

The Jerome N. Frank
Legal Services Organization

YALE LAW SCHOOL



April 24, 2023

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500
Submitted electronically through www.regulations.gov

**Re: Open Communities Alliance Comments on Docket No. FR-6250-P-01,
"Affirmatively Furthering Fair Housing"**

To Whom It May Concern,

Open Communities Alliance ("OCA") respectfully submits the following comments on the Department of Housing and Urban Development ("HUD")'s Affirmatively Furthering Fair Housing Proposed Rule.¹ OCA is a non-profit fair housing organization based in Hartford, Connecticut. Our mission is to address housing segregation and its impact, including through the advancement of local, state, and federal policies to promote fair housing choice, overcome segregation, and support inclusive economic development.

OCA supports HUD's efforts to streamline and strengthen implementation of the Affirmatively Furthering Fair Housing ("AFFH") mandate of the Fair Housing Act ("FHA").² The AFFH Rule is essential to ensuring that HUD, along with states, local governments, and public housing authorities ("PHAs"), realize the FHA's goal of providing for fair housing throughout the United States.³

Connecticut needs the AFFH Rule. For starters, Connecticut is one of the most racially segregated states in the country.⁴ Black and Latino families are disproportionately low-income and overwhelmingly reside in areas of lower educational attainment and higher

¹ Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. Parts 5, 91, 92, 93, 570, 574, 576, 903, 983) [hereinafter "Proposed Rule"].

² See 42 U.S.C. § 3608(d), (e)(5).

³ See 42 U.S.C. § 3601.

⁴ See CONN. DEP'T OF HOUS., STATE OF CONNECTICUT ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 74-82 (2015).

Open Communities Alliance

75 Charter Oak Avenue • Hartford, CT 06106 • O: 860.610-6040 • www.CTOCA.org

The Jerome N. Frank Legal Services Organization

P.O. BOX 209090, NEW HAVEN, CONNECTICUT 06520-9090 • TEL 203 432-4800 • FAX 203 432-1426

COURIER ADDRESS 127 WALL STREET, NEW HAVEN, CONNECTICUT 06511

unemployment, poverty, and crime rates.⁵ According to a 2017 analysis, 73% of Black and Latino residents in Connecticut live in such areas of low or very low opportunity, compared to 26% of White and 36% of Asian residents.⁶ People with disabilities, single-parent households, LGBTQ+ people, and Housing Choice Voucher (“HCV”) holders, among other groups, also tend to be concentrated in certain parts of the state.⁷

The concentrated siting and insufficient availability of affordable housing units contributes to Connecticut’s fair housing challenges. A 2020 analysis prepared for OCA found that 376,850 Connecticut households are housing-burdened, paying over 30% of their income towards housing costs.⁸ Black, Latino, and single-parent households, as well as people with disabilities, have a disproportionate need for such housing.⁹ However, a huge affordable housing gap remains. OCA’s analysis estimates the state needs 121,085 new affordable housing units.¹⁰ Of the affordable housing units that do exist, many tend to perpetuate existing inequities. For example, more than 75% of subsidized housing units across several key State and federally funded programs are in areas of very low, low, or moderate opportunity.¹¹ As of 2020, 55% of the State’s 35,000 HCV holders lived in neighborhoods with concentrated poverty, and nearly 80% of HCV holders were Black or Latino.¹²

Previous analyses have identified numerous state and municipal reforms to overcome Connecticut’s barriers to fair and affordable housing, including: reform local zoning policies to remove barriers to affordable and multifamily housing development; fund affordable housing development in high opportunity communities; expand meaningful housing choice for HCV holders, including by increasing voucher payment levels and improving mobility counseling programs; and strengthen fair housing enforcement.¹³ However, jurisdictions have been slow or resistant to implement these and other much-needed remedies.¹⁴ An updated AFFH Rule

⁵ See *id.* at 55-58; ERIN BOGGS & LISA DABROWSKI, OPEN CMTYS. ALL., OUT OF BALANCE: SUBSIDIZED HOUSING, SEGREGATION AND OPPORTUNITY IN CONNECTICUT 1-3 (2017).

⁶ *Id.*

⁷ CONN. DEP’T OF HOUS., *supra* note 4, at 83-91.

⁸ Here, “housing-burdened” households are defined as Connecticut households with household incomes below 80% of the HUD Adjusted Median Family Income and housing cost burden of more than 30% of household income. See DAVID N. KINSEY, OPEN CMTYS ALL., FAIR SHARE HOUSING MODEL FOR CONNECTICUT 8, 13 (2020).

⁹ CONN. DEP’T OF HOUS., *supra* note 4, at 66.

¹⁰ KINSEY, *supra* note 8, at 7.

¹¹ BOGGS & DABROWSKI, *supra* note 5, at v.

¹² Jacqueline Rabe Thomas, *How Wealthy Towns Keep People With Housing Vouchers Out*, PROPUBLICA (Jan. 9, 2020, 5:00 AM), <https://www.propublica.org/article/how-wealthy-towns-keep-people-with-housing-vouchers-out>.

¹³ See, e.g., CONN. DEP’T OF HOUS., *supra* note 4, at 200-04; BOGGS & DABROWSKI, *supra* note 5, at 30-32; COMM’N ON HUM. RTS. & OPPORTUNITIES, CONNECTICUT ZONING AND DISCRIMINATION 2021 36-37 (2021) [hereinafter CHRO REPORT].

