Leveraging the Besieged Assessment of Fair Housing Process to Create Common Ground Among Fair Housing Advocates and Community Developers

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The duty to affirmatively further fair housing, commonly known by its acronym AFFH, has the potential to serve as one of the strongest weapons in the arsenal of both community developers and fair housing advocates to address structural barriers to full and equal participation in U.S. society for people of color, persons with disabilities, and others protected from discrimination by the Fair Housing Act (FHA). Over its history, the duty has typically been observed in the breach, but, while AFFH is currently under attack, more has been done to give meaning to the obligation in the past decade than in any span over the course of the half-century life of the FHA. This essay explores the potential of fair housing planning that utilizes recently developed tools and relies on robust community engagement to build common ground between community developers and fair housing advocates. In doing so, this essay explores the history of the duty to AFFH, the tensions that have often divided community developers and fair housing advocates, the ways in which recent fair housing planning processes have built common ground, and the prospects for replicating those successes going forward.

I. One Step Forward, Two Steps Back: The Long Road to the 2015 Affirmatively Furthering Fair Housing Rule

In passing the FHA in 1968, Congress had two overarching purposes. First and most straightforwardly, Congress intended to outlaw housing

discrimination against members of protected classes and to end the formal
dual housing market for African Americans, in particular. Second, the legis-
lation body wished to begin the process of dismantling patterns of resi-
dential racial segregation and concentrated disinvestment that were cre-
ated, in significant part, through deliberate governmental action at the
local, state, and federal levels. Toward this end, the FHA places an obliga-
tion on the Secretary of the U.S. Department of Housing and Urban Devel-
opment (HUD), as well as on all other federal agencies that administer
housing and community development programs, to AFFH.

Until recently, HUD’s efforts to comply with the duty to AFFH, as well
as to ensure compliance by its grantees and by other federal agencies such
as the Departments of the Treasury, had been sporadic and largely ineffec-
tual. In the years immediately following the passage of the FHA, HUD
Secretary George Romney launched his Open Communities initiative,
which strove to condition the receipt of federal funds by predominantly
white suburbs on willingness to accept affordable housing that would fos-
ter residential racial integration. President Richard Nixon unceremoni-
ously pulled the plug on the program before it could bear fruit. Despite
an early circuit court decision holding that the duty to AFFH applied to
HUD grantees as well as to the department itself and clarification from
Congress on that point, HUD failed to develop a regulation concerning
grantee AFFH compliance until 1995. That rule created the Analysis of
Impediments to Fair Housing Choice (AI) process for state and local gov-
ernment recipients of Community Development Block Grant (CDBG),
HOME Investment Partnerships Program (HOME), Emergency Solutions
Grant (ESG), and Housing Opportunities for Persons with AIDS (HOPWA)
funds. From the start, the vagueness of the regulation, a lack of clear guid-
ance from HUD, and a deficit of political will for enforcement undermined
the effectiveness of the AI process. The rule was also incomplete in its cov-
erage; HUD did not require public housing authorities to conduct AIs. The
Anti-Discrimination Center of Metro New York, a private civil rights group,

2. 42 U.S.C. § 3608(e)(5).
5. Id.
8. Consolidated Submission for Community Planning and Development Pro-
9. SARA PRATT ET AL., THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COM-
MISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY 44–46 (2008).
stepped into the void left by HUD, shining a spotlight on brazen grantee non-
compliance through False Claims Act litigation that challenged Westchester
County’s AFFH certification. By 2010, when the Government Accountability
Office (GAO) published a report detailing the failures of the AI process,
the conclusion that HUD needed to revisit its regulatory approach to grantee
compliance was irrefutable.

