

11-0262

No Certification, No Money:

THE REVIVAL OF CIVIL RIGHTS OBLIGATIONS IN HUD FUNDING PROGRAMS

Editor's Note: This short article provides an "early warning" alert on an important housing issue that may well affect your community. I hope you'll plow through the acronyms and some of the legal background, as it's a topic worth becoming familiar with.

by Michael Allen, Esq.

RECIPIENTS OF FEDERAL HOUSING FUNDS WILL BE REQUIRED TO TAKE A HARD LOOK AT IMPEDIMENTS TO FAIR HOUSING CHOICE

Since the late 1960s, states and municipalities receiving federal housing and community development funds – under the Community Development Block Grant (CDBG), HOME Investment Partnership (HOME), and similar programs – have been required to certify that they will comply with federal civil right laws. Many have done so without understanding what is required by these certifications, assuming that the U.S. Department of Housing and Urban Development (HUD) would not challenge their validity.

Until recently, this assumption was largely correct, as HUD rarely questioned recipients on these issues and virtually never terminated or threatened to terminate funding. HUD simply did not press recipients to comply with their civil rights fair housing certifications. Consequently, from 1995 through 2009, hundreds of recipients bowed to NIMBY pressures,¹ ignored their certifications, and spent billions of dollars in federal funds to segregate affordable housing by placing most of it in already disadvantaged neighborhoods or communities.

In just the past year, however, this situation has begun to rapidly change – the result of a ground-breaking lawsuit against Westchester County, New York² – and the Obama Administration's interest

in reviving civil rights enforcement. Under emerging HUD guidelines and a stepped-up agency enforcement policy, recipients of federal housing funds will be required to take a hard look at impediments to fair housing choice in their jurisdictions and propose robust actions to overcome them.

This new environment will have a dramatic impact on communities across the country, whether they are one of the 1200+ "entitlement jurisdictions" receiving federal funds directly from HUD, or small cities or rural counties whose federal funds are channeled through a state community development agency.³

Civil Rights

To be eligible for CDBG and related funds, state and local governments must certify that they will comply with a range of federal civil rights laws⁴ and "affirmatively further fair housing." Since at least 1995, this last obligation, sometimes referred to as "AFFH," has required recipients to conduct an Analysis of Impediments (AI), in which they identify and analyze impediments to fair housing

choice within their jurisdictions, and outline appropriate actions to overcome those impediments. HUD also requires recipients to maintain records supporting the analysis and the actions taken to overcome impediments.

HUD requires state and local governments to use their AIs to list impediments experienced by members of all seven protected classes,⁵ whether caused by intentional discrimination or by policies and practices that have a harsher effect on members of a protected class than on those not in a protected class.

Recipients, in their AI, must make an honest assessment of their own zoning, land use, building, and other ordinances that may decrease housing choice, and must design approaches that will counteract those negative effects. An AI is also required to look at impediments caused by private sector actors, including steering in the sales and rental markets, discriminatory lending practices, insurance redlining, and similar practices.

While recipients are encouraged to provide affordable housing, HUD makes clear that doing so does not fully satisfy the obligation to affirmatively further fair housing, where the focus is on eliminating discrimination on the basis of protected class and expanding housing opportunity regardless of income.

Westchester County Goes Astray

Westchester County ignored HUD regulations and guidance. County officials had Census and other data showing that cities, towns, and villages in Westchester were dramatically segregated,⁶ and

1 See, e.g., Michael Allen, "Why Not in Our Back Yard?" *PCJ* #45 (Winter 2002).

2 *United States ex rel. Anti-Discrimination Center v. Westchester County, New York*, Case No. 06-cv-2860, U.S. District Court for the Southern District of New York (settled in August 2009). Pleadings, legal memoranda, court decisions, and other materials on the case are available at: www.antibiaslaw.com/wfc

3 Because a significant portion of funds made available to communities through the American Recovery and Reinvestment Act of 2009 (ARRA) are programmed through the CDBG program, even "non-entitlement" jurisdictions and those that have never applied for funds from state CDBG or HOME pools will likely have to sign civil rights certifications prior to receiving ARRA funds.

4 These include, but are not limited to, Title VI of the Civil Rights Act of 1964; the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; the Fair Housing Act; and Section 109 of the Housing and Community Development Act of 1974.

5 The Fair Housing Act prohibits discrimination on the basis of race, color, religion, national origin, sex, familial status, and disability. People protected by

knew that nearly three-quarters of county-funded affordable housing was being built in racially-segregated, African-American neighborhoods.

Despite this the county's AIs in 1996, 2000, and 2004 made absolutely no mention of that segregation or of race-based impediments to fair housing choice. Moreover, even though the County's own appointed Housing Opportunities Commission had identified intense opposition to affordable housing in the whitest communities and the failure of 20 municipalities to build a single unit of affordable housing pursuant to the County's affordable housing "allocation plan," the AIs failed to mention these impediments.

The Anti-Discrimination Center of New York began an investigation of Westchester County's civil rights performance in 2005, requesting records to establish whether the County had truthfully made certifications of AFFH compliance. Document discovery in a subsequent lawsuit brought under the False Claims Act revealed the nearly complete absence of supporting records. As the then-County Executive testified at his deposition, he never read the AFFH certifications requiring his signature, and "signed whatever [he had] to sign to get the money from HUD."