¹⁴ For example, fewer than half of Connecticut towns met the statutory deadline, C.G.S. § 8-30j(a)(1) (2023), to adopt an Affordable Housing Plan by June 1, 2022. CTR. FOR HOUS. OPPORTUNITY, *Affordable Housing Plan Scorecards* (Sep. 22, 2022), <https://cthousingopportunity.org/resources/fairfield-county-affordable-housing-plan->

will allow the State, local governments, PHAs, and community members to identify and implement these and other long-overdue measures to further fair housing in Connecticut. OCA offers the below recommendations to ensure the Final AFFH Rule most effectively furthers fair housing in Connecticut and across the nation. In addition, OCA wishes to highlight several features of the Proposed Rule that constitute substantial improvements over previous iterations of the AFFH Rule and thus warrant considerable praise.

I. The Proposed Rule is a Huge Achievement in the Fight for Fair Housing

OCA applauds HUD for developing an AFFH Rule that meaningfully addresses this nation's crises of residential segregation and affordable housing scarcity. In Connecticut, HUD grantees bear substantial responsibility for our state's severe patterns of racial and socioeconomic housing segregation. As such, the Rule imposes and enforces vital fair housing obligations on these grantees.

OCA wishes to specifically praise four features of the Proposed Rule that have resonance in Connecticut. First, the Proposed Rule requires grantees to pay specific attention to the ways in which zoning laws construct and maintain patterns of housing segregation. As we discuss in detail below, many wealthy Connecticut municipalities impose zoning regulations that severely restrict the development of affordable housing types. For instance, one municipality prohibits the development of non-age-restricted multifamily housing in 98.4% of its residential land.¹⁵ The Proposed Rule includes specific language that requires grantees to consider and address the effects of local land use policies on fair housing within their relevant jurisdictions. This requirement is essential for ensuring that Connecticut grantees truly comply with their AFFH obligations.

Second, OCA applauds the Proposed Rule's requirement that States evaluate their AFFH obligations throughout their jurisdictions, rather than restricting those analyses to non-entitlement jurisdictions (local governments that receive HUD grants from the State rather than directly). In Connecticut, residential segregation frequently plays out across municipalities. Many suburban Connecticut towns are disproportionately white and wealthy, while neighboring municipalities have significantly higher populations of low-income people and people of color. These inter-municipal patterns of segregation – frequently between entitlement and non-entitlement jurisdictions – are the partial result of exclusionary state and local policies. Crucially, however, these wealthier suburban areas often are not grantees and will not be required to submit Equity Plans. Requiring States to evaluate their AFFH obligations

scorecards; see also CONN. OFFICE OF POL'Y & MGMT., *Inventory of Municipal Affordable Housing Plans* (Mar. 30, 2023), <https://portal.ct.gov/OPM/IGPP/ORG/Municipal-Plans/Municipal-Affordable-Housing-Plans> (inventorying affordable housing plan submission dates). In addition, only 31 out of 169 towns have planned and zoned for at least 10% of their housing stock to be affordable as defined by state law. *2022 Affordable Housing Appeals List – Exempt Municipalities*, CONN. DEP'T OF HOUS., <https://portal.ct.gov/-/media/DOH/Affordable-Appeals-List-2022-for-On-Line.pdf> (last visited April. 20, 2023).

¹⁵ See *infra* Section IV and accompanying footnotes.

in all areas of the state is essential to ensuring that important drivers of housing scarcity and residential segregation do not go unaddressed. Furthermore, this requirement will enable States to analyze the interplay between grantee and non-grantee jurisdictions that frequently produce housing segregation between urban and suburban municipalities.

Third, OCA strongly praises Proposed Rule's new procedure for submitting and processing complaints. Private enforcement of fair housing laws driven by non-profits and members of the public has long played an indispensable role in ensuring compliance with these laws throughout Connecticut. OCA has direct experience with non-compliance by municipalities, PHAs, and the State. Moreover, OCA has been a party to private suits attempting to bring these entities into compliance with their state and federal fair housing obligations. By developing a formal complaint procedure, the Proposed Rule empowers the public to play a similar role in enforcing the AFFH requirement as we have in enforcing numerous other fair housing laws. The inclusion of this procedure will work a massive improvement over previous iterations of the AFFH Rule because it will ensure vastly greater compliance among grantees.

Fourth, OCA applauds the inclusion of PHAs as parties against whom complaints may be filed and as grantees that must complete equity plans. As we discuss below, PHAs have been a major driver of housing injustice in Connecticut and should be critical players in proactively counteracting it. Moreover, private enforcement efforts have been an important part of the effort to hold these PHAs accountable. Applying the AFFH complaint procedure to PHAs is therefore critical to combatting unfair housing practices in our state. Moreover, because PHAs play such an important—and at times damaging—role in shaping fair housing in Connecticut, it is highly valuable that the new AFFH Rule requires them to produce equity plans themselves.

II. Clarify the Required Content and Quality of Responses to HUD's Questions, Fair Housing Issue Identification, and Fair Housing Goal-Setting in Program Participants' Equity Plans

OCA appreciates HUD's efforts to streamline the Equity Plan analysis and create greater allowances for program participants to tailor their Equity Plans to local needs and concerns. However, OCA is concerned that some of the proposed questions are too flexible or vaguely worded,¹⁶ such that program participants—particularly jurisdictions with poor track records of supporting fair housing efforts—may be able to conduct only cursory analyses or otherwise avoid uncovering root causes that would require comparatively greater resources and efforts to remedy.

¹⁶ See Proposed Rule at 8562-65 (to be codified at 24 C.F.R. §§ 5.154(d)-(e)).

