

Affirmatively Furthering Fair Housing: The Potential and the Challenges for Fulfilling the Promise of HUD's Final Rule

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The context for the Affirmatively Furthering Fair Housing final rule, issued by the Department of Housing and Urban Development (HUD) in July of 2015, begins more than fifty years ago in a highly racially segregated America experiencing urban civil unrest. HUD and its predecessors were among the large number of public and private actors that fostered and perpetuated that segregation. The Federal Housing Administration (FHA), created to revive the housing market and stimulate homeownership in the Great Depression, mirrored and even formalized the discriminatory practices that were widespread among private actors at the time.¹ Public housing was frequently segregated itself and sited so as to segregate large segments of the African American community in isolated areas.² Urban Renewal often targeted functioning minority communities, leading to displacement and further concentration in other areas.

Against this backdrop and one week after the assassination of Martin Luther King, Jr., Congress passed a long-debated Civil Rights bill on April 11, 1968. Title VIII of the legislation, known as the Fair Housing Act, expressly prohibits the kinds of discrimination that had evolved over the years to deny blacks equal access to housing. Given the historical role of HUD and other federal housing agencies in creating segregation, the Act requires more from such agencies than merely avoiding discrimination; they are to take steps through their programs to “affirmatively further” fair housing (AFFH). This obligation extends to those jurisdictions and entities funded by HUD.

While this AFFH obligation has existed for nearly fifty years, fair housing advocates and many others have criticized HUD for inaction on this portion of the Fair Housing Act. As laid out by Bostic and Acolin,³ prior to the new rule, HUD had taken only limited steps to enforce the AFFH obligations through its grants programs. For example,

internal and external reviews of the Analysis of Impediments (AI) process, the precursor to the current rule, found the approach greatly flawed.

HUD'S FINAL AFFH RULE

It is in this context, the existence of AFFH obligations for HUD grantees but the absence of a clear and effective process for achieving them, that HUD issued its AFFH final rule. In broadest strokes, the rule requires jurisdictions and grantees to conduct an Analysis of Fair Housing (AFH), assessing their fair housing issues and describing goals for affirmatively furthering fair housing. The content of the AFH is standardized through an on-line assessment tool, which contains a variety of mandatory categories of analyses and specific questions in each. The tool provides participants with associated data and maps on their jurisdiction and region. Those data and maps are also available to the public, and participants are required to enlist meaningful community participation in identifying fair housing issues and shaping goals. Those goals must then be linked to a program participant's Consolidated Plan and/or Public Housing Agency (PHA) plan. Unlike the AI, the AFH must be submitted to HUD, and HUD has 60 days to determine whether to accept it.

CURRENT STATE OF PLAY

The provision and use of data in a standardized assessment, combined with a process of public engagement and HUD final review, is a fundamentally different approach to AFFH that has been well received by many. It has also been loudly, and brutally, criticized. The Republican Party platform of 2016 referenced the rule as a threat to local control of zoning. Legislation has been entered into the House and Senate that would essentially erase the rule and anything like it, and also prohibit the use of federal dollars for the geospatial data.⁴ HUD Secretary Ben Carson referred to the rule as "social engineering" prior to his nomination, although subsequent remarks suggest he has not finalized his views.⁵

KEY ISSUES AND CHALLENGES

This current state of affairs raises a set of key questions about what it would take for HUD's AFFH to meaningfully increase inclusion.

Achieving Long-run Success in Light of Near-term Threats

How can we help AFFH succeed in the long run if HUD is not supportive or is outright hostile right now?

Bostic and Acolin start us off by providing a clear and concise history and description of the rule. They note the critical role HUD could and should play in the near term. This would require HUD's investing not only in its own capacity to review and support AFHs, but also in the capacity of jurisdictions to conduct their AFH. Given federal budget

discussions, no one expects HUD to do either. Yet there is minimal hand-wringing about the expected absence of HUD's near-term support in this set of papers. Collectively, the papers lay out a roadmap of what is needed from a much broader set of actors whose efforts can keep the AFFH rule headed towards long-term success. Lack of HUD efforts in the near term need not threaten the long-term success of AFFH.

The papers identify the largest immediate threat as the outright dismantling of the rule and the elimination of the associated online data. If the rule is dismantled, any future administration wishing to address the AFFH obligation would need to go through a full rule-making process, surmounting all of the obstacles that have slowed or stopped previous efforts.⁶ This process would require sustained effort within HUD and cooperation across program offices that have historically held widely different views on AFFH, in addition to surmounting external political obstacles. In 1998, HUD did issue a Proposed AFFH Rule, to amend HUD regulations and establish AFFH performance standards. HUD received extensive public comments raising concerns about clarity and usefulness. HUD chose to not issue a final rule at that time. The most recent rule-making process raised no fewer concerns, and took most of the eight years of the Obama administration to get to completion. Even with the knowledge that the rule was a priority for the administration, there was considerable public skepticism that a final rule would be issued.

The long-run prospects of using the AFFH obligation in the Fair Housing Act as a lever for addressing segregation and fostering inclusion may not require HUD's active support in the near term, but does require that the architecture of the rule remain in place, even if temporarily dormant. If the rule remains intact but is not actively supported or enforced by HUD, there are still actors and jurisdictions who will move forward now. There could well be future leadership at HUD that will pick up where others left off. A question for broad supporters of the rule is: how do we ensure that the rule is not formally dismantled? Are there particular actions that should — or should *not* — be taken now so as to lower the likelihood that the current administration will undertake the effort of dismantling the rule?