There is, of course, a vast difference between a consensus about the
need for regulatory reform and a consensus about the specific details of
regulatory reform. Proposed changes ranged from modest steps flowing
from GAO report recommendations, such as to mandate that grantees ac-
tually submit their AIs to HUD for approval, to paradigm shifts that
would refocus the obligation on objective metrics for the reduction of seg-
regation and enforcement, including by private parties, in the event of
grantee non-compliance. Ultimately, HUD opted to hew more closely
to the limited vision of regulatory reform by primarily addressing the
GAO’s concerns without implementing fair housing advocates’ more am-
bitious recommendations. The hallmarks of the Affirmatively Furthering
Fair Housing rule, which HUD finalized in 2015, include: (1) the retention
of a planning process, now called the Assessment of Fair Housing (AFH),
as the central vehicle for AFFH; (2) a requirement that grantees submit
their AFHs to HUD for review and either acceptance or non-acceptance;
(3) a mandatory timeline for when grantees must submit their AFHs to
HUD; (4) an expansion in the coverage of the planning obligation to in-
clude public housing authorities; (5) a set format with required sections
for the AFH document; and (6) the integration of the AFH into program-
matic planning processes that grantees use to determine how they will
spend federal funds. The first local governments to submit AFHs to
HUD under the new rule did so in October 2016.
Although HUD, under Secretary Ben Carson, purported to suspend the obligation of local governments to complete and submit AFHs until after October 31, 2020, through a notice that appeared in the Federal Register on January 5, 2018, the resources that HUD created through the development of the AFFH rule still have the potential to advance efforts by community developers and fair housing advocates to promote win-win policies.\footnote{Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683 (Jan. 5, 2018).} In the notice, HUD asserts that the obligation of local governments reverts to the requirement to conduct an AI while also recommending that grantees avail themselves of the AFH assessment tool and the AFFH Data and Mapping Tool in the AI process.\footnote{Id. at 685.} Multiple major cities have already announced their intention to conduct AFHs despite the notice.\footnote{See, e.g., Maria Torres-Springer, To Deliver on Promise of MLK, Act Now on Fair Housing, CRAIN’S NEW YORK BUS. (Jan. 15, 2018, 12:01 AM), available at: http://www.cranisonline.org/article/20180115/OPINION/180119961/op-ed-to-deliver-on-promise-of-mlk-act-now-for-fair-housing (last visited Jan. 24, 2018); Alex Macon, Dallas Fair Housing Study Won’t Be Stopped by Trump Administration Decision, DMAG. (Jan. 9, 2018, 10:30 AM), https://www.dmagazine.com/frontburner/2018/01/dallas-fair-housing-study-wont-be-stopped-by-trump-administration-decision/ (last visited Jan. 24, 2018).} The HUD notice is a major setback and will result in significant backsliding in some communities, particularly with regard to the obligation to follow up fair housing planning with effective action. A broad range of affordable housing, fair housing, and civil rights stakeholders have met the notice with a robust advocacy response.\footnote{Press Release, National Fair Housing Alliance, Civil Rights, Housing, and Community Development Organizations Call on HUD to Maintain a Critical Fair Housing Tool (Jan. 8, 2018), http://nationalfairhousing.org/2018/01/08/civil-rights-housing-and-community-development-organizations-call-on-hud-to-maintain-a-critical-fair-housing-tool/ (last visited Jan. 31, 2018).} Moving forward will require both vigorously fighting the suspension and actively engaging in the AFH process where it proceeds.

II. Can Every Community Be a Community of Opportunity? AFFH and the Debate over Place-Based and Mobility Strategies

One hotly contentious issue in the AFFH rulemaking process was the approach that HUD was going to take to address the tension between strategies for meeting the needs of members of protected classes, in general, and racial and ethnic minorities, in particular, by promoting mobility to predominantly white areas or by reinvesting in low-income communities of color. There was concern in the community development sector that HUD would place primary emphasis on mobility strategies that directly
target patterns of segregation. This was natural because promoting integration had been a primary focus of AFFH efforts dating back to Secretary Romney’s thwarted Open Communities initiative. All of the major litigation concerning AFFH over the decades attacked barriers to integration, not impediments to community revitalization. At the same time, fair housing advocates worried that the greater lobbying clout of community development groups and the power of HUD’s offices of Public and Indian Housing (PIH) and Community Planning and Development (CPD) in comparison to the office of Fair Housing and Equal Opportunity (FHEO) would result in a rule that diluted the traditional focus on integration in AFFH efforts. To resolve this conflict, HUD adamantly insisted that AFFH requires a “balanced approach” that seeks to increase access to opportunity for members of protected classes both by fostering mobility and through community revitalization.