For example, in its 2015 Analysis of Impediments to Fair Housing Choice (“AI”), the Town of Greenwich identified the “high cost of housing” as the only zoning-related “identifiable impediment” to fair housing because the Town created “special zones” that “address any need for additional housing choices.”¹⁷ In its 2022 state-mandated Affordable Housing Plan, however, the Town admitted it only added 311 affordable housing units from 2002-2021, and only had 10 affordable accessory dwelling units.¹⁸ As a further example, the Town of Fairfield’s 2015 AI briefly discussed amendments to the Town’s zoning regulations that provided for affordable housing density bonuses and “modified” “restrictions on coverage, bulk and minimum floor area” requirements “to provide greater flexibility in accommodating affordable housing developments.”¹⁹ The AI acknowledged “these measures . . . have not provided a sufficient incentive . . . to create affordable housing.”²⁰ However, the AI failed to discuss the “differential” nature of the amended regulations’ treatment of single-family and multi-family developments, nor did it mention the special exception procedures and other restrictions imposed on multifamily development that were not similarly required for single-family homes.²¹ It was not infeasible for the Town to conduct a more in-depth analysis of its restrictive zoning policies: recently, OCA published a series of reports analyzing barriers to affordable housing development in Fairfield and 23 other Connecticut towns—in greater depth than Fairfield’s 2015 AI provided.²²

Similarly, OCA believes that proposed § 5.154(g), describing the required process and contents of fair housing goals, is ambiguously worded as to which elements program participants are required to include in their Equity Plans, and which remain in participants’ discretion. Accordingly, OCA recommends the following changes to outline the required content and quality of Equity Plan analyses and goals more clearly.

- A. *Clarify, add, and provide examples for certain questions to communicate the expected content and quality of Equity Plan analyses more clearly.*

In general, OCA recommends that HUD: (1) clarify certain questions to better communicate the expected content and quality of responses; (2) add important questions to better understand the need for and program participants’ efforts to remedy gaps in fair and affordable housing; and (3) provide examples of the kinds of responses HUD will accept. HUD should also explicitly state that a participant’s failure to answer the required questions in

¹⁷ CMTY. DEV. OFF. OF THE TOWN OF GREENWICH, ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE: TOWN OF GREENWICH, CT 26 (2020).

¹⁸ TOWN OF GREENWICH, AFFORDABLE HOUSING PLAN 36, 52 (2022).

¹⁹ TOWN OF FAIRFIELD, CONN., ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 33 (2015).

²⁰ *Id.*

²¹ See OPEN CMTYS. ALL., ZONING FOR EQUITY: IDENTIFYING PLANNING AND ZONING BARRIERS TO AFFORDABLE HOUSING, VOLUME I 73-83 (2021).

²² See generally *id.*; OPEN CMTYS. ALL., ZONING FOR EQUITY: EXAMINING PLANNING AND ZONING IMPEDIMENTS TO HOUSING AND SCHOOL DIVERSITY, VOLUME II (2022).

sufficient detail for the participant, HUD, and community members to fully comprehend the underlying fair housing issues is a ground for nonacceptance of an Equity Plan.

Specifically, OCA suggests the following modifications and additions to the proposed questions for program participants to answer:

Proposed § 5.154(d) — local governments, States, and insular areas:

- (1) Demographics:
 - *Add* a question requiring program participants to analyze the relationship between different protected class groups, in part to understand the extent to which certain subgroups of protected class groups may be particularly disadvantaged. For example, Connecticut’s 2015 Analysis of Impediments to Fair Housing Choice found that single parents in the state are disproportionately poor and people of color, and there is a greater need for affordable housing among this demographic subgroup.²³
- (2) Segregation and integration
 - (i)(A)-(B): For local governments, *clarify* that they should separately analyze patterns of segregation within their local jurisdiction and within the relevant region.²⁴ Separate localized and regional analyses will allow readers to compare the levels of segregation or integration within the local jurisdiction with levels across the relevant region. Robust regional analyses will also allow readers to identify the extent to which local policies and factors affect patterns of segregation in the surrounding region. For example, a comparison of the Black-White isolation index for the Town of Woodbridge (0.951) and for the South Central Connecticut Planning Region (0.890), which encompasses Woodbridge, would show that segregation is more severe within the Town than across the region—and the region is already highly segregated.²⁵ As another example, a comparison of the Town of Fairfield and Fairfield County would show that Black, Latino, and low-income people are disproportionately underrepresented in the Town of Fairfield compared with Fairfield County.²⁶ HUD could provide this

²³ CONN. DEP’T OF HOUS., *supra* note 4, at 48-49, 58-60, 66-68.

²⁴ See *infra* Section V for discussion of the relevant region to analyze.

²⁵ Compl., *Open Cmtys. Trust, LLC v. Town Plan & Zoning Comm’n of the Town of Woodbridge*, No. HHD-CV22-6166209-S (Conn. Super. Ct. Aug. 30, 2022).

²⁶ OPEN CMTYS. ALL., ZONING FOR EQUITY: IDENTIFYING PLANNING AND ZONING BARRIERS TO AFFORDABLE HOUSING, VOLUME I 73 (2021).

clarification by amending questions in proposed § 5.154(d)(2)(i)(A), (B), or by clarifying the definition of “geographic area of analysis” in proposed § 5.152.²⁷

- (i)(A)-(B): For States, *clarify* that they should analyze patterns of segregation in the relevant surrounding region, such as the region encompassing adjacent states or overlapping Combined Statistical Areas (“CSAs”). Connecticut, for example, could be required to analyze patterns of segregation in all regions of which Connecticut is a part, including the portions of Massachusetts, New York, and Rhode Island that are part of these regions. This could include the region encompassing the New York-Newark, Hartford-West Hartford, and Boston-Worcester-Providence CSAs.²⁸
- (i)-(ii): *Clarify* and *provide examples* of the metrics program participants should use to analyze patterns of segregation and changes over time. For example, HUD could give examples of the appropriate use of dissimilarity, exposure, isolation, or other indices of racial segregation, and specify whether a program participant should use one or more of these indices.²⁹
- (iii)(C): *Clarify* that the question, “How have siting decisions . . . impacted the overall patterns of concentration . . . ?,” is meant to require program participants to assess historical and current policies, including work site and neighborhood standards, and other site-based decisions that affect whether the locations of present and future publicly supported housing, including those sited through the Qualified Allocation Plan (“QAP”) for Low Income Housing Tax Credits (“LIHTC”), perpetuate or mitigate patterns of segregation—both within the jurisdiction and in the relevant region. HUD should also reframe the question in positive terms, *e.g.*, “How have siting decisions . . . affirmatively furthered fair housing, such as by increasing access to well-resourced areas and other areas that have historically excluded members of protected class groups?” HUD should also *give examples* of responses that satisfy the minimum requirements of this question. In Connecticut, the historical effects of exclusionary zoning policies, housing subsidy incentives, and other policies on segregation of protected class groups are relatively well-documented.³⁰ However, requiring the

²⁷ See discussion of regional units of analysis *infra* Section V.

