



# Homes and Community Renewal

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Commissioner/CEO

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Regulations Division  
Office of the General Counsel  
Department of Housing and Urban Development  
451 Seventh Street SW, Room 10276  
Washington, DC 20410-0500  
Submitted electronically through regulations.gov

Re: **New York State Homes and Community Renewal Comments to Proposed Rule:  
"Affirmatively Furthering Fair Housing" (Docket No. FR-6250-P-01)**

To Whom it May Concern:

New York State Homes and Community Renewal (NYSHCR) submits the following comments in response to the notice in the Federal Register (88 FR 8516) soliciting comments on the Proposed Rule regarding "Affirmatively Furthering Fair Housing." NYSHCR is a consolidated leadership platform of associated New York State executive agencies and public benefit corporations with the shared mission to build, preserve, and protect affordable housing and increase home ownership across New York State.

Thank you for the opportunity to comment.

Sincerely,

RuthAnne Visnauskas  
Commissioner/CEO

New York State Homes and Community Renewal (NYSHCR) reviewed the above-referenced notice (the Proposed Rule), published in the Federal Register on February 9, 2023. NYSHCR provides the following comments in support of the Proposed Rule.

NYSHCR is a consolidated leadership platform of associated New York State executive agencies and public benefit corporations with the shared mission to build, preserve, and protect affordable housing and increase home ownership across New York State. NYSHCR administers funding received by New York State from the U.S. Department of Housing and Urban Development (HUD) through several grant programs, including Section 8. Through these and other programs, NYSHCR works to fulfill its mission to provide New York State residents with access to safe and affordable housing.

The duty to affirmatively further fair housing (AFFH) is an essential component of the Fair Housing Act (FHA). The AFFH duty requires all HUD program participants to confront and address historic patterns of housing segregation and other barriers to meaningful fair housing choice. However, decades of inadequate federal enforcement and a lack of regulatory guidance from HUD inhibited the effectiveness of the AFFH duty as a means of addressing fair housing concerns. This has contributed to the persistence of massive racial and socioeconomic inequities in housing across the country.

For this reason, NYSHCR supported HUD's 2015 AFFH Rule, which was the first meaningful federal effort to develop a regulatory framework for translating the general AFFH duty into a powerful tool for combatting housing segregation. As an agency, NYSHCR continued to abide by the principles of the 2015 AFFH Rule even as the federal regulations changed in recent years. NYSHCR submitted multiple comments in opposition to subsequent efforts to weaken or suspend enforcement of that rule.

When HUD took regulatory steps to roll back enforcement of the AFFH duty, New York State sought to fill the void by implementing its own version of the AFFH requirement. Under this new law, which was signed in December 2021, local municipalities and agencies that administer or receive housing and community development funding from New York State must take meaningful steps to further fair housing. Like the FHA's AFFH requirement, the New York State law recognizes that active steps are necessary to overcome segregation and create diverse, inclusive communities.

NYSHCR has the following specific comments on the Proposed Rule.

#### *Disability Access as a Fair Housing Issue*

The Proposed Rule has modified the seven fair housing issues to be examined in the Equity Plan, replacing one of the issues that focused exclusively on access for those with disabilities. If this issue will no longer be a standalone issue, it is imperative that a disability analysis be specifically prompted in each of the Proposed Rule's fair housing issues, and not just be restricted to the specific call-out with respect to restrictive land use policies (issue v).

### *Restrictive Zoning as a Fair Housing Issue*

NYSHCR strongly agrees with the increased emphasis that this Proposed Rule places on exclusionary zoning as an obstacle to fair housing. Zoning in New York State, as in much of the country, is conducted on the local level. In far too many municipalities here and throughout the region and nation, local restrictive land use policies prevent or significantly hinder the development of new housing, especially multifamily housing and affordable housing. This can have the effect of entrenching and deepening existing, segregated housing patterns. Therefore, NYSHCR supports the requirement that localities that are in receipt of HUD funding examine their local land use laws and take steps to address those policies which further entrench existing inequities and segregated housing patterns.

### *Complaint Procedure*

While NYSHCR generally endorses HUD's effort to revive the AFFH requirement, certain elements of the complaint and enforcement system laid out in the Proposed Rule raise concerns. Under this procedure, members of the public can file complaints with HUD concerning a program participant's failure to comply with the requirements of the Proposed Rule, failure to comply with a commitment laid out in the Equity Plan, or any action that is materially inconsistent with the AFFH duty as defined in the Proposed Rule.