On February 24, 2009, a federal judge concluded that more than 1,000 of the County's AFFH certifications – those in the annual applications and those implicitly made each time the County requested payment from the federal government based on annual written certifications – were false. Finding that HUD's 1995 *Fair Housing Planning Guide*⁷ was persuasive authority, the court instructed the County (and other recipients) that the AFFH certifications were "not mere boilerplate," but were material and substantive requirements that are required for receipt of federal funds.

these provisions are often colloquially referred to as the "protected classes."

6 The County's own data showed that 24 of these municipalities had African-American populations of 3 percent or less, and that others had block groups that were almost entirely African-American.

7 Available at: www.nls.gov/offices/theo/images/flhpg.pdf

Within a few weeks of the court's ruling, HUD Secretary Shaun Donovan and Deputy Secretary Ron Sims were personally engaged in settlement negotiations with the county. Those efforts, combined with a temporary cutoff of funds to the county, culminated in a \$62.5 million settlement on August 10, 2009, requiring the county to develop 750 units of affordable housing in the whitest towns and villages in Westchester, and to affirmatively market them to people of color. In addition, the settlement requires the county to conduct a new AI and to consider all fair housing impediments.

Speaking not just to Westchester County, but also to the state and municipal recipients of HUD funds across the country, Sims noted that the agency would begin to "hold people's feet to the fire" on civil rights certifications.⁸

Scattering the Seeds of Westchester

While HUD has announced it will publish a proposed regulation toughening AFFH substantive and procedural requirements later this year, the agency has already become active in reviewing recipients' certifications and performance. The most notable instances involve St. Bernard Parish, Louisiana; the State of Texas; and the City of Joliet, Illinois. All three involve litigation or administrative complaints by grassroots advocates, alleging discrimination on the basis of race or national origin, and the failure to identify and analyze impediments experienced by people in those protected classes.

• In Louisiana, HUD threatened to withhold hurricane recovery funds to rebuild a hospital because St. Bernard had adopted a series of racially discriminatory ordinances with respect to multi-family housing.

• In Texas, HUD rejected the state's plan to spend \$1.7 billion in disaster

8 As reported by Peter Abelbome in *The New York Times*, "Integration Faces a New Test in the Suburbs," (August 22, 2009).

9 Available at: www.planningcommunications.com/ai/naperville_ai_2007.pdf or www.naperville.il.us/emplibrary/Boards_and_Commissions/flhcanalysisofimpediments.pdf

10 See footnote 7 for download location.

recovery money, in part because its seven-year old AI did not comply with federal requirements.

• In Illinois, HUD has taken enforcement action against the City of Joliet because the city allegedly used its eminent domain power in a discriminatory fashion to shut down affordable housing inhabited almost exclusively by low-income, African-American single mothers.

What It All Means for Municipal Planning

Planning professionals and planning commissioners across the country will increasingly be called upon to inform and guide their communities through the HUD-required planning processes. Communities whose planning departments and commissions are already immersed in conversations about addressing local housing issues will have a head start in developing robust AIs. Those with little experience in assessing the civil rights impacts of zoning, land use, building, and funding functions may have to bring in outside consultants to help develop compliant AIs.

One AI worth taking a look at – especially for those in small or mid-sized municipalities – is that of the City of Naperville, Illinois (a Chicago suburb), winner of an Illinois APA 2009 Best Practices Award.⁹

Planners would also do well – even before HUD's new regulations are in place – to dust off their copy of the HUD *Fair Housing Planning Guide* and review its roadmap on how to conduct an AI.¹⁰ The *Guide* includes valuable suggestions on data sources and community involvement strategies. ♦

Michael Allen, Esq. is a partner in the civil rights law firm, Relman & Dane, PLLC, which engages in litigation and consulting throughout the country, principally in the areas of fair housing and fair lending. Allen was the firm's lead attorney in *United States ex rel. Anti-Discrimination Center v. Westchester County* and has a similar role in the *State of Texas* matter noted in this article.



RIN Data

HUD/HUDSEC

RIN: 2501-AD33

Publication ID: Spring 2011

Title: Affirmatively Furthering Fair Housing (FR-5173)

Abstract: This rule would provide fair housing performance standards for the requirement to affirmatively further fair housing. The Department seeks to foster effective fair housing strategies and to provide clear guidance to local communities, public housing agencies, and assisted housing providers to help them in their efforts to responsibly identify and solve fair housing problems, as these recipients strive to achieve equal opportunity in housing for all. To that end, the rule is intended to provide specific standards and the bases upon which these requirements would be measured—both for purposes of receiving HUD funds and to aid the Department in determining that recipients are in compliance with applicable requirements.

Agency: Department of Housing and Urban Development(HUD) **Priority:** Other Significant

RIN Status: Previously published in the Unified Agenda

Agenda Stage of Rulemaking: Proposed Rule Stage

Major: No

Unfunded Mandates: No

CFR Citation: Not Yet Determined (To search for a specific CFR, visit the [Code of Federal Regulations.](#))

Legal Authority: [42 USC 3608\(e\)\(5\)](#); [42 USC 5304](#); [42 USC 12705\(b\)](#); [42 USC 1437c-1](#)

Legal Deadline: None

Timetable:

Action	Date	FR Cite
NPRM	12/00/2011	

Regulatory Flexibility Analysis Required: No

Government Levels Affected: Federal, Local, State

Small Entities Affected: No

Federalism: No

Included in the Regulatory Plan: No

RIN Data Printed in the FR: No

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