²⁸ See *Connecticut – Core Based Statistical Areas (CBSAs) and Counties* (2013), U.S. CENSUS BUREAU, https://www2.census.gov/geo/maps/metroarea/stcbsa_pg/Feb2013/cbsa2013_CT.pdf.

²⁹ See, *e.g.*, CONN. DEP’T OF HOUS., *supra* note 4, at 75-82 (analyzing racial segregation along several different indices). Other indices could include the entropy score, diversity index, and divergence index. See *Technical Appendix*, ROOTS OF STRUCTURAL RACISM PROJECT (Feb. 28, 2023), <https://belonging.berkeley.edu/technical-appendix>; see also *Housing Patterns: Appendix B: Measures of Residential Segregation*, U.S. CENSUS BUREAU (Nov. 21, 2021), <https://www.census.gov/topics/housing/housing-patterns/guidance/appendix-b.html>.

³⁰ See generally CONN. DEP’T OF HOUS., *supra* note 4, at 112-73; CHRO Report, *supra* note 13; Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 PEPPERDINE L. REV. (forthcoming 2023); BOGGS & DABROWSKI, *supra* note 5, at 9-10.

State and towns to document the specific policies and actions that they have taken—especially in recent years—to perpetuate or remedy segregation is essential to identifying fair housing goals that will effectively remedy Connecticut’s legacy of segregation.

- *(iv): Clarify and provide examples of the kinds of policies, practices, and trends that program participants must assess to adequately answer this question (as well as the equivalent questions for the other question categories). HUD should provide different *minimum* requirements for States and local governments, as well as for suburban and urban jurisdictions. For example, HUD could specifically require States to analyze their QAPs in addition to other relevant policies and practices, and specifically require local governments to analyze disparities in provision of municipal services and community assets and the impact of local zoning regulations in addition to other relevant policies and practices. Meanwhile, HUD could require suburban jurisdictions to conduct more detailed analyses of their zoning regulations and require urban jurisdictions to analyze any disparate effects of exposures to environmental harms from industrial facilities. HUD should clarify that program participants must still analyze *all* relevant policies, practices, and trends, in addition to these and other minimum required modalities.*

HUD should also explicitly state that the failure to adequately assess contributing policies, practices, and trends is grounds for nonacceptance of an Equity Plan. As written, program participants may be able to respond to this question with only cursory explanations.³¹ Clarifying the requirements of this question will ensure program participants provide more thorough, honest, and accurate explanations of the driving forces behind their fair housing issues.

- (3) R/ECAPs

- *(i)(A): Clarify the definition of “R/ECAP” by revising the prior 2015 definition. First, we recommend moving the poverty rate threshold from 40% to 30% or more individuals living below the poverty line. Secondly, HUD could similarly revise the race threshold. Instead of requiring a tract to have at least 50% non-white population, HUD could borrow from its own definition of an “area of minority concentration” to necessitate that the total percentage of minority persons within a tract must be at least 20 percentage points higher than the total percentage of minorities in the housing market area as a whole.³² HUD*

³¹ See, e.g., text accompanying *supra* notes 17-22.

³² See HUD, *Rental Assistance Demonstration (RAD) Notice Regarding Fair Housing and Civil Rights Requirements and Relocation Requirements Applicable to RAD First Component – Public Housing Conversions, PIH 2016-17 (HA) § 5.4(B)(1)* (2016), https://www.hud.gov/sites/documents/16-17HSGN_16-17PIHN.PDF.

should also provide guidelines for use by program participants in determining whether any tracts that do not meet the R/ECAP definition feature similar conditions that impede residents' access to opportunity. This guidance is likely to be particularly helpful in regions with high income levels and high costs of living in which many of the lowest-wage workers still have incomes above the federal poverty line.³³

- *Add*, for State, local, and insular area program participants, the following question that HUD has proposed to ask of PHA participants: “Describe the conditions in R/ECAPs that limit access to opportunity for the residents who live there, including housing costs and cost burden, housing quality, housing instability, displacement, source of income discrimination, and eviction risk. How have these conditions changed over time?”³⁴
- (iii)(A): *Clarify* the meaning of “align” in, “How do R/ECAPs in the geographic area of analysis align with the location of publicly supported housing?” HUD should specify the expected outputs or metrics for analyzing the relationship between R/ECAPs and siting of publicly supported housing.
- (iv): *Clarify* and *provide examples of* responses to this question that HUD will consider sufficient—see discussion *supra* about proposed question § 5.154(d)(2)(iv).
- (4) Access to community assets
 - (iv)(A): *Clarify* that program participants should analyze whether residents of publicly supported housing in particular parts of the geographic area of analysis, *e.g.*, highly segregated areas, R/ECAPs, or other areas of low opportunity, experience disproportionately high disparities in access to opportunity and community assets.
 - (iv): *Clarify* and *provide examples of* responses to this question that HUD will consider sufficient—see discussion *supra* about proposed question § 5.154(d)(2)(iv).
- (5) Access to affordable housing opportunities
 - *Add* a question requiring program participants to analyze whether there exists a gap between the supply of affordable housing opportunities and current and

³³ See Poverty & Race Research Action Council et al., Public Comments on AFFH Data Questions (Apr. 17, 2023), <https://www.regulations.gov/comment/HUD-2023-0009-0300>.

