities. In wealthier suburbs or high-cost cities, we protect affordable housing that is at risk of losing its affordability because of gentrification. Thus, in Washington, D.C., we worked with low-income tenants in an affluent area to preserve their homes near million-dollar condos.

In other instances, we have engaged with residents, local governments, and community-based organizations to preserve affordable housing and invest in neighborhoods that have experienced disinvestment and neglect. Our investments have helped to maintain long-term affordability for affordable properties, improved the energy efficiency and safety of these buildings, and created a healthier environment for low-income residents. We have developed after-school tutoring programs for resident children, built on-site computer labs to allow parents to improve their technological literacy and pursue education and job training, and planted gardens to allow residents to grow and enjoy healthy food.

Instead of abandoning the communities where low-income families live, we strive to transform them into areas of opportunity. These communities have value, and as fair housing advocates, we cannot simply promote efforts to move people out. Many residents want to remain in their neighborhoods. NHT is dedicated to preserving their affordable homes and thereby helping to improve the communities in which they exist.

We strongly support distributing federal resources in a manner that allows low-income people to make housing choices that are best for themselves and

their families, to increase their access to opportunity. Federal, state, and local governments agree with this balanced approach to housing investment.

Let's create effective solutions together.

The Right Target for Fair Housing Advocacy

by Edward Goetz

Michael Allen calls for a sustained “ground game” in which advocates across the country “mobilize and create their own enforcement strategies” to leverage HUD’s new rule on Affirmatively Furthering Fair Housing (AFFH). His own actions have led the way in showing what that ground game can look like. Those interested in racial equity in housing owe a debt of gratitude to Allen and his firm for the work they did in producing the *Westchester County* settlement. Jurisdictions that conspire, through a combination of land-use controls and investment decisions, to exclude affordable housing and thereby exclude the populations dependent on that housing should, as Allen argues, find themselves in jeopardy of losing federal funding.

I, too, would like to see the fair housing movement incorporate more grassroots activism. **It is important, however, to choose the right targets. Fair housing advocacy is best directed against intransigent communities that continue to exclude affordable housing or people of color, pressing for greater housing opportunities where they do not currently exist.**

Fair housing goals are ill served by instead challenging central-city revitalization efforts and community development activities. Some of Allen’s own advocacy has made this mistake, including his complaints against the cities of Minneapolis and Saint Paul (see, for example, *Metropolitan Interfaith Coalition on Affordable Housing (MICAHA) v. City of Minneapolis*, and *MICAHA v. City of St. Paul*). **Efforts to reduce the public resources going to poor and predominantly minority neighborhoods are counterproductive.** Even if those challenges are successful on their own merits, they do nothing to get housing built in exclusionary communities where it is needed. **Denying affordable housing in neighborhoods that are deemed to have “too much” of it already in no way compels exclusionary communities to change their practices.** Some may think that they can find support for such an approach in HUD’s recent AFFH rule or in the Supreme Court’s 2015 decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, but both of these acknowledge the legitimate place of community development initiatives that direct investment to low-income neighborhoods and to communities of color.

Segregation by income in this country is greatest at the high end of the income distribution, and racial isolation is greatest among whites.

The grassroots activism Allen urges should be the sustained advocacy necessary to create opportunities for affordable housing in high-income, predominantly white, exclusionary communities. Let's hope that is where the movement focuses.

Notes

1. "In the face of the clear legislative purpose of the Fair Housing Act, enacted pursuant to Congress's power under the Thirteenth Amendment as Title VIII of the Civil Rights Act of 1968, to combat racial segregation and discrimination in housing, an interpretation of 'affirmatively further fair housing' that excludes consideration of race would be an absurd result." *United States ex rel. Anti-Discrimination Center v. Westchester County*, New York, 495 F.Supp.2d 375, 387–88 (S.D.N.Y. 2007). "[T]he central goal of the obligation to AFFH [is] to end housing discrimination and segregation." *United States ex rel. Anti-Discrimination Center v. Westchester County*, New York, 668 F.Supp.2d 548, 564 (S.D.N.Y. 2009). The author was cocounsel for the plaintiff-relator in the *Westchester* litigation.
2. HUD's final appropriations for FY 2015 provided approximately \$4.5 billion in HUD block-grant funding for state and local governments and \$33.5 billion in public housing and rental-assistance funding to public housing authorities and similar agencies.
3. See 42 U.S.C. §3608(e)(5). See also 42 U.S.C. §§5304(b)(2), 5306(d)(7)(B) (Housing and Community Development Act of 1974, as amended); 42 U.S.C. §12705(b)(15) (consolidated planning); 42 U.S.C. §1437C-1(d)(16) (public housing). HUD has promulgated regulations implementing the AFFH requirements for entities receiving block-grant and public housing funds. See 24 C.F.R. §§570.602; 91.225, 91.325, 91.425, 903.7(o).
4. *NAACP v. Sec'y of Housing and Urban Development*, 817 F.2d 149, 156 (1st Cir. 1987).
5. *NAACP v. Sec'y of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987).
6. See, for example, *NAACP v. Sec'y of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987).
7. 60 Fed. Reg. 1896 ff. (January 5, 1995).
8. These include Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Section 109 of the Housing and Community Development Act of 1974.
9. To be fair, whether through the phenomenon of "industry capture" or because of a political reluctance to disrupt funding to state and local governments, most federal agencies have had a poor record of using funding leverage to secure such objectives. See, for example, Eloise Pasachoff, "Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off," *Yale Law Journal* 124, no. 2 (November 2014): 248–335; Olatunde C. A. Johnson, "Beyond the Private Attorney General: Equality Directives in American Law," *NYU Law Review* 87, no. 5 (November 2012): 1339–1413. As this article was going to press, the Second Circuit affirmed HUD's authority, pursuant to the "old" AFFH regulations—24 C.F.R. § 91.500(b)—to withhold block-grant funds because Westchester County's AFFH certification was "inaccurate" and without supporting evidence. *Cty. of Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 802 F.3d 413, 435 (2d Cir. 2015).
10. See, for example, 24 C.F.R. §§91.500(b) (HUD approval action); 570.304 (making of grants); 570.485(c) (making of grants); 570.601 and 570.602 (civil rights certification requirements); 570.904 (equal opportunity and fair housing review criteria); 570.910–570.913 (corrective and remedial actions).

11. *PBS NewsHour*, July 9, 2015, accessed August 20, 2015, <http://www.pbs.org/newshour/bb/new-rules-require-cities-fight-housing-segregation/>.
12. 24 C.F.R. §5.152 (definition of “Affirmatively furthering fair housing”).
13. 24 C.F.R. §5.152.
14. See, for example, Conciliation Agreement between Texas Low Income Housing Information Service et al. and the State of Texas, May 25, 2010, <http://www.relmanlaw.com/docs/Texas-AFFH-Final-Conciliation-Agreement-signed-by-HUD.pdf> (resolution governing \$1.7 billion in disaster-relief funding); Conciliation Agreement between Latino Action Network et al. and the State of New Jersey, May 30, 2014, <http://www.relmanlaw.com/docs/New-Jersey-Conciliation-Agreement-signed-5-30-2014.pdf>.