

# The Duty to Affirmatively Further Fair Housing: A Legal as well as Policy Imperative

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“We make two general assertions: (1) that American cities and suburbs suffer from galloping segregation, a malady so widespread and so deeply imbedded in the national psyche that many Americans, Negroes as well as whites, have come to regard it as a natural condition; and (2) that the prime carrier of galloping segregation has been the Federal Government. First it built the ghettos; then it locked the gates; now it appears to be fumbling for the key. Nearly everything the Government touches turns to segregation, and the Government touches nearly everything.”

— Senator Edward Brooke, 114 Cong. Rec. S2280 (1968),

**T**he Fair Housing Act declares that it is “the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>1</sup> In one of the first Fair Housing Act cases decided by the U.S. Supreme Court, the Court noted the words of the Act’s co-sponsor, Senator Walter F. Mondale, that “the reach of the proposed law was to replace the ghettos ‘by truly integrated and balanced living patterns.’”<sup>2</sup> The Second Circuit U.S. Court of Appeals declared the following year that, under Title VIII, “[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”<sup>3</sup> The history and scope of residential segregation in the United States, and its relationship to the purposes of the Fair Housing Act, is cogently laid out in the Housing Scholars Amici Curiae brief, filed at the Supreme Court in the case upholding disparate impact under the Fair Housing Act (FHA).<sup>4</sup> Justice Kennedy’s opinion affirmed the important role that the FHA must continue to play in avoiding the Kerner Commission’s grim prophecy that “[o]ur Nation is moving toward two societies, one black, one white—separate and unequal,” and the Court acknowledged the Fair Housing Act’s continuing role in “moving the Nation toward a more integrated society.”<sup>5</sup>

## THE STATUTORY DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING

While the sections of the Act prohibiting discrimination are crucial to our efforts to ensure that bad actions are remedied and bad actors held accountable, the Fair Housing Act contains another equally important section requiring federal agencies to administer all federal housing and urban development programs in a manner to affirmatively further the purposes of the Fair Housing Act (AFFH). This mandate imposes an affirmative obligation on the federal government and recipients of funds it administers to take actions to undo historic patterns of segregation and other types of discrimination and afford access to opportunity long denied. It was of that challenge that Senator Brooke was speaking on the floor of the U.S. Senate almost fifty years ago.

This obligation has been repeatedly reinforced by Congress in HUD program statutes over the years by requiring that program participants certify, as a condition of receiving federal funds, that they will affirmatively further fair housing.<sup>6</sup>

Like the FHA, these statutes themselves do not define the precise scope of the affirmatively furthering obligation in specific programs. However, over the years courts have made clear that more is required than simply to not discriminate: some affirmative actions to further the goals of the FHA are required, and those actions by and large depend on the facts on the ground.<sup>7</sup>

### Litigation

In spite of the fact that for much of the life of the Fair Housing Act, HUD has taken the position that compliance with the AFFH duty is not reviewable by courts, federal courts which have dealt with the issue have consistently disagreed.

#### *Boston Chapter of NAACP*

The seminal case involving the AFFH provision in the Act was brought in 1978 by the Boston Chapter of the NAACP. NAACP alleged that HUD's administration of housing and community development programs violated various civil rights statutes, including HUD's duty to affirmatively further the policies of the Fair Housing Act.<sup>8</sup> The federal district court found that Boston had a history of racial discrimination in housing, that Boston suffered from a shortage of low-income family housing, that a higher proportion of black than white families were renters, and a higher proportion of black than white renters were families with children; that Boston's neighborhoods were racially separate and that "at least in part as the result of the lack of safe, desegregated housing in white neighborhoods black families found it difficult to move out of black areas." The court also found that both city and federal officials were aware of these facts, that the city had not effectively enforced fair housing requirements, that neither the city nor HUD had complied with HUD regulations regarding the need to assess special needs of identifiable segments of the lower-income population, and that taken

together the facts added up to a violation of HUD's duty to affirmatively further fair housing. In particular, the Court noted that HUD's failure to use its "immense leverage" over the programs at issue "to provide desegregated housing so that the housing stock was sufficiently large to give minority families a true choice of location in the context of Boston's history and practices, violated HUD's Title VIII obligations."