³⁴ See Proposed Rule at 8564 (to be codified at 24 C.F.R. §§ 5.154(e)(3)(ii)(B)).

future need in the jurisdiction, surrounding region, and particular sub-areas of interest (e.g., areas of high segregation and R/ECAPs). HUD should require program participants to analyze expected changes in housing demand based on local, regional, and statewide population changes, housing market trends, and economic shifts. To ease the burden on smaller program participants, HUD could require only states and large program participants to conduct forecasting analyses—but require all participants to incorporate the findings of such local or regional forecasts into their Equity Plans. In Connecticut, for example, the Urban Institute and Fairfield County’s Center for Housing Opportunity conducted a statewide assessment of affordable and accessible housing needs, finding a gap of 86,068 housing units for very low-income households.³⁵ OCA conducted a “fair share” analysis that identified the affordable housing needs in each region of the State (for a total of 137,754 units statewide), then allocated a share of the need to each town based on the town’s fiscal capacity, relative household wealth, poverty rate, and relative share of multifamily housing.³⁶ These and other similar analyses provide important information for program participants and community members to identify the overall need for additional affordable housing opportunities, in addition to understanding disparities in the location and provision of affordable housing to protected class groups.

- (i): Clarify the definition of “affordable housing opportunities,” either for purposes of this question or in the Definitions section, proposed § 5.152. HUD should clarify the meaning of “low- and moderate-income households” and provide clear guidance or examples of minimum conditions that satisfy the requirements that affordable housing be “accessible to individuals with disabilities” and ensure “housing stability.” Alternatively, if HUD cannot provide clearer definitions or examples, HUD should explicitly require program participants to explain the measures by which they will determine if housing is an affordable housing opportunity.
- (7) Local and State policies and practices impacting fair housing
 - Generally, provide examples of the kinds of local and State laws, policies, and practices that program participants should analyze. HUD should provide

³⁵ See generally CHRISTIE STEWART ET AL., URBAN INST., HOUSING CONNECTICUT’S FUTURE: MEETING THE STATE’S AFFORDABLE AND ACCESSIBLE HOUSING NEEDS (2021).

³⁶ See generally KINSEY, *supra* note 8.

examples that are appropriate for different kinds of program participants, *e.g.*, State v. local and urban v. suburban.³⁷

- *Add* a question requiring program participants to analyze the effects of local laws, policies, and practices on the existing supply and future development pipeline of affordable housing in the jurisdiction and surrounding region.³⁸
- *Clarify* that State participants must analyze the downstream effects of state laws, policies, and practices on local laws and actions that affect the availability and siting of affordable housing opportunities and fair housing choice, and local government participants must analyze the conformance of local laws, policies, and practices with state (as well as federal) requirements. For example, recent amendments to Connecticut’s zoning enabling act, C.G.S. § 8-2 (2023), require towns’ zoning regulations to address significant housing disparities and affirmatively further fair housing.³⁹ These amendments followed prior changes that attempted to require towns to adopt zoning regulations that promoted housing choice and multifamily housing development.⁴⁰ In addition, C.G.S. § 8-30g (2023), enacted in 1989, requires municipalities with less than 10% of their housing deemed affordable to bear the burden of justifying a rejection of an affordable housing development.⁴¹ These and other state laws have direct and indirect effects on local laws, policies, and practices.⁴² Furthermore, local

³⁷ See discussion *supra* text in paragraph preceding note 31. As a further example, in Connecticut, a key State policy that has significant downstream impacts for local governments and PHA participants is a statute that limits PHAs’ jurisdiction to “the municipality in which [they were] created” and only allows PHAs to operate in neighboring municipalities with consent of the neighboring municipality. C.G.S. § 8-39(a) (2023). “For those PHAs whose program participants are predominantly Black and Latino households, this mandatory requirement prevents the PHAs from administering Section 8 vouchers in predominantly white neighboring areas unless the PHA asks the neighboring white community for, and is granted, permission by the governing body of the local municipality, not by the PHA.” OPEN CMTYS. ALL., Housing Discrimination Complaint to HUD (Aug. 3, 2020), [[link](#)].

³⁸ See also *supra* discussion accompanying notes 35-36.

³⁹ C.G.S. § 8-2 (2023). See also *Connecticut General Assembly Passes Zoning Reform Bill*, CARMODY (June 18, 2021), <https://www.carmodylaw.com/connecticut-general-assembly-passes-zoning-reform-bill/>.

⁴⁰ See CONN. DEP’T OF HOUS., *supra* note 4, at 22.

⁴¹ See CONN. OFFICE OF LEGIS. RSCH., No. 2022-R-0254, *Issue Brief CGS § 8-30g* (Oct. 28, 2022), <https://cga.ct.gov/2022/rpt/pdf/2022-R-0254.pdf> (describing the § 8-30g mechanism); CONN. DEP’T OF HOUS., *supra* note 4, at 116-18 (discussing the efficacy of C.G.S. § 8-30g); Memorandum from Tim Hollister & Andrea Gomes, Hinckley Allen (Mar. 2, 2022), <https://www.psychousing.org/sites/default/files/inline-files/Memo%20to%20Interested%20Parties%20re%208-30g%20housing%20units.pdf> (providing a more recent estimate of the number of housing units attributable to § 8-30g).

