

# 2012 OHIO HOUSING CONFERENCE



Nov. 27-29, 2012

Navigating the "Affirmatively  
Furthering Fair Housing" Initiative



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What is “affirmatively furthering fair housing?”

- ▶ Section 3608 (e)(5) of the Fair Housing Act requires HUD to “administer the programs and activities relating to housing and urban development in a manner to affirmatively further the policies of the Fair Housing Act.”
- ▶ Federal Executive Orders 12259 & 12892 provide that federal agencies shall require applicants or participants of federal agency programs relating to housing and urban development to affirmatively further fair housing.



Section 3609 imposes an “affirmative “ obligation

- ▶ Requires HUD to do “more than simply refrain from discriminating.. or from purposely aiding discrimination by others.”
- ▶ To the contrary, “[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[.]”



So.....who must comply?

- ▶ Programs and activities “operated, administered, or undertaken by the Federal Government; grants; loans; contracts; insurance; guarantees; and Federal supervision or exercise of regulatory responsibility.”
- ▶ In other words, AFFH obligations are applicable to all federal funding entities, including HUD, and their respective grantees.



## Current AFFH Regulations

- ▶ Community Development Block Grant regulations, 24 C.F.R. Part 570, provide that:

The Housing and Community Development Act of 1974 requires state and general local governments to certify to the satisfaction of HUD that they will affirmatively further fair housing.

(NCRC Affirmatively Furthering Fair Housing webinar <http://www.youtube.com/watch?v=8Z2An5bEOjs> )



## What are the state requirements?

1. Conducting an analysis to identify impediments to fair housing choice (AI) within the State;
2. Taking appropriate actions to overcome the effects of any impediments identified through the analysis;
3. Maintaining records reflecting the analysis and actions taken; and
4. Assuring that units of local government funded by the State comply with their certifications to affirmatively further fair housing.



## The Fair Housing Planning Guide

- ▶ Last published by HUD in 1996 and available on-line at <http://www.hud.gov/offices/fheo/images/fhpg.pdf>
- ▶ The 2 volumes provide detailed guidance and recommendations for fulfilling the fair housing requirements of the CDBG and Consolidated Plan regulations



## Current Problems with AFFH

- ▶ HUD does not require that AIs be reviewed or approved;
- ▶ No HUD regulations that identify what must be included in an AI
- ▶ No requirement that efforts must be made to reduce existing segregation, consider residential living patterns in the placement of new housing or promote fair housing choice or inclusion



## Efforts to AFFH...

- ▶ In 1998, HUD Secretary Andrew Cuomo proposed a regulation that defined what it meant to "affirmatively further fair housing."
- ▶ The rule made clear that HUD would deny funding if it found a community's efforts "did not result in meaningful and measurable progress," or if HUD or the Justice Department had charged the community with violating the Fair Housing Act.
- ▶ It had taken HUD a year and half of internal wrangling to release the rule to the public.
- ▶ The cities and counties killed it in just a few weeks.



## Westchester County, NY

- ▶ Plaintiffs provided evidence that the historically segregated impact of the county's housing policies were furthered because "Westchester refused to identify or analyze community resistance to integration on the basis of race and national origin as an impediment."

(Michael Allen speaking on the Westchester County Case -<http://www.youtube.com/watch?v=yzYSH1KcuAQ>)



## The “promised” AFFH Proposed Rule

- ▶ HUD has drafted a proposed rule.
- ▶ Currently under review by the Office of Management and Budget ((OMB)
- ▶ Expected by be published for comment Spring 2012...after election... early next year?





## Proposed Changes???

- ▶ HUD plans to eliminate the current AI requirement and replace it with a new form of analysis known as the Assessment of Fair Housing or AFH
- ▶ AFH very similar to the HUD's Sustainable Communities Initiative's Fair Housing Equity Assessment.



AFH has at least 5 components:

1. An analysis of housing needs of protected classes;
2. An assessment of patterns of integration or segregation;
3. Identification of racially or ethnically concentrated areas of poverty;
4. Analysis of disparities in access to opportunity;
5. Examination of local fair housing organizations, both public and private



## Other Details of proposed AFH...

- ▶ Grantees will be required to submit the AFH to HUD before but on the same cycle as the submission of their Consolidated Plan (Con Plan).
- ▶ HUD intends to review each AFH
- ▶ Con Plan and PHA Plans must have consistent goals and priorities in their AFHs
- ▶ Unless HUD takes action within 45 days, AFH deemed approved
- ▶ Annual plans must include changes in conditions, update goals and priorities



## Concerns???

- ▶ HUD capacity to review all of the AFHs
- ▶ Lack of public participation provisions and an appeals process for public
- ▶ HUD enforcement
- ▶ Will the proposed rule even be published????