The First Circuit provided further clarification regarding the provision in an opinion written by then Judge, now Justice, Stephen Breyer, ruling that a court could review HUD's actions under the Administrative Procedure Act (APA) and decide whether they violated HUD's obligation to affirmatively further fair housing, separate and apart from whether HUD has engaged in discriminatory conduct or has funded discriminatory conduct with the purpose of furthering the grantee's discrimination.<sup>9</sup> The facts upon which liability was found in NAACP are instructive of the viability of actions to enforce the obligation to affirmatively further fair housing through the federal courts even in the absence of regulatory guidance from HUD. Given our country's history, it is not unlikely that a similar pattern of conduct might be found in many places.

### *Westchester*

In 2007 and 2009, a federal court revisited the obligation of recipients of federal housing and community development funds to affirmatively further fair housing, this time in the context of a False Claims Act claim against Westchester County, New York brought by a New York-based civil rights organization. The judge in that case held that "a local government entity that certifies to the federal government that it will affirmatively further fair housing as a condition to its receipt of federal funds must consider the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction."<sup>10</sup> She subsequently ruled that Westchester County had repeatedly falsely certified that it was affirmatively furthering fair housing, and that millions of federal dollars had been dispensed to Westchester County based on those false certifications.<sup>11</sup> HUD was not sued.

## **Regulation**

As described in the papers by O'Regan and by Bostic and Acolin, since 1968 there have been two regulations promulgated by HUD related to HUD's statutory duty to affirmatively further fair housing in housing and community development programs. The first, in 1995, required recipients of HUD funds to prepare an Analysis of Impediments to Fair Housing (AI), develop an action plan for addressing those impediments, and maintain records related to the process. The AI regulation did not require submission to HUD, and there was no formal process for objecting to or complaining about the adequacy of the process or product. After the initial rollout of the regulation, political and resource limitations made the regulation honored mostly in the breach.<sup>12</sup> An attempt to enact a more robust regulation in 1998 failed.<sup>13</sup>

The second HUD AFFH regulation came in the wake of the Westchester case discussed above. The Westchester litigation's timing was fortuitous. It gave the incoming Obama administration an opportunity to take hold of the issue and in some ways make it its own. A settlement between the parties was brokered by HUD, and public pronouncements from the highest levels in the department declared that HUD was going to move forward with a more robust effort to comply with the statutory mandate as it pertained to recipients of federal funds administered by the department.

Over the next seven years, HUD engaged in an extensive process to develop an AFFH regulation that would provide more specificity about what it means to affirmatively further fair housing, and address the concerns raised by the Westchester litigation. Those concerns were generally articulated as follows: jurisdictions did not know what AFFH meant, did not know what compliance required, and did not have the resources and/or capacity to generate the information and data necessary to know what they needed to know to formulate a plan to affirmatively further fair housing. The listening tour undertaken by the HUD leadership was exhaustive, and resulted in a regulation that finally put meat on the bones of the AFFH statutory mandate. The Final Rule, promulgated in 2015, requires recipients of federal block grant funds administered by HUD to develop an Assessment of Fair Housing (AFH) (replacing the ineffective Analysis of Impediments to Fair Housing) and submit it to HUD for approval as a condition of receiving funds under the covered programs. The purpose of the AFH is to allow recipients of HUD funds to develop their own plan to address racial segregation and inequality in housing and community conditions in their local communities. The regulation and supporting material give jurisdictions a wealth of data and information about local circumstances, as well as very detailed guidance about how to put together an AFH that will both pass muster with HUD and actually effect change on the ground in the communities involved.

The Final Rule's limitations are most obvious in terms of the lack of an effective "stick" to go with the "carrots." The enforcement capacity of HUD in the context of the AFH Rule (as well other civil rights laws) is limited by the institutional structure of HUD, by the different and often conflicting interests of HUD's various constituencies reflected in their ability to exert influence both internally and externally through the political process, and, last but not least, by resource capacity. To most people, HUD's primary job is to funnel federal funds related to housing and community development to people, places, and institutions through a myriad of programs created by Congress. While all of those programs have civil rights-related requirements imposed by various civil rights laws, only the Office of Fair Housing and Equal Opportunity (FHEO) has direct responsibility for seeing that those laws are complied with and enforced. FHEO has historically been the least well-funded and most politically impotent of the "Big Four" program offices in HUD. For FHEO to "enforce" anything related to civil rights