⁴² See also Tom Condon, *At Griswold Hills in Newington, the state’s affordable housing law has worked the way it was intended*, CT MIRROR (Oct. 23, 2022, 5 AM), <https://ctmirror.org/2022/10/23/ct-8-30g-affordable-housing-griswold-hills-newington/> (reporting on the impact of § 8-30g and other recent local efforts to respond to the state’s affordable housing shortage).

policies may or may not conform with state laws or guidelines.⁴³ State and local governments should be required to analyze the interactions between their laws and policies and those of the other.

- *Add* a question requiring program participants to describe the extent to which prior fair housing assessments, such as a participant’s AIs and Assessments of Fair Housing, are incorporated into the participant’s planning documents. Relatedly, HUD should also require program participants to describe the extent to which their existing planning documents address fair housing issues, as well as the status of and barriers to implementation of their existing fair housing-related goals.

Proposed § 5.154(e) — public housing agencies:

OCA incorporates the recommendations provided above regarding the questions for State, local government, and insular area participants here for equivalent and analogous questions for PHA participants.

B. Clarify expectations for establishment of fair housing goals and grounds for non-acceptance.

HUD should clarify the requirements of proposed § 5.154(f) — Content: Description and prioritization of fair housing issues, and § 5.154(g) — Content: Fair housing goals.

First, HUD should clarify that program participants are required to identify *all* fair housing issues by changing “are expected to” to “must” in proposed § 5.154(f)(1).⁴⁴

Second, HUD should clarify, in proposed § 5.154(g)(1), that the program participant must set fair housing goals that address each fair housing issue identified, then may prioritize goals according to the prioritization of fair housing issues.⁴⁵ As written, this section is ambiguous as to whether, after prioritizing fair housing issues, a program participant may only set fair housing goals for a subset of the fair housing issues identified (*i.e.*, those of the highest priority), or whether the participant must set goals for every identified issue.

Third, HUD should consider clarifying the meaning of “reasonably expected,” proposed § 5.154(g)(1).⁴⁶

⁴³ See, e.g., *Compl., Open Cmty. Trust, LLC v. Town Plan & Zoning Comm’n of the Town of Woodbridge*, No. HHD-CV22-6166209-S (Conn. Super. Ct. Aug. 30, 2022) (alleging that the Town of Woodbridge’s zoning regulations violate the affordable housing and fair housing choice requirements of C.G.S. § 8-2, among other claims).

⁴⁴ Proposed Rule at 8565-66.

⁴⁵ Proposed Rule at 8566.

⁴⁶ *Id.*

Fourth, HUD should amend the following language, “While HUD expects to see progress toward the achievement of each goal by the time of the program participant's next Equity Plan, HUD recognizes that all goals may not be fully achieved during a single five-year cycle,” proposed § 5.154(g)(1), by either deleting this text or stating that goals should be established on the fastest achievable timeframe considering the program participant’s fiscal and staffing resources, but that goals need not be limited to a five-year timeframe.⁴⁷

Fifth, HUD should delete the following text in proposed § 5.154(g)(3), which, without a clear benchmark by which to measure “significant impact,” may give reluctant program participants undue discretion to set goals that are readily achievable and not as impactful as the participant could achieve: “When establishing fair housing goals, program participants may adopt a small number of goals if such goals could ultimately result in outcomes that have a significant impact toward advancing equity for protected class groups by reducing the adverse effects of fair housing issues.”⁴⁸ Instead, HUD should clarify that fair housing goals will be evaluated based on their expected outcomes, including the size of impact relative to the program participant’s fiscal and staffing resources, and their conformity with the Equity Plan analysis and identified fair housing issues.

III. Require an Earlier Equity Plan Submission Timeline for Small Jurisdictions

Proposed § 5.160(b),(c) phases in Equity Plan submission timelines based on the amount a jurisdiction receives in HUD formula grant funds (Consolidated Plan participants) or combined total number of public housing units and vouchers (PHA participants).⁴⁹ Larger jurisdictions must submit their Equity Plans earlier, beginning two years after the Rule takes effect or one year before their next five-year plan after January 1, 2024 is due, whichever is earlier. However, for the smallest jurisdictions, defined as local governments that receive less than \$1 million in formula grant funds and PHAs with fewer than 1,000 combined public housing units and vouchers, the submission timeline is significantly longer. These jurisdictions must submit a first Equity Plan “365 calendar days prior to the date for which a new five-year plan is due following the start of the fiscal year that begins on or after January 1, 2027.”⁵⁰ Because most grantees have Consolidated Plans due in years ending in ‘0’ and ‘5,’ this suggests that most small jurisdictions will have their first Equity Plans due in 2029, a full six years after publication of the Proposed Rule.

OCA suggests a shorter timeline for Equity Plan submission for these small jurisdictions. In Connecticut, local governments that receive less funding from HUD are often those with the most severe fair housing issues. For example, Greenwich, which received \$745,610 from HUD in FY 2023, prohibits multifamily housing on 95% of its land and has a well-

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Proposed Rule at 8570.

⁵⁰ *Id.*

documented history of exclusionary housing policies.⁵¹ Other relatively exclusionary entitlement municipalities within Connecticut, such as Fairfield and Milford, also receive less than \$1 million.⁵² By implication, PHAs administering fewer public housing units and vouchers are *more* likely to exist in jurisdictions that limit housing opportunity than PHAs that provide higher numbers of units for poor households.

OCA recognizes the concern expressed by HUD about smaller jurisdictions' capacity to submit Equity Plans on a short turnaround. However, a six-year window in which municipalities with some of the state's most troubling fair housing records would have no well-defined AFFH obligations is too generous of an allowance.

