ANTI-DISCRIMINATION CENTER, INC.

"ONE COMMUNITY, NO EXCLUSION"

November 25, 2014

Secretary Julian Castro
Department of Housing and Urban Development
451 7th Street, SW, Room 10276
Washington, DC 20410-0500

Re: AFFH Assessment Tool, Docket No. FR-5173-N-02

Dear Secretary Castro:

Anti-Discrimination Center's historic lawsuit against Westchester County, http://www.antibiaslaw.com/wfc, brought the sorry state of affirmatively furthering fair housing (AFFH) to national attention. Since the consent decree in that case was entered in August of 2009, we have hoped that housing desegregation efforts would gain new momentum. So far, the results have been disappointing both in Westchester (*see* Cheating On Every Level, http://www.antibiaslaw.com/coel) and nationally (*see* ADC's comments on the proposed AFFH rule, a proposal that studiously avoids a focus on requiring meaningful action, http://www.antibiaslaw.com/sites/default/files/all/ADC_comments_2013_09_16.pdf).

Faulty premises yield a faulty enforcement regime

There are positive elements to the Assessment Tool, but we have deep concerns as well. We make these comments in light of the intended broad applicability of the Assessment Tool. (HUD has said that, although the Assessment Tool for which comment is sought is "for use by entitlement jurisdictions other than States and joint submissions by entitlement jurisdictions and public housing agencies," the Assessment Tool "presents the basic structure of the Assessment Tool to be used by all program participants, and is illustrative of the questions that will be asked of all program participants.")

There are two key premises underlying the tenor of the proposed tool:

(1) The key stumbling block to material change in segregation patterns (and in other important barriers to fair housing choice like units that are not accessible to and for people with disabilities) is that jurisdictions lack information about the impediments and their "determinants."

(2) If jurisdictions come to know about barriers, they will in good faith take meaningful steps to eliminate those barriers.

HUD continues to operate pursuant to these premises in the face of decades of experience that neither is true. Patterns of racial segregation have long been obvious to jurisdictions

throughout the country, but that hasn't yielded a willingness to engage in effective action. The soft approach -- exhortation to do something, to try harder, to recognize that affordable housing does not mean, "There goes the neighborhood" -- has continued to be a staple of analyses of impediments to fair housing choice and of action plans, but actual change has been very slow in many metropolitan areas.

The reality is that, in most jurisdictions, citizens and officials like (or, at least, accept) their segregation the way it exists.

The reality is that, in most jurisdictions, analyses of impediments have been "boilerplate" affairs, with tough issues resolutely avoided altogether or, at best, said to be out of the control of the jurisdiction.

The disjunction between HUD premises and historical reality means that steps to force examination of specific issues and steps to require specific actions are missing from, or inadequately set forth in, the proposed rule.

The bottom line must be action

Whether it is the current analysis of impediments process or the proposed Assessment of Fair Housing (AFH) process, the point is supposed to be to yield change on the ground. Change can't come without action. And action to desegregate, by definition, is action that would destabilize the longstanding status quo in most jurisdictions. What makes HUD think that localities will volunteer to do something that is likely deeply unpopular with their constituents?

In fact, most jurisdictions are expert in recycling old analyses of impediments to avoid action. This means that HUD needs to use an assessment tool to demand several things:

(1) That *goals* have concrete metrics associated with them; for example, *X* percent reduction in isolation index; or causing *Y* number of affordable housing units in mixed income (market rate and subsidized) developments that are in areas of opportunity;

(2) That actions be identified *with an explanation of why those actions are expected to be effective and what the expected impact will be;*

(3) That previously identified action steps be assessed for what effect they have or have not had (to make evident whether the jurisdiction is continuing to proceed with window-dressing steps); and

(4) That a cores set of HUD-specified actions be addressed unless the jurisdiction is able to prove to HUD that such actions would not be effective.

As to the last, it is certainly true that there is local variation in conditions. Not all patterns of segregation are caused, for example, by restrictive zoning. *But restrictive zoning is responsible for an awful lot of perpetuation of segregation in many parts of the country.*

Similarly, while it is possible that developments that consist exclusively of affordable units could be appropriate in some circumstances, that approach has historically led both to concentrations of subsidized units in some neighborhoods and jurisdictions, and to the placement of units in undesirable locations (locations that would never be picked if the development had a significant market-rate component).

As such, jurisdictions should be asked to develop action plans that include features like easing zoning restrictions and building mixed-income housing in areas of opportunity *regardless of whether a jurisdiction has ranked such a step as a highly- or moderately-significant determinant.* Again, it makes no sense to leave it to jurisdictions to excuse themselves from action by understating the importance of strategies that commonly prove necessary.