against a recipient of HUD funds requires FHEO to take on the powerful constituencies of the other program offices, be it mayors, governors, public housing authorities, affordable housing and community development nonprofit or for-profit institutions, or Congress itself. The record of HUD's failures to take on those constituencies is found in the decades of litigation against HUD for knowingly funding entities that have engaged in discrimination and perpetuation of segregation.<sup>14</sup> In addition, the statutory AFFH provision is not self-enforcing. There is no recognized private right of action for violation/non-compliance against recipients of HUD funds. While the regulation speaks to the consequences of failing to submit an approvable AFH, the Final Rule is essentially designed to give jurisdictions the tools they need to prepare an AFH that will pass muster. In that sense, it is focused more on process and data/information than on actual results on the ground. In the hands of jurisdictions acting with some degree of good faith and intent to both do what is required and further the goals of the FHA, there is the possibility of some progress, particularly over time. But it will depend in large part on the cooperation and support of HUD program offices that have not historically seen such progress as their responsibility, and their cooperation will certainly be impacted by the political environment in which the effort is being undertaken.

#### *What Will "Compliance" with the AFFH Regulation Look Like?*

It should be anticipated that the response of jurisdictions will be uneven, but will fall into 4 basic categories:

- 1** Full acceptance of both the letter and spirit of the AFH Rule and the demonstrated capacity to use the AFH Tool and the Rule's requirements to develop and implement a plan to effectively address the problems caused by segregation and exclusion in the community.
- 2** Acceptance of both the letter and spirit of the Rule, but a limited capacity to use the Tool and the Rule's requirements to develop and implement a plan to effectively address the problems that exist because of segregation and exclusion in the community.
- 3** Acceptance of the need to comply with the specific requirements of the Rule to get federal funds, but actions that demonstrate a lack of understanding or willingness to develop a plan to actually address the problems caused by segregation and exclusion in the community.
- 4** Resistance to the Rule, both in letter and spirit, as demonstrated by refusal to demonstrate compliance with the basic minimal requirements outlined in the Rule, and perhaps by an assertion that there are no problems caused by segregation and exclusion in the community in the face of clear evidence to the contrary.

Jurisdictions that fall into the first two categories are likely to benefit from HUD's involvement in a supportive and incremental way to get them to improve and achieve their long-term goals under the AFH. HUD should recognize and reward the high achievers, and offer technical assistance and other support to those in category 2 to encourage them to use the AFH process more effectively to achieve results over time. Those that fall into category 3 will benefit from the sort of "enforcement" of which HUD is realistically capable. That would involve the using the administrative steps outlined in the Rule to withhold approval of the AFH until necessary issues are appropriately addressed. At some point in the process, those in categories 2 and 3 may demonstrate that they really should be in category 4, but the process of getting there will be instructive for both HUD and the jurisdiction. And the role of the outside advocate will be crucial to that process playing out as it should.

It is the premise of this paper that, whatever the potential of the Rule and HUD to deal with those in categories 1-3, there are significant limitations on HUD's ability to effectively deal with jurisdictions in category 4. Those jurisdictions will have to be dealt with by an external, relatively independent, and well-resourced enforcement structure. It must be external for the reasons discussed above concerning the inherent tensions and conflicts between the different program offices and who they see as their primary constituents or clients. An external structure also helps ensure independence from relationships or perspectives that, in other contexts, might be valuable to the people involved in doing their jobs. And independence means that the enforcement structure must not be dependent upon funds that can be easily withdrawn in order to shut down or retaliate against an enforcement effort. For that reason, it is doubtful that private fair housing organizations will be up to that task, unless they are funded by non-governmental sources which support a real litigation capacity and ultimately are able to access the resources of an independent federal judiciary.

## **LESSONS FROM THE VOTING RIGHTS ACT**

It is instructive to look, by analogy, to the Voting Rights Act of 1965, and the tools it provided for addressing the historic, official, systemic, institutional, and widespread effort to deny people the right to vote throughout the states of the Old Confederacy (and a few other places with specific circumstances). By the time the VRA passed, it was clear that overt resistance to extending the franchise of a fair and non-discriminatory basis was a creative and ever changing endeavor. It was not an individual harm, but a class based harm that would not be effectively addressed simply by providing retrospective remedy though traditional laws making such actions unlawful, which require a plaintiff challenging a practice as discriminatory to engage in lengthy and complicated litigation, involving issues of legal standards of proof, and evidence as well as what constituted appropriate relief even if they were successful. More often than not, once a practice was successfully challenged the offending jurisdiction would