OCA recommends changing the latest possible submission date to two years after the effective date of the Final Rule. Because small jurisdictions with five-year plans due in 2027 would have to complete Equity Plans by January 1, 2026, HUD clearly believes that PHAs and small municipalities would have the capacity to complete an Equity Plan on this approximate timeline. OCA believes that the urgent need to begin AFFH in some of the smallest entitlement communities—in Connecticut and nationwide—creates an obligation to ensure that Equity Plans are submitted as quickly as institutional capacity will allow.

IV. Heighten Focus on Exclusionary Jurisdictions

Exclusionary jurisdictions that provide almost no affordable housing have been central to Connecticut's housing crisis. By strategically making planning, zoning, and infrastructure choices that limit the feasibility of multifamily and affordable homes, these areas have severely limited the supply of affordable housing in the state. What's more, the affordable housing that does exist is deeply concentrated in higher-poverty jurisdictions.

To take an example from OCA's recent work, the Town of Woodbridge directly borders New Haven to the northeast. Woodbridge has engaged in a variety of practices to avoid building multifamily and affordable housing: 98.4% of the Town's residential land area is zoned to impose a minimum 1.5- or 2-acre lot size for single- and two-family homes, while non-age-restricted multifamily housing can only be built on the remaining 1.6% of land if the Town Planning and Zoning Commission grants a special exception. Additionally, the Town has refused to extend sewer infrastructure out of a desire to impede multifamily construction. The

⁵¹ HUD, COMMUNITY PLANNING AND DEVELOPMENT FORMULA PROGRAM ALLOCATIONS FOR FY 2023 (2023); Nicholas Abbott, *How restrictive zoning shut the middle class out of Greenwich, Conn.*, BROOKINGS (Apr. 14, 2021), <https://www.brookings.edu/blog/the-avenue/2021/04/14/how-restrictive-zoning-shut-the-middle-class-out-of-greenwich-conn/>.

⁵² See KINSEY, *supra* note 8, for an analysis of Connecticut jurisdictions' supply of affordable housing.

Town has also strategically purchased land that would be suitable for multifamily development and instead maintained a golf course on the site.⁵³

The result of policies like these is a deeply fractured and unequal metro area. Whereas 16.5% of the households in the region are Black or Latino households at or below 80% of AMI, Woodbridge includes zero Black and twenty Latino households at or below 80% of AMI—comprising a mere 0.7% of the town.

OCA applauds HUD for recognizing the necessity of addressing these exclusionary policies in its rulemaking in important ways. In particular, OCA believes it is essential to maintain the specific language asking state and local governments and PHAs to address how zoning and land use policies have contributed to segregation and lack of housing opportunity, as discussed further above. OCA also applauds HUD’s decision to ask States to evaluate fair housing issues in both entitlement and non-entitlement areas. Given that jurisdictions like Woodbridge that are among the most exclusionary are unlikely to receive grants from HUD and thus will not be required to submit an Equity Plan, this can ensure that States have an impetus to deal with fair housing issues in these locations even if the towns themselves do not. At the same time, requiring States to also evaluate entitlement areas ensures that they must be responsive to the municipalities receiving the most HUD funding. OCA supports this aspect of the Proposed Rule as well, as it can direct state action toward AFFH in the jurisdictions in which individuals who are most vulnerable to fair housing violations are most likely to live.

That said, the final Rule can address exclusionary jurisdictions even more directly. To do so, OCA recommends explicitly asking States to include an analysis of how to challenge exclusionary jurisdictions. As an example of how this could work, proposed § 5.154(d)(5) currently asks local governments, States, and insular areas to analyze access to affordable housing opportunity within the geographic area of analysis. OCA would suggest adding an additional section to this part of the Proposed Rule directed specifically at States, asking them the following: “Are there non-entitlement jurisdictions within the geographic area of analysis whose public or private policies or practices significantly limit access to affordable housing? If so, what tools does the state have to affirmatively further fair housing within these jurisdictions?” The inclusion of this language can more effectively ensure that HUD’s Proposed Rule is responsive to fair housing issues across all jurisdictions, rather than only in entitlement areas.

V. Clarify the Required Regional Units of Analysis

As written, local governments’ “expected geographic area of analysis includes the whole jurisdiction of the local government pursuant to 24 C.F.R. § 91.5, the Core-Based Statistical Area (“CBSA”), and where necessary to identify fair housing issues, lower levels of

⁵³ See *Compl., Open Cmty. Trust, LLC v. Town Plan & Zoning Comm’n of the Town of Woodbridge*, No. HHD-CV22-6166209-S (Conn. Super. Ct. Aug. 30, 2022).

geography such as neighborhoods, ZIP codes, census tracts, block groups, housing developments, or portions thereof, while also including any analysis of circumstances outside the jurisdiction that impact fair housing issues within the jurisdiction.”⁵⁴ The expected geographic area of analysis for PHAs contains nearly identical language.

First, OCA suggests modifying this language to allow for geographic areas of analysis other than the CBSA. In Connecticut, the state’s CBSAs include groupings of municipalities such as Bridgeport-Stamford-Norwalk or New Haven-Milford.⁵⁵ These designations often obscure the realities of regional housing markets. New Haven’s CBSA, for example, includes cities like Waterbury that are not realistically part of the same housing market as New Haven. New Haven may want to choose to determine its equity goals in the context of the South Central Regional Council of Governments, which would give a more accurate reflection of the New Haven region’s housing market. OCA recommends giving jurisdictions acting in good faith the flexibility to determine which regional area of analysis makes most sense for analyzing the regional fair housing landscape.

HUD should also explicitly require jurisdictions to analyze the impact of their policies on the regional housing market. While the Proposed Rule explicitly asks local governments and PHAs to consider “circumstances outside the jurisdiction that impact fair housing issues within the jurisdiction,” it does not ask as clearly for an analysis of how policies affecting housing *within* the jurisdiction affect fair housing *outside* the jurisdiction. This may suggest to exclusionary jurisdictions that they do not have to consider the severe disparities between themselves and neighboring municipalities within the region that have much higher concentrations of poverty. Instead, they may limit their analysis to the distribution of affordable housing within their own boundaries. Meanwhile, only jurisdictions with higher concentrations of affordable housing such as New Haven would have an incentive to analyze the exclusionary policies of their neighbors.