The tenor of the debate over what exactly is an appropriate balance between desegregation and revitalization goals for, say, the expenditure of HOME funds in a particular community is a fraught question today. Congress has slashed funding for HOME repeatedly over the course of several years, and there is significant support in Congress for eliminating the program altogether. Other HUD block grant programs, such as CDBG, have also been on the chopping block, although the threat of elimination is less dire. Affordable housing developers that have concentrated their


activities in low-income communities of color naturally feel more protective of federal funds if the prospect of creating a bigger pie of federal resources to pay for development in high-opportunity areas (which tends to be more expensive) appears unlikely. Meanwhile, if fair housing advocates are left with inclusionary zoning and other strategies that do not involve actual subsidy, efforts to build affordable housing in high opportunity areas are less likely to reach very low- and extremely low-income households, who may be more likely to be people of color than are low-income and moderate-income households in many regions. Effective intervention to promote integration through affordable housing development will always require some subsidy because the market alone will not produce sufficient decent affordable units for low-income households. In this context, every debate over what a balanced approach actually means, from the national scale to the hyperlocal, can seem like a zero sum game. Although the short-term prospects for increased appropriations are grim, increasing the size of the federal pie is perhaps the single most effective step that any entity could take to harmonize integration and revitalization goals.

Unfortunately, though often for good reason, disputes over the definition of balance outside of the AFH have tended to spill over into litigation and acrimonious lobbying fights instead of reaching resolution through collaborative planning processes. In the context of public housing redevelopment, community developers and fair housing advocates fought over every word when hashing out the propriety and extent of on-site replacement of public housing.  

26. See, e.g., Gautreaux v. Chicago Hous. Auth., 2013 WL 556771, at *4 (N.D. Ill. 2013) (denying motion to assign lawsuit challenging the Chicago Housing Authority’s decision to redevelop the Cabrini-Green site with anything less than 100 percent public housing units as a related case to a long-running public housing desegregation case); Anita Singh et al., We Call These Projects Home: Solving the Housing Crisis from the Ground Up (May 2010).

a portion of the units. These fights, all of which involved a defined quantity of federal assistance, are the baggage that community developers and fair housing advocates often bring to the table at the outset of the AFH process.

III. Finding Common Ground Through the AFH Process

The core values at stake in debates about the relative emphasis on mobility and place-based strategies are important and merit continued discussion, but the fair housing planning process prescribed by HUD’s AFFH rule is not up to the task of creating harmony where discord has persisted for decades. To try to leverage the AFH process to achieve that end would be to preordain failure and miss a major opportunity to create the conditions in which future consensus-building efforts could find greater success. But the AFH process can lift up policy interventions that are outside of the zero sum sphere of decisions about the use of federal funds. For example, inclusionary zoning, prohibiting source of income discrimination, and reductions in zoning barriers in high opportunity areas can all promote integration without redirecting resources for the development of additional subsidized units away from low-income communities of color. Fair hous-

28. Sunia Zaterman et al., Dear Colleagues, RAD COLLABORATIVE (Dec. 9, 2016), available at: https://static1.squarespace.com/static/5693b0579cad61a0a1cda98/t/585aef1415d5db6a4ca11627/1482354456165/Final+Comments+on+RAD+Fair+Housing-Relocation+Notice+12-16.pdf (last visited Jan. 24, 2018) (commenting on HUD notice concerning civil rights requirements for the Rental Assistance Demonstration program on behalf of public housing agencies).

29. Under the AFFH rule, states, insular areas, and local governments that receive funding through the Community Development Block Grant, HOME Investment Partnerships, Emergency Solutions Grant, and Housing Opportunities for Persons with AIDS programs, as well as public housing authorities, are required to submit AFHs to HUD in order to be eligible for funding. 24 C.F.R. § 5.154(b). In AFHs, program participants must analyze fair housing issues in their jurisdiction and in their region, identify the factors that contribute to those fair housing issues, and set goals for overcoming the effects of those contributing factors. 24 C.F.R. § 5.154(d). After the submission of an AFH to HUD, program participants must incorporate strategies and actions to achieve the goals specified in the AFH in their Consolidated Plan or Public Housing Agency Plan. 24 C.F.R. § 5.154(d)(5). The process of conducting an AFH is informed by data analysis and robust community participation. 24 C.F.R § 5.154(d).