As currently drafted, this provision of the Proposed Rule is overly broad. The introductory summary of the regulation states that HUD "does not intend the complaint process to be a forum to challenge program participants' day-to-day activities that have little nexus to the AFFH obligation." Similarly, the Proposed Rule anticipates that "program participants will not be subject to investigations or sanctions arising from frivolous complaints regarding actions that do not actually implicate AFFH compliance." Unfortunately, these limiting principles are not included in the actual proposed regulatory language. HUD acknowledges that this enforcement mechanism has the potential for frivolous complaints and yet the Proposed Rule does not set any standing requirement for who can file a complaint or otherwise attempt to address this problem.

Therefore, NYSHCR urges HUD to make the proposed complaint procedure more narrowly tailored. For example, the final rule could include a list of specific actions that would constitute the basis for a valid complaint. Additionally, HUD should make clear that program participants will not be liable for factors outside their control. Housing segregation is one of the most persistent and deeply rooted problems in American society with myriad contributing factors. The final rule should reflect this reality by placing clearer limits on the complaint process and including specific standing requirements.

In the absence of more narrowly tailored guidance, this complaint mechanism risks the imposition of a costly administrative burden on state and local agencies. This overly-broad enforcement system has the potential to open the floodgates to frivolous complaints from various individuals and advocacy groups. State and local agencies may be forced to divert staff and other resources away from valuable housing programs in order to address these complaints.

The Proposed Rule creates an otherwise robust mechanism to ensure compliance with the AFFH duty through the Equity Plan, which must be reviewed and approved by HUD. Members of the public will have opportunities to provide meaningful input throughout this process. Finally, individuals who believe they have been subjected to discrimination by a HUD program participant have, and will continue to have, recourse to all applicable federal, state, and local fair housing laws and forums.

In addition, NYSHCR is concerned that this complaint system could create a chilling effect. The AFFH requirement will be at its most effective as a tool for combatting housing segregation when states, municipalities, and PHAs include ambitious goals as part of the Equity Plan process. While NYSHCR has been and will remain dedicated to full compliance with its AFFH obligations, other program participants may be inclined to adopt a more cautious approach if they believe they could be held liable for falling short of the goals listed in the Equity Plan. This result would undermine the fundamental purpose of the AFFH requirement.

#### *Comments Regarding Data*

In general, NYSHCR supports the efforts HUD is making to streamline the 2015 requirements and to reduce the burden on grantees. In the past, NYSHCR has combined data provided by HUD with its own administrative and other data in conducting a thorough Assessment of Fair Housing. Maintaining this flexibility while reducing the burden on grantees will lead to more robust fair housing planning processes.

A specific data request that aligns with the Proposed Rule's prompts regarding the concentration of Housing Choice Vouchers is for HUD to provide anonymized data by census tracts (or other hyperlocal unit) of the location of Housing Choice Vouchers (and other subsidized housing) and the Public Housing Agency that administers them. This information would provide statewide transparency on areas that do not have these vouchers and will allow New York State to further tailor the mobility programs that NYSHCR funds throughout the state.

NYSHCR also believes that the mapping of racial and ethnic concentrations of poverty needs to be adjusted for urban and rural areas. HUD uses a combined metric to determine which census tracts represent "racially and ethnically concentrated areas of poverty" or "R/ECAPs." The standard HUD definition of a R/ECAP is any tract where the total non-white population is greater than 50 percent and the poverty rate is greater than 40 percent. For its own analysis of fair housing issues throughout the state, and to determine areas that have racial/ethnic concentrations of poverty despite having a small non-white population, NYSHCR has adjusted the R/ECAP methodology for rural areas to refer to census tracts in which fewer than 80 percent of its households are white and 25 percent or higher of its households are below the poverty level. NYSHCR suggests including this different metric for more rural areas, as well.

Finally, while HCR applauds the addition of the fair housing issue regarding "[i]nequitable distribution of local resources, which may include municipal services, emergency services,

community-based supportive services and investments in infrastructure,” federal data regarding federal investments made in the geographic area would be useful to supplement the analysis.

For the foregoing reasons, it is NYSHCR’s request that the Proposed Rule be adopted with due consideration given to the above comments.