It Takes a Village

Even under the best of circumstances, HUD alone cannot provide the needed resources and support for the creation and implementation of strong AFHs. How do we ensure robust participation by the broader set of actors needed for success?

Allen provides a clear list of what is needed at each stage of the AFH process for the rule to meet its full promise.⁷ This list highlights the full arc of the AFH process, from initial analysis of data, to meaningful engagement of communities of color, through to designing and ultimately implementing effective strategies. Each of these stages

can — and needs to be — supported by a range of actors who can add to local capacity. As he says, “the full promise of AFFH will not be realized without a ‘ground game.’”⁸ He specifically makes his call to action for the needed capacity to academics and foundations, rather than HUD. This goal creates a challenge, as those actors are dispersed, and there is not an obvious coordinating body for mobilizing local actors.

Data Alone Is Not Knowledge

This exercise is heavily dependent on analysis of HUD-provided data from national sources, as well as local data and knowledge. How do we ensure there is local capacity for the heavy analytical lift of a robust AFH?

The papers by Bostic and Acolin and by Allen both emphasize the powerful role of data in the new AFH process, and the critical role of local actors in leveraging those data. The data are meant to reduce the burden of the standardized assessment tool; to provide a minimum floor of analytics across jurisdictions; and, perhaps most importantly, to be publically available to empower members of those communities who might otherwise have little voice. Two conditions must be met for the data to play this role: that the national data are updated and made available in digestible form, and that jurisdictions have the capacity to analyze these (and local) data.

With regard to the first condition, there is certainly the risk that HUD will not continue to provide the data publicly. Even in the absence of legislative action to limit federal provision of such data, HUD could simply stop updating the existing data. HUD, however, does not have a unique advantage in translating what are primarily publicly available data into usable maps and tables. I would argue this first risk is fairly small as numerous others can — and will — step into this space. The second risk is the larger risk — that many jurisdictions and community members lack the capacity to analyze those data and combine them with local data. Such capacity is very uneven across jurisdictions, and with the likely retreat of HUD from providing assistance, even greater resources are needed for the data to have the empowering and equalizing effect originally intended. Allen in particular lays out extensive examples of fair housing cases where it was the capacity to analyze data appropriately that won the day. The distinction between data and effective analysis is not made often enough in understanding what it will take for AFFH to succeed. Jurisdictions need more than data: they and all interested parties need the capacity to make good use of the data.

Good Planning Versus Good Lawsuits

How do we manage the tension between AFFH’s role as a planning tool and its role as an enforcement tool?

There is an inherent tension in the AFH process that connects to HUD's dual goals of supporting more effective planning and enforcing compliance with the Fair Housing Act. All three papers highlight these roles and potential tensions. Building on the stages of the AFH process laid out in Allen, Julian creates a very useful categorization of jurisdictions by their level of acceptance of the letter and spirit of the law, their capacity to analyze, and their capacity and willingness to ultimately implement strategies.⁹ Those most willing and able are 1's; those who are outright hostile are 4's.

The distinction between willingness and capacity for the first stages of AFH and willingness and capacity to move from AFH to actual action is quite useful and made by both Julian and Allen. Different strategies are likely needed for jurisdictions lacking data capacity than for those unable to develop actionable plans to address issues that surface in their AFH. HUD's rule serves as a planning enhancement for jurisdictions lying on the spectrum from 1 to 3; its power is solely in enforcement for jurisdictions that are a 4. The stance HUD needs to take to partner well with jurisdictions in categories 1-3 is a different stance than jurisdictions in category 4. Such flexibility in approach may be necessary for success, but poses a challenge for HUD. Will HUD manage to navigate these dual roles? In the absence of HUD as enforcer, Allen and Julian both suggest non-HUD enforcement paths.

We Need a Bigger Boat

The geographic and sector scope of the problem – and solution, is larger than HUD's siloed planning requirements. Can we harness AFFH for larger, bolder solutions?

As pointed out in Bostic and Acolin, addressing residential segregation and the unevenness of opportunity across places requires a larger geographic scale than singular jurisdictions, and resources far beyond housing. Housing provides more than shelter, and it is the full complement of where one lives — the safety, the transit, the schools, that ultimately determines whether residents have full access to opportunity. The funding levers needed to adequately re-invest in distressed communities, a valid strategy within the 'balanced approach' endorsed by HUD, need to be tapped by having a broad engagement strategy across sectors and jurisdictions. While the HUD rule encourages collaboration on AFH submissions, there are limited incentives. What is the longer run path to supporting the type of regional AFHs needed for more impactful changes? Does this require a different or additional engagement strategy beyond Allen's suggestions?

CONCLUSION

The large number of advocates, policymakers, and communities concerned and frustrated by the persistence of racial segregation in the U.S. saw HUD's final rule as the architecture for truly — and finally — making progress. Recent political events have

given pause as to the specific path forward, and perhaps reset expectations about what more might be required for HUD's rule to meaningfully increase inclusion. But these papers provide a rough preliminary roadmap, and some strategies for the broad group of stakeholders invested in creating a more equal society. The charge is clear: what it takes for HUD's rule to be impactful is not really about HUD. It takes us.

Bibliography

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Endnotes

- 1 <http://www.bostonfairhousing.org/timeline/1934-FHA.html>.
- 2 For background, see Goering (2012).
- 3 Bostic and Acolin (2017).
- 4 "Local Zoning Decision Protection Act of 2017," H.R. 482 in the House and S. 103 in the Senate.
- 5 Carson (2015).
- 6 This assumes that the dismantling of the final rule is not done through legislative action that would prohibit future rulemaking.
- 7 Allen (2017).
- 8 Allen (2015).
- 9 Julian (2017).