30. At the same time, there are ways in which these policies could, in an indirect way, reduce affordable housing development in low-income communities of color. Under inclusionary zoning, the decision as to whether to have an in-lieu fee option and the parameters for the use of fee proceeds can implicate affordable housing development in low-income communities of color. Banning source of income discrimination, which increases Housing Choice Voucher holders’ access to high opportunity areas, can affect the underwriting of LIHTC developments in low-income communities of color by reducing demand for units. Eliminating exclusionary zoning removes one of the obstacles that often makes developments in low-income communities of
ing advocates are also typically eager to support interventions, including those involving federal funds, that facilitate the revitalization of low-income communities of color through non-housing means, such as workforce development and environmental remediation. Lastly, community developers and fair housing advocates can collaborate around strategies for increasing the pie of total resources, such as commercial linkage fees and document recording fees, to pay for affordable housing as long as advocates and policymakers frame the need for such programs in terms of the impact of affordable housing resource scarcity on members of protected classes. Merely focusing on the need for affordable housing without connecting that need to protected class status conflates the concepts of fair housing and affordable housing and is inconsistent with sound fair housing planning.31

Conflicts of interest and competition are inherent in the AFH process. Organizations and constituents who receive HUD and local funding are usually key participants in the community engagement process. There may be pressure to silence criticism due to real or perceived threats of funding cuts. In addition, these organizations are often competing against each other for limited resources and may promote their own activities over others based on funding rather than community needs. For example, fair housing organizations are usually strong advocates for fair housing testing and nonprofit housing developers often promote predevelopment funding strategies. This competition plays out during the prioritization of goals and strategies that lead to a reallocation of funding during the Consolidated Plan process.32

The AFH process can also be a platform for reaching consensus around win-win strategies. This is only possible in jurisdictions that welcome meaningful input from a wide array of stakeholders and limit undue political influence. One of the most striking examples of a win-win strategy is found in New Orleans, the first major jurisdiction to submit an AFH. Ellen Lee, Director of Housing Policy and Community Development, invited stakeholders to come together to help draft the AFH. The drafting process was more time-consuming than it would have been with the bare minimum level of community participation required by the AFFH rule. Yet, it resulted in the inclusion of a number of progressive goals color more competitive than developments in high opportunity areas for LIHTC awards.


32. 24 C.F.R. §§ 91.1-91.600 (requiring states, insular areas, and local governments that receive funds through the Community Development Block Grant, HOME Investment Partnerships Program, Emergency Solutions Grant, and Housing Opportunities for Persons with AIDS programs to prepare and submit Consolidated Plans that analyze housing conditions within grantees’ jurisdictions, identify needs, and propose strategies and actions for meeting those needs).
and strategies that genuinely reflected the community’s priorities to increase housing choice in high opportunity areas without undermining ongoing revitalization and anti-displacement efforts. Over the past several years, city officials worked closely with fair housing advocates and community developers to pilot a mandatory inclusionary zoning program in a few high opportunity and rapidly gentrifying areas of New Orleans. The development of a mandatory inclusionary zoning ordinance became one of the most important AFH strategies.33 This is an example of the power of collaboration that leads to lasting change.

Los Angeles had a more complex community engagement process because of its immense size and the enormous number of stakeholders. Community engagement was solicited though public meetings in each City Council district, focus groups conducted jointly with Los Angeles County (which was also going through the AFH process), meetings with the Resident Advisory Council for the Housing Authority of the City of Los Angeles, stakeholder meetings, meetings with city agencies and commissions, public hearings, and the formation of a Fair Housing Collaborative. The contribution of the Alliance for Californians for Community Empowerment (ACCE), a community organizing group with a strong commitment to fighting displacement, and the Housing Rights Center (HRC), a fair housing organization, with assistance from the Grounded Solutions Network, was a unique aspect of the AFH process. ACCE and HRC convened a series of well-attended meetings with hundreds of service providers, advocates, and residents to identify fair housing issues and contributing factors and to develop a list of goals and strategies designed to overcome those barriers. These meetings, which were attended by city and housing authority staff, provided valuable insight into the struggles residents of low-income communities of color face and resulted in the incorporation of dozens of goals and strategies that are win-wins for fair housing advocates and community developers, including source of income discrimination protections.34 After holding these sessions, ACCE and HRC submitted written comments to the draft AFH on behalf of 42 community-based organizations.