Along these lines, jurisdictions need to be made to articulate what particular kinds of zoning changes could accomplish. They also need to articulate what legal authority (both federal and state) that they could exercise over sub-jurisdictions and others who create barriers to fair housing choice. They need to identify the contribution to reducing segregation (and other fair housing barriers, like the lack of accessible apartments) were they to take responsibility for causing affordable and accessible units to be built by them or under contract to them. They need to identify the ways that the inclusion of market rate housing could create a cross-subsidy (most especially in the highest cost communities) that would facilitate the construction of affordable housing with desegregation potential.

Doing more to prevent evasion

HUD has long experience in the ways by which jurisdictions attempt to understate the scope of their segregation problems. The Assessment Tool should be designed proactively to reduce the possibility that this type of evasion will occur. A step in this direction is the requirement that jurisdictions state the basis for the "significance level" assigned to each of the HUD-listed potential determinants of the creation or perpetuation of segregation. But the tool would be more effective if, for example, jurisdictions had to demonstrate that they had engaged in a good faith consultative process with regional developers and fair housing advocates to explore what the impact of changing zoning would be. An alternative or supplemental safeguard would be to have a review system that automatically set in motion greater scrutiny when common determinants of segregation were said by a jurisdiction not to be significant.

In any event, HUD should make clear that an AFH analysis that is materially inconsistent with data readily available and relevant to one or more questions in the Assessment Tool, or that identifies priorities, goals, or actions that are materially inconsistent with available local data or local knowledge, that AFH analysis *is* substantially incomplete and therefore unacceptable. The current language (at 57951) unfortunately suggests that a violation of duty hasn't occurred until there is a (discretionary) HUD finding. In fact, the violation occurs at the time of submission, and HUD (and other relevant parties, including those in the Justice Department examining the possibility of false claims) should be able to act whether the violation is discovered before or after HUD's "acceptance" of the submission.

Other types of evasion occur when minority groups are lumped together in order to conceal or understate the extent to which one minority group is excluded (this is a tactic used both by Westchester and the court Monitor to disguise the especially intense level of segregation of African-Americans in the county); when "Black" and "White" are used even when data on "non-Hispanic Blacks" and "non-Hispanic Whites" are available (a form of double-counting also used in Westchester); and similar techniques. HUD should bar these types of maneuvers.

The regional picture

HUD is to be commended for recognizing to a greater extent than it has before that segregation is a regional phenomenon. But the Assessment Tool doesn't make clear that a locality *always* needs to examine regional data to help determine the extent to which the locality itself is segregated, as well as the extent to which the locality contributes to regional segregation. If HUD doesn't do this, it risks permitting wealthy, virtually all-white jurisdictions to argue that members of minority groups aren't "clustered" within the jurisdiction and thus the jurisdiction (even one that abuts another jurisdiction that has a significant minority population) is not characterized by segregation. If this sounds fanciful, just read the analysis by the Westchester Monitor that purports to look at disparate impact and that proceeds to artificially limit findings of exclusionary zoning on just that basis.

In having jurisdictions look regionally, it is important that the process not be bureaucratized. The regional picture is not automatically just a HUD-defined or Census-defined region. The region is *functional;* areas are relevant when they are part of a unified or overlapping housing market.

The concept of "fair share" is not a new one and it should be incorporated into the Assessment Tool process: what is a jurisdiction's fair share of regional affordable housing need and to what extent has the jurisdiction (and, where relevant, its subdivisions) met that need?

Segregation outside of R/ECAPs

The continued existence of so many racially and/or ethnically concentrated areas of poverty is the shame of the nation, and part of any fair housing analysis or action plan has to include attention to them and the reasons that they remain in place. But HUD seems to pay less attention to two other very important phenomena. One is the flip side of extreme concentration; that is, areas where one or more minority groups are absent or virtually absent. The other is the existence of concentrations of minority group members that differ significantly (either higher or lower) than an area's overall concentration. Both are crucial indicators of segregation and have to be explored.

Studies (principally focusing on African-Americans) have long recognized that most African-Americans are willing to live in a wide range of demographic environments. There is, however, an "inhibition" factor to moving to a location where virtually no African-Americans currently live. Put another way, the virtually all-White character of many neighborhoods itself

operates to perpetuate segregation; the opening of those neighborhoods to what were traditionally called "pioneers" of integration would reduce the inhibition factor. So looking at areas of *least* concentration is as important as looking at areas of *greatest* concentration. The map available at this web link, http://www.remappingdebate.org/dm, for example, vividly illustrates just how much of the country has African-American populations of 0.0 to just under 3.0 percent. This type of approach needs to be incorporated into the Assessment Tool.

In addition, racial concentration far less than the threshold for inclusion as a R/ECAP can reflect segregation. One can easily imagine a circumstance where some parts of a jurisdiction (or adjoining jurisdictions) have African-American population of 15 percent and Latino population of 20 percent and where that compares to areas where the percentages are 1 percent and 3 percent respectively. That's segregation and shouldn't be discounted.

Asking for identification of "high" levels of segregation is an invitation to ignore a significant part of the problem. A better term would be either "material" or "non-trivial" level of segregation.