"It is fair to say, it is accurate to say, that the only situation in which HUD is doing anything effectively to affirmatively further fair housing are situations where there has been litigation,"  
said Florence Wagman Roisman,  
a law professor at Indiana University.





## References:

- ▶ **Living Apart: How the Government Betrayed a Landmark Civil Rights Law -**  
<http://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>
- ▶ **2012 Fair Housing Trends Report - NFHA -**  
<http://www.nationalfairhousing.org/Portals/33/Fair%20Housing%20Trends%20Report%202012%20with%20date.pdf>



# QUESTIONS ON “AFFIRMATIVELY FURTHERING FAIR HOUSING?”

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Affirmatively Furthering Fair Housing  
As Defined by the Courts



Courts start with the law

The Federal Fair Housing Act of 1968

- ▶ 42 U.S.C. 3608(e)(5) says that among the functions of the Secretary of Housing and Urban Development is to administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this chapter.
- ▶ State and local governments are required to conduct an analysis of impediments to fair housing in order to receive certain federal funding. 24 C.F.R. § 570.487. The U.S. Department of Housing and Urban Development requires the analysis to be conducted in accordance with the recommendations set forth in its Fair Housing Planning Guide.



United States of America ex rel. Anti-discrimination Center of Metro New York, Inc. v. Westchester County, New York



Under [42 U.S.C.S. § 5304\(b\)\(2\)](#) and [24 C.F.R. § 91.425\(a\)\(1\)\(i\)](#), the county's certification to HUD that it would affirmatively further fair housing (AFFH) was a condition of its receipt of federal funds, requiring the county to analyze the existence and impact of race discrimination on housing opportunities and choice in the county.



## Who is Westchester County

- ▶ Westchester County is comprised of 45 municipal entities and in their behalf, the County applied for federal funding, including Community Development Block Grant funds each year from 2000 through 2006 totaling over \$ 52 million in federal funding for housing and community development.



## Westchester Acknowledged Its Segregation

- ▶ The county's analyses of impediments (AIs) noted the County had areas of minority concentration and identified which municipalities had the largest black population as well as the largest gain in black population.
- ▶ The AI noted that blacks made up between 0.1% and 16% of all homeowners and between 1% and 30% of all renters. It noted that the waiting list for Section 8 rental assistance by race and that low-income families and individuals with special needs were frequently excluded from housing opportunities due to illegal discrimination.



## Westchester Acknowledged But Failed to Act

- ▶ While the AI identified it “NIMBY” problems, it did not withhold funds or impose sanctions on any community for failure to AFFH and instead seeks concurrence of the municipality when it acquires land for affordable housing.
- ▶ The county limited its review of race based impediments to collecting data on fair housing complaints filed with area agencies without analyzing those impediments or identifying programs to overcome them.



## Westchester's Proposed Actions

- ▶ In spite of Westchester County being racially segregated, its proposals focused exclusively on obtaining federal funds to increase the stock of affordable housing within the county while ignoring the fact that its actions were increasing patterns of segregation.



## Enter the False Claims Act Violations

- ▶ The county's requests for payment of grants funds impliedly certified their compliance with the grant requirements, including the requirement to AFFH.
- ▶ In the absence of evidence indicating that the county's AIs analyzed race-based impediments to fair housing or that the county maintained records of its analysis of whether race created an impediment to fair housing, the county's certifications to HUD that it would AFFH were false.



## The False Claims Act – 31 U.S.C. § 3729

- ▶ In order to impose liability under the FCA, the plaintiff must show that defendants:
- ▶ 1. Made a claim
- ▶ 2. To the United States government
- ▶ 3. That is false or fraudulent
- ▶ 4. Knowing of its falsity, and
- ▶ 5. Seeking payment from the federal treasury.