Philadelphia’s community engagement process coalesced later than intended as a result of an unrealistic ten-week schedule that was later extended by another thirty days. The city had convened several focus groups at the beginning of the community engagement process but meetings focused on educating the community about the AFH process instead of serving as an opportunity for stakeholders to provide meaningful feedback. By the time key


34. CITY OF LOS ANGELES & HOUSING AUTHORITY FOR THE CITY OF LOS ANGELES, ASSESSMENT OF FAIR HOUSING PLAN 409 (Nov. 6, 2017).
partners were fully engaged, the city had drafted many of its goals and strategies. As a result, the goals and strategies were not optimally tailored to the challenges facing protected class members. Recognizing this misstep, the city returned to the community participation process in order to strengthen the AFH. Stakeholders were divided into the following three groups to review and prioritize the draft goals and strategies: (1) Preservation of Existing Housing and Development of New Housing; (2) Fair Housing—Outreach, Training, Enforcement, and Legal Strategies; and (3) Place-Based Strategies and Quality of Life/Access to Opportunities. One strategy that emerged illustrates the power of data to create common ground: the proposal to use a Displacement Risk Ratio to identify areas to prioritize the preservation of existing affordable housing in order to prevent resegregation.\textsuperscript{35} Fair housing advocates and community developers often agree in principle about the need to preserve affordable housing in gentrifying areas, but struggle to come to consensus about which areas are actually undergoing gentrification. Through its emphasis on robust community participation, data, and policy analysis, the AFH process has the potential to be a platform for resolving that harder question.

That the AFH process can create common ground when fair housing advocates and community developers focus on win-win strategies that increase the total pie and protect tenants’ rights does not mean that more contentious issues should be ignored. Local governments continue to play a critical role in the siting of affordable housing. As long as state qualified allocation plans for the LIHTC program reward the leveraging of resources, the geographic distribution of HOME funds will have significant implications for patterns of residential racial segregation. Building trust among fair housing advocates and community developers by starting with win-win policies in the AFH process, however, can help ensure that discussions about decisions with a zero sum dimension are grounded in data, mutual respect, and the balanced approach promoted by HUD. In the best-case scenario, collaborative discussions through the AFH process could even transform the perception of policies that have some zero sum dimensions into win-wins. One example is Small Area Fair Market Rents for the Housing Choice Voucher Program, which were included as a strategy in the Philadelphia AFH.\textsuperscript{36} Although individual affordable housing developers with properties in neighborhoods with rents significantly below the area median may be hurt by the adoption of Small Area Fair Market Rents, data suggests that Small Area Fair Market Rents may increase the total pie of Housing Choice Vouchers by reducing the cost of

\textsuperscript{35} CITY OF PHILADELPHIA & PHILADELPHIA HOUSING AUTHORITY, ASSESSMENT OF FAIR HOUSING 320 (Dec. 23, 2016).

\textsuperscript{36} Id. at 319.
each voucher\textsuperscript{37} while increasing the range of housing options available to voucher holders.\textsuperscript{38}

IV. Will This Opportunity Withstand the Current Threat?

It is clear that the AFFH rule and the AFH process are under attack by the political leadership of HUD and the Trump administration. In this perilous moment, the future of the rule and the process depends in no small part on the actions of local governments to make use of the AFH process as part of their efforts to comply with the duty to AFFH. Municipalities that are committed to fair housing can facilitate the long-term success of the rule and the process if there is a steady stream of examples of best practices for effective fair housing planning, informed by robust community engagement and intensive data analysis. Fair housing advocates and community developers also have a valuable role to play in that process, both through active engagement in jurisdictions that choose to go forward with AFHs and through the promulgation of best practices, particularly for implementing goals and strategies to address fair housing issues and contributing factors. If that occurs, less progressive jurisdictions will not be starting from square one if and when HUD restores the requirement to submit an AFH. As key stakeholders, fair housing advocates and community developers are well positioned not only to use the AFH process as a platform for advancing win-win strategies, but also to push their communities to move forward with the AFH process and not revert to business as usual under the failed AI regime.


\textsuperscript{38} How Do Small Area Fair Market Rents Affect the Location and Number of Units Affordable to Voucher Holders?, \textit{NYU Furman Center} (Jan. 5, 2018), available at: http://furmancenter.org/files/NYUFurmanCenter_SAFMRbrief_5JAN2018_1.pdf (last visited Jan. 24, 2018).