simply enact a new discriminatory provision, which would require a new, drawn out challenge, and the new discriminatory policy would be in effect until a new ruling was obtained, often years later. The solution was a dramatic and ultimately incredibly effective provision in the VRA, known as Section 5, which required that states and certain smaller jurisdictions that had such a history of denying African Americans the right to vote, submit any changes in voting policies, practices or procedures to a “pre-clearance” process before they could be implemented. The pre-clearance could be through an administrative process administered by the U.S. Department of Justice (where most issues were resolved), or through a declaratory judgment process through the federal courts. In effect, Congress shifted the burden of proof, so that jurisdictions that had a sordid history of voting discrimination had to prove that the new policy or procedure was NOT discriminatory before it could be implemented. This important enforcement provision changed the face of political participation and political representation in the South forever. By the time a conservative majority on the Supreme Court effectively struck down the provision in 2013 on the grounds that it was no longer justified,<sup>15</sup> the experience under Section 5 had provided ample evidence of the effectiveness of the “preclearance” approach.

The AFH process, while not nearly as stringent a provision as Section 5, does place a “speed bump” to jurisdictions continuing to take federal funds without any demonstrated compliance with the AFFH obligation. That speed bump requires jurisdictions to slow down and look at the legacy of segregation in their communities, and develop a plan to address that legacy. The result, if done right, should address unequal conditions in communities as a result of segregation, promote greater inclusion, choice and equal access to opportunity, and insure that the jurisdiction continues to receive federal funds for their housing and urban development activities. The Regulation has a “progressive discipline” approach built in that should insure that most jurisdictions will move into at least basic compliance rather than jeopardize their access to federal funds. In those hopefully rare instances where a jurisdiction demonstrates a resistance/hostility to the purposes of the FHA, and specifically the AFFH duty, the matter will require more adversarial intervention. That intervention could come from the Department of Justice, Civil Rights Division, which can act on a referral from HUD or based on other information about a jurisdiction’s conduct. The Civil Rights Division, however, has prosecutorial discretion, and there is no guarantee that an unsympathetic or even hostile administration will undertake enforcement activity. For that reason, it is imperative that private litigants be prepared to bring cases that get the facts before a court when necessary.

Indeed, whatever the possibilities prior to November 2016, it is probably not realistic to assume that the Department of Justice, at least for the next few years, will be a helpful partner in insuring compliance with the duty to affirmatively further fair

housing. On January 24, 2017 a bill was introduced in the Congress to invalidate the AFFH regulation promulgated by HUD, which is discussed in other papers. Advocates are preparing to employ all tools at their disposal to prevent Congress and the Executive Branch from undoing this important and long overdue effort by HUD to meet its obligation under the Fair Housing Act. Over the longer term, if the basic structure of the Regulation or something like it remains, the possibility of a real and effective progress toward the goals of fostering more inclusive communities of opportunity is real. But that progress will depend on enforcement efforts by outside advocates working in affected communities to complete the compliance/enforcement infrastructure of AFFH.

## **USING AFFH TO ENFORCE THE FAIR HOUSING ACT AND RELATED CIVIL RIGHTS LAWS**

In the meantime, civil rights advocates should look for opportunities to combine the AFFH requirement with more direct statutory provisions in the FHA that prohibit discrimination. A jurisdiction which is resistant to meeting its obligation to AFFH is likely to have a history of segregation and discrimination that has never been effectively addressed. While the AFH Rule may be aimed at fostering worthwhile policy objectives of inclusion and equity for their own sake, it should be remembered that where jurisdiction has an unaddressed legacy of official segregation, the legal imperative to desegregate may also be in play.<sup>16</sup> While it may not be possible to directly sue a jurisdiction for failure to AFFH, the jurisdiction's actions in responding to the regulatory requirement could certainly be current evidence of policies and practices that intend to and/or have the effect of singling out a racially identifiable group because of race for unequal treatment that makes housing unavailable and/or perpetuates segregation, actionable under the Fair Housing Act as well as Title VI of the 1964 Civil Rights Act, and the 14<sup>th</sup> Amendment to the U.S. Constitution. While advocates may be able to effectively participate in the AFFH process and move a community toward greater understanding of the need for and ways to achieve more inclusiveness, in those instances where more adversarial advocacy is called for, the AFFH rule can provide an excellent road map. And of course, as the decades of case law make clear, HUD can itself be sued under the APA for its own failure to comply with the duty to affirmatively further fair housing.

