



Long Island Housing Services, Inc.

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Protecting Civil Rights for Long Islanders since 1969



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Regulations Division
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US Department of Housing and Urban Development
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RE: Docket No. FR-6123-P-02, RIN: 2577-AA97 Affirmatively Furthering Fair Housing

Dear Madam/Sir:

I am writing on behalf of Long Island Housing Services, Inc. to express our strong opposition to HUD's proposed new Affirmatively Furthering Fair Housing (AFFH) regulation, as described in FR 6123-P-02. Long Island Housing Services is HUD qualified Fair Housing Organization and a HUD certified Housing counseling organizations that serves the diverse population of Long Island, NY (Nassau and Suffolk counties). We regularly work with the two counties and four towns that are entitlement jurisdictions within our service area on their Analysis of Impediments, Analysis of Fair Housing, and Consolidated Plans.

The AFFH provisions of the Fair Housing Act¹ are an essential tool for creating the fairer and more equitable country that Congress envisioned when it passed the Act in 1968. Congress gave HUD the mandate to implement those provisions, and they are a critical component of HUD's mission to create "strong, sustainable, inclusive communities."² By adopting these provisions, Congress gave HUD the job of ensuring that its programs are free from discrimination. Congress also wanted HUD and its grantees to work actively to dismantle residential segregation and to redress the harms segregation imposed both on people of color and other protected classes under the Act.

¹ (42 USC 3608 (d) and (e))

² <https://www.hud.gov/about/mission>

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HUD has largely ignored this mandate for most of the 52 years since the Fair Housing Act was passed. In 2015, after extensive input from stakeholders and pilot testing, HUD adopted a regulation that provided its grantees with the clarity and guidance they had requested in order to better fulfill their fair housing obligations.

HUD also provided grantees the data and mapping capacity needed to understand how segregation and discrimination were manifested in their communities, a framework that focused their analysis on relevant fair housing problems, a requirement for robust community engagement to ensure that the voices of those most affected by these problems were front and center in this debate, and a requirement to identify specific goals and priorities, with metrics and timelines for assessing progress. At the same time, the regulation allowed grantees the flexibility to decide for themselves what priorities to set, what goals to adopt, what metrics to use, and what strategies to employ. In all of these ways, the 2015 regulation was a dramatic improvement over HUD's previous approach, responded to the specific critiques identified by the Government Accountability Office, and provided for a bottom-up approach to achieving the vision set out by Congress in the Fair Housing Act. Although it was only in effect for a short time, the 2015 rule showed real promise.

In addition our decades long work to fight housing discrimination on Long Island, the recent *Newsday* investigation "Long Island Divided" brought into focus the size of the continuing problem of racism on Long Island and its direct impact in creating housing discrimination.

Now HUD is proposing to abandon the 2015 rule and go in another direction altogether. For the reasons set out below, Long Island Housing Services believes HUD's proposed new AFFH regulation is misguided and unworkable. We urge HUD not to move forward with this proposal, but rather to reinstate the 2015 AFFH regulation and resume its implementation and enforcement.

The proposed rule does not satisfy the mandate set out in Section 3608 of the Fair Housing Act.

Although the Fair Housing Act does not include a definition of "affirmatively furthering fair housing," the legislative history of the Act³ and subsequent court decisions⁴ have clarified what

³ See, for example, 114 Cong. Rec. 2276-2707 (1968)

⁴ Particularly pertinent court decisions on this issue include *Trafficante v. Metro. Life Insurance* (409 U.S. 205, 211 (1972)), *NAACP, Boston Chapter v. HUD* (817 F.2d at 154), and *Otero v. New York City Housing Authority* (484 F.2d at 1134).

Congress intended with this provision. That comes down to three key requirements that HUD must ensure:

1. Neither HUD itself nor its grantees are discriminating in their housing and community development programs;
2. HUD programs must work to topple the barriers created by residential segregation; and
3. HUD programs must ensure that its programs increase access to the kinds of opportunities that are tied to where a person lives – jobs, transportation, schools, healthy environment, and the like – for members of protected classes.

The proposed new AFFH rule does none of these things. Instead, it focuses on reducing housing production obstacles within grantees' "spheres of influence" to provide individuals and families housing choice "within their means." It does not consider discrimination. It does not consider segregation and access to opportunity. It limits its focus to housing development and fails to consider the impact of community development activities that help form the neighborhood context for and may have significant impact on access to opportunity. It does not require grantees to take any steps to analyze or understand local fair housing issues that may be barriers to fair housing choice. For all of these reasons, the proposed rule fails to meet the statutory mandate of Section 3608 of the Fair Housing Act.

The historic segregation on Long Island continues to this day and has done damage nationwide.. Many trace the segregation patterns in suburbs across the United States to Long island's own Levittown. As noted in the *Newsday* investigation "Long Island Divided," those segregation patterns continue to today with clearly delineated dividing lines. As shown by Long island Housing Services' own investigation and by the *Newsday* series, that segregation is the result of continuing systemic discriminatory acts.