Finally, the Assessment Tool needs to take account of the fact that segregation operates outside the boundaries of poverty and exists all through the income scale. Identifying and acting upon segregation among middle-class and upper-class members of minority groups should certainly not supplant consideration of segregation of poor and working-class households, but it should not be ignored either.

Conflating the location of "need" and the location of "where housing should be built"

Local officials are often happy to believe that additional affordable housing should be built where families in need of such housing currently live. That is precisely the way that segregation is perpetuated. Need, of course, can be met *outside* of where concentrations of such families currently live, in areas of opportunity; doing so is very likely to have a desegregating effect.

The Assessment Tool's discussion of "geographic patterns" of disproportionate housing need may inadvertently encourage matching of new development to where those in need currently reside. A better focus would be to combine the identification of where those in need currently live with an identification of the amount of affordable housing that exists in areas where those in need *don't* currently live and an assessment of the ways that affordable housing opportunities can be expanded in those areas.

The role of public transit

It is true that transit-oriented development is more sustainable than the patterns of sprawl so long encouraged at all levels of government. It is also true that transit-oriented development, by reducing the need to own or lease a car, can be a more economical housing choice for poor families (and thus make mobility more feasible in some circumstances).

But an enormous percentage of residential development -- and that means an enormous percentage of effectively still-segregated residential neighborhoods -- is still car-based. If jurisdictions are allowed to say that affordable housing should *only* go where they can be close to public transit, then HUD will be ratifying widespread continuing segregation in perpetuity.

In reality, the creation of affordable housing with desegregation potential is not going to be a driver of continuing sprawl (under the best of circumstances, it's a relatively small percentage of new development). To the extent that lack of public transportation is offered as a reason for not permitting the construction of such housing, HUD must be clear that the jurisdiction must then recognize the lack of public transit as an impediment to fair housing choice that must be overcome.

The Assessment Tool should leave no room for the idea that the existence (or creation) of transit options (a "reliable bridge") from one segregated location (say, segregated African-American) to another segregated location where jobs are available (say, segregated White) is an acceptable alternative to desegregating housing. Having a reliable bridge may be better than not having a reliable bridge, but the bridge solution is still a *Bantustan* solution (come during the day, but go away at night). Indeed, it should not be surprising that many of those already working in "asset-rich / low poverty" areas may well be interested in *moving near to where they work* and avoiding a commute.

Coming to grips with gentrification

An irony of the "anti-gentrification" movement is that, in many cases, the demand for maintenance of the status quo (albeit with neighborhood reinvestment) is effectively the demand for maintaining housing patterns originally created not by the desire of residents but by decades of intentionally discriminatory conduct by both public and private participants in the housing market. These patterns are characterized by striking levels of segregation and intense concentrations of poverty.

Why defend this status quo? One (very understandable) reason is that, in many metropolitan areas, gentrification has operated as a one-way expulsive force. In other words, if we get kicked out of this neighborhood, we won't have anywhere else to go.

One very important way out of this box is to help people out of a defensive posture by making the possibility of mobility real. Another important element is to provide reliable assurance against harassment and other means of forcing people out. We at the Anti-Discrimination Center refer to this as a security-plus-mobility strategy.

While we are not certain how the Assessment Tool can best cause jurisdictions to look the security-in-place part of the equation, it is clear that the negative aspects of gentrification are mitigated when there is a net gain of affordable housing units in a region (or at least no net loss) and where movement is allowed into areas that were previously off-limits to families of modest means. The Assessment Tool should capture those data.

Fair housing "compliance and infrastructure determinants"

Entirely missing from this section is any recitation or assessment of what has been *achieved.* For example: How many trials have been conducted? How many investigations and prosecutions has an agency initiated independent of an individual complainant? What is the median level of compensatory damages and penalties that have been collected? To what extent has equitable relief been achieved by judgment or settlement?

It is useful that a potential determinant listed is "lack of resources for fair housing agencies and organizations." But a long-term phenomenon is that underfunded agencies send the signal to victims of discrimination that it is not worthwhile to complain because real relief is unlikely to be forthcoming. That creates a long-term cycle of under-reporting and underfunding. A paucity of complaints cannot be relied on as an accurate indicator of a lack of a problem. If a jurisdiction has not had its fair housing agency engage in a robust program of agency-initiated investigation, it should not be permitted to claim that lack of resources is not a significant determinant of fair housing compliance issues.

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As we perhaps should have made more clear at the outset, the Assessment Tool as drafted by HUD is quite useful *for those jurisdictions who are genuinely interested in cooperating with you and in meeting their AFFH obligations.* Unfortunately, most jurisdictions have not been. Separate and apart from our or anyone else's specific comments, it would be useful for HUD to simulate the process of how a jurisdiction that was interested in *evasion* would respond to the requirements of the Assessment Tool. Then HUD will be in the position of creating a reformulated document that tries to eliminate those opportunities for non-compliance. Among other things, such a document would surely place front and center *action steps* with demonstrated promise for results.

Very truly yours,

Craig Gurian

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