## **AFFH BEYOND HUD**

It is also important to remember that the HUD Rule, as important and sweeping as it is, only covers what is required of recipients of HUD's block grant funds. Section 3608 is much broader. It mandates not only that HUD shall administer all of its housing and community development programs in a manner that affirmatively furthers the policies of the FHA, it also mandates that "all executive departments and agencies shall administer their programs and activities related to housing and urban development

(including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further” the purposes of the Act. Pending litigation in the Northern District of Texas against the U.S. Treasury Department and the Office of the Comptroller of the Currency involves a claim under the Administrative Procedure Act (APA) that those agencies have failed to meet their obligation to administer the LIHTC program in a manner that affirmatively furthers fair housing.<sup>17</sup> The Court’s willingness to allow the AFFH claim to go forward against Treasury and OCC suggests possible fertile ground for private enforcement activity against other federal agencies administering housing and community development programs, particularly if the federal agency environment is not friendly to fair housing.

In addition to direct litigation against federal agencies under the APA, the False Claim Act cause of action upon which the Westchester County litigation was based, always a viable legal theory, may be get renewed traction. As earlier noted, there were some who saw the HUD push to promulgate a AFFH regulation to replace the AI process as a way to hit the “reset” button for local jurisdictions who had not, for a number of reasons, demonstrated a robust interest in compliance with the AFFH obligation. To the extent that the goal was to provide jurisdictions acting in good faith with clarity and cover, the new Rule could provide a path to pardon for past sins. If the Rule is either voided, or the agency otherwise fails to enforce it, then it is conceivable that jurisdictions whose certifications and AIs are the only thing standing between them and a False Claim finding could be challenged on the same grounds as Westchester County. Depending on how long the litigation is in the courts it is not inconceivable that a different administration might view the situation differently again at some point in the future. For that reason alone Jurisdictions who are subject to the HUD AFFH Rule may come to see the Rule as their “safe harbor” and not be all that excited to see it go.

## **CONCLUSION**

All is not lost. The HUD regulation is an excellent road map for jurisdictions seeking to address the difficult and persistent challenges posed to community health and viability by a legacy of segregation, discrimination, and a culture of exclusion. While it will certainly depend on the local circumstances, it is possible that at least some recipients of HUD funds will see the wisdom of meeting their obligation to affirmatively further fair housing, and take to heart the Rule’s information and guidance on how to do so, at least to some degree. Over the next five to ten years, with persistence, those communities could become more inclusive places of opportunity for everyone. Where there is intransigence, and there will no doubt be in places, then the legal tools will be available to civil rights advocates to address those situations. It will not necessarily be quick or easy, as the history of HUD’s efforts to comply with its own obligations under the FHA demonstrate. But it will be worth the effort.

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## Endnotes

- 1 Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601.
- 2 *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 2005 (1972).
- 3 *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).
- 4 Brief for Housing Scholars as Amici Curiae.
- 5 *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S.Ct. 2507 (2015).
- 6 HUD, "Final Rule," at 42274, fn.3.
- 7 HUD, "Final Rule," at 42274.
- 8 *NAACP, Boston Chapter v. Harris*, 567 F. Supp.637 (D.Mass.1983).
- 9 *NAACP, Boston Chapter v. HUD*, 817 149 (1<sup>st</sup> Cir 1987).
- 10 *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester Cnty.*, 495 F. Supp. 2d 375, 376 (2007).
- 11 *U.S. ex rel. Anti-Discrimination Center v. Westchester County*, 668 F.Supp. 2d 548, 563 (S.D.N.Y. 2009); *Shelby County v. Holder*, 570 U.S.2 (2013).
- 12 Bostic and Acolin.
- 13 O'Regan.

- 14 *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Young v. Pierce*, 685 F.Supp 986 (1988); *Walker v. HUD*, 734 E.Supp. 1231 (N.D.Tex. 1989); *Thompson v. HUD*, 348 F.Supp2d 398 (2004).
- 15 *Shelby County v. Holder*, 570 U.S.2 (2103).
- 16 Novara.
- 17 *ICP v. U.S. Dept. of Treasury and U.S. Comptroller of the Currency*, Northern District of Texas, CA No. 3:14-3013-D.