The proposed rule jettisons important aspects of the 2015 rule.

The 2015 rule incorporated a number of elements that helped to ensure that both the process of developing an Assessment of Fair Housing (AFH) and the content of that plan focused on the major barriers to fair housing in a community and outlined concrete steps for overcoming them. Because of these elements, the 2015 rule was a significant improvement over the previous AI process and helped jurisdictions chart a path for meaningful action to fulfill their fair housing obligations.

Having reviewed years of pre-AFH Analysis of Impediments and Consolidated Plans for Long Island, it is clear that the format of those HUD reports leave the municipalities free to ignore focusing funding on remediating continuing systemic segregation.

The proposed new rule eliminates those elements and fails to replace them with provisions that are designed to address barriers to fair housing in any meaningful way. It would weaken, not strengthen, implementation of this important provision of the Fair Housing Act.

The proposed rule would have a harmful effect on fair housing groups and fair housing enforcement.

Under the provisions of the proposed rule, HUD would conduct an annual jurisdictional risk assessment⁵, sorting jurisdictions into several groupings based on population growth and housing market conditions, ranking them based on an analysis of various factors unrelated to fair housing. It would then divide each grouping into three categories, deeming those at the top “outstanding AFFH performers” and those at the bottom “low AFFH performers.” HUD states that outstanding performers would be eligible for a number of benefits, including bonus points on applications for competitive funding programs. In the description of this provision in the preamble to the rule, HUD specifically cites the Fair Housing Initiatives Program (FHIP) as one of these. Further, it suggests that for FHIP and possibly other programs, those bonus points would be awarded to applicants located in top performing jurisdictions.

FHIP is a highly competitive program, and a few points on an application can make the difference between an applicant receiving funding or not. The notion that an applicant’s score could be increased based not on their own performance or the competitiveness of their application, but by factors outside their control – as the outcome of the proposed jurisdictional risk assessment would be – is unfair and inappropriate. Applicants should be evaluated based on their own performance and the strength of their applications, and not on extraneous and unrelated factors outside of their control.

In addition, jurisdictions that are deemed “low-ranking” may need the greatest assistance in improving their fair housing performance. It would be counter-productive to decrease the competitiveness of, and potentially the resources available to, the very organizations those jurisdictions may rely upon to make those improvements.

Further, many FHIP agencies serve multiple jurisdictions. Many are likely to have service areas that include some jurisdictions that are ranked “outstanding AFFH performers” and also some that are “low-ranking” jurisdictions, not to mention some that fall in between. The rule does not state how HUD would apply the scoring boost in such circumstances. Long Island Housing Services would be doubly unfairly penalized for forces outside of our control. As mentioned about, our service area encompasses six different entitlement jurisdictions within the space of two counties. Those jurisdictions contain patterns of segregation that reach back for many

⁵ See proposed AFFH rule at §5.155 Jurisdictional Risk Assessment.

decades and the HUD regulations prior to 2015 did nothing to encourage them to use HUD funds to recognize, much less directly attack those forces causing that systemic discrimination.

The proposed rule effectively exempts public housing authorities from meaningful AFFH compliance.

Under the proposed rule, public housing authorities (PHAs) would be virtually exempt from any meaningful requirements to affirmatively further fair housing.

PHAs manage critical affordable housing resources in their local communities, providing much-needed housing opportunities for members of protected classes. It is crucial that they undertake a careful analysis of their programs and policies in order to ensure that they are not discriminating and are not perpetuating segregation. The proposed rule would set back efforts to ensure that PHAs are fulfilling their fair housing obligations in a meaningful way.

Unfortunately PHAs can contribute to the problems of housing discrimination as much as private actors. Long Island Housing Services has had to overcome issue of racial and national origin discrimination in both PHA discriminatory policies and lack of services. Affordable housing on Long Island is consistently excluded from high opportunity zones on Long Island despite our constant advocacy to the contrary.

Conclusion

The AFFH provisions of the Fair Housing Act mandate that HUD should use its programs to end housing discrimination, eliminate racial and other forms of segregation and ensure fair access to opportunity for all. It is critical for HUD to take this mandate seriously and carry it out effectively, and our country would benefit enormously from the result. This proposed rule represents, however, accomplishes neither of those ends. It represents a serious reversal in civil rights enforcement and should be abandoned. We urge HUD to withdraw this proposed rule and immediately reinstate the 2015 AFFH regulation.

Thank you for the opportunity to submit these comments. If you have questions or need further information, please contact Ian Wilder, Esq. at 631-567-5111 ext. 314 or Ian@LIFairHousing.org.

Sincerely,

Ian S. Wilder, Esq.
Executive Director

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