## False Claims Act's Theories of Falsity

- ▶ “legally false” where a party certifies compliance with a statute or regulation as a condition to government payment
- ▶ “factual false” certification theory involves an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided



## Westchester's Defense-Inadequacy of HUD Guide Regarding the Preparation of its AI

- ▶ The court rejects this argument in light of the focus of the AI is to be on “actions, omissions, and decisions” which restrict housing choice including policies, practices or procedures that appear neutral on their face and how segregation and restricted housing supply occurred.” The Court notes that the County specifically considered race but having failed to analyze race-based housing discrimination reflects the AI’s inadequacy.



## Westchester's Defense-Inadequacy of HUD Guide Regarding the Preparation of its AI, cont.

- ▶ The Court specifically rejected an argument that the County used income as a proxy for race because the AI failed to report that analysis and demonstrate how it acted to overcome the effects of that race-based impediment to fair housing, making their certification to HUD no less false.



## False Claims Act Violation, Was It Intentional?

- ▶ The county's requests for payment of grants funds impliedly certified their compliance with the grant requirements, including the requirement to AFFH.
- ▶ The county's voluntary submission of AIs permitted the inference that the county did not act in knowing and reckless disregard as to the falsity of its certifications.



## No Significance Attached to HUD's Review

- ▶ That fact that HUD reviewed the county's submissions and continued to grant funding did not make the false certifications immaterial.



## The Westchester Court Rules:

- ▶ Since the County had submitted false certifications to receive approximately \$52 million from HUD, it was liable for over \$150 million in damages pursuant to the treble damages provision of the FCA.
- ▶ A trial was scheduled to determine whether the violation had been willful, in other words whether the fraud was a knowing fraud.



## Enter the United States and Settles With Westchester

- ▶ pay the Government \$30 million, with \$21.6 million of that amount credited to the County's account with HUD for development of housing in accordance with the Stipulation.
- ▶ The County was also required to secure \$30 million in additional funding for such housing development over six years.
- ▶ The Country agreed to the development of 750 units of new affordable housing over the course of seven years in areas with low black and Hispanic populations.
- ▶ The County was required to promote, through the County Executive, legislation currently before the [County's] Board of Legislators to ban 'source-of-income' discrimination in housing to prevent landlords from refusing to rent to tenants solely on the grounds that a person's income is derived from government programs such as [Section 8](#), Social Security, or disability benefits.



## The Courts Continue to Address Affirmatively Further Fair Housing

- ▶ *Thompson v. U.S. Dept. of Housing and Urban Development*, 348 F. Supp. 2d 398 (D. MD 2005)
- ▶ The Court concludes that HUD violated Section 3608(e)(5), the AFFH provisions, by failing adequately to consider regional approaches to ameliorate racial segregation in public housing in the Baltimore region.
- ▶



The Courts Continue to Address Affirmatively Further Fair Housing, cont.

- ▶ ***Darst-Webbe Tenant Association Board v. St. Louis Housing Authority***, 417 F. 3d 898 (8<sup>th</sup> Cir. 2005)
- ▶ The Court upheld the district court's decision approving the plan for 80 low-income rental units mixed with market and below market for-sale and rental units because it addressed the statutory mandate of de-concentration and there was no evidence that the 120 additional low-income units would address the primary objective of a de-concentration of low-income housing.



The Courts Continue to Address Affirmatively Further Fair Housing, cont.

- ▶ ***Broadway Triangle Community Coalition, et al v. Michael Bloomberg and the City of New York, 35 Misc. 3d 167 (S. Ct of N.Y. 2011)***
- ▶ A community coalition successfully secured an injunction against the transfer of city-owned land for the construction of affordable housing in the predominately white community of Williamsburg-Greenpoint neighborhood designed to meet the needs of Hasidic Jews because it perpetuated racial segregation.



## The Courts Continue to Address Affirmatively Further Fair Housing, cont.

- ▶ **Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs, 2012 U.S. Dist. LEXIS 37450 (N.D. TX 2012)**
- ▶ At issue is a practice of the TDHCA to approve tax credits for low income housing developments in minority neighborhoods while denying them in Caucasian neighborhoods in the Dallas metropolitan area. Because their process has a disparate impact on minorities in violation of the FHA, the Court requires TDHCA to submit a remedial plan that sets out how it will bring its allocation decisions into compliance with the requirement to affirmatively further fair housing's de-concentration purposes.