HUD may intend to use the current language of the Proposed Rule to require analysis of these regional factors. However, OCA believes that jurisdictions may be able to successfully challenge agency action if HUD attempts to impose penalties for a failure to consider regional housing needs. OCA therefore requests clearer language requiring an analysis of each jurisdiction’s affordable housing landscape in the context of regional needs and demographics.

VI. Maintain and Strengthen the Complaint Procedures

OCA applauds the Proposed Rule’s inclusion of a formal complaint procedure.⁵⁶ The proposed complaint processes work essential improvements over previous iterations of the

⁵⁴ Proposed Rule at 8560 (to be codified at 24 C.F.R. § 5.152).

⁵⁵ *Connecticut – Core Based Statistical Areas (CBSAs) and Counties* (2013), U.S. CENSUS BUREAU, https://www2.census.gov/geo/maps/metroarea/stcbsa_pg/Feb2013/cbsa2013_CT.pdf.

⁵⁶ Proposed Rule at 8575-77 (to be codified at 24 C.F.R. §§ 5.170-5.174).

AFFH Rule. By empowering the public to report non-compliant program participants, the Proposed Rule dramatically strengthens its compliance mechanisms. HUD must retain the new complaint procedure and should consider clarifying certain important definitions to ensure that it has teeth. Specifically, OCA urges HUD to revise or clarify its definition of “routine decision” and “routine action” for purposes of defining the substantive coverage of the complaint procedure.⁵⁷ This Section outlines OCA’s praise for and suggestions for strengthening the complaint procedure, and responds to HUD’s request for “comment on whether and the extent to which setting out an AFFH complaint and compliance review process is likely to facilitate AFFH compliance.”⁵⁸ It also responds to HUD’s request for “comment on whether it should further clarify the scope of permissible complaints, including by reference to specific examples of subject matter that would or would not be the appropriate basis of a complaint.”⁵⁹

In Connecticut, advocacy groups like OCA have long played a vital role enforcing fair housing requirements where state and federal oversight has been insufficient to ensure compliance. OCA regularly encounters municipalities that are out of compliance with state and federal fair housing laws. For instance, in 2020, OCA filed an administrative complaint, with the assistance of counsel, against the State of Connecticut, alleging that its housing authority jurisdiction statute has a segregative effect in violation of the FHA.⁶⁰ The statute prevents PHAs from administering their programs outside of the municipalities to which they are linked. This means, for example, that a housing authority serving a diverse city could not invest Project-Based Vouchers in a multifamily property in a nearby high-resource suburb and then affirmatively market those deeply affordable units to extremely low-income families from the city. It also means that tenants with Housing Choice Vouchers generally have to go through the burdensome porting process if they seek to move outside of the jurisdiction whose housing authority issued their vouchers.

Our complaint against the State is emblematic of the role that law firms, non-profits, and members of the public often play as watchdogs when local municipal entities fail in their fair housing obligations. Private complaints against public sector entities in Connecticut have frequently been the key to overcoming unlawful local opposition to new housing development.⁶¹ This is because even with meaningful commitments from state and federal governments to enforce fair housing laws, resource constraints make it impossible for public oversight to ensure complete compliance. Local organizations in Connecticut like OCA are

⁵⁷ See *id.* at 8539.

⁵⁸ *Id.* at 8538.

⁵⁹ *Id.* at 8539.

⁶⁰ OPEN CMTYS. ALL., Housing Discrimination Complaint to HUD (Aug. 3, 2020), [\[link\]](#).

⁶¹ See, e.g., Press Release, U.S. Dep’t of Just., Justice Department Resolves Housing Discrimination Lawsuit Against the Town of Wolcott, Connecticut (Dec. 6, 2021); Ruling on Pending Motions and Order, *Gilead Cmty Servs., Inc. v. Town of Cromwell*, No. 3:17-cv-00627 (D. Conn. May 27, 2022); Compl., *Crystal Carter v. Hous. Auth. of the Town of Winchester*, No. 3:12-cv-01108-WWE (D. Conn. Aug. 1, 2012).

ready to continue playing our part in enforcing the new AFFH Rule and we applaud HUD for providing us with a formal channel to do so.

There is one area of the complaint procedure's substantive coverage that could be strengthened. The Proposed Rule states that "it generally would be insufficient for a complainant to allege that a routine decision made or routine action taken by a program participant does not affirmatively further fair housing."⁶² OCA understands that the Proposed Rule imposes the AFFH obligation only on the collective effect of program participants' actions rather than on every individual action. However, by carving out routine decisions and actions, the Proposed Rule may go further than necessary to achieve that understandable goal.

For instance, as discussed above, PHAs in wealthy Connecticut towns have a history of imposing preferences for existing residents when administering Housing Choice Vouchers.⁶³ OCA is concerned that a PHA might argue that, even if such preferences undoubtedly undermine fair housing, they cannot be the subject of AFFH complaints because they reflect routine decisions. Likewise, a one-off decision by a municipal planning board to reject a low-income housing development might be characterized by the grantee as a routine decision. Such decisions have huge fair housing consequences in Connecticut and are a significant driver of housing segregation.

If HUD wishes to limit AFFH complaints to grantee policies rather than one-off actions, saying so explicitly would be preferable to creating uncertain categories like routine decisions and actions. At a minimum, HUD should provide much more clarity about what types of grantee actions qualify as routine. This definition should be done with an eye towards the many ways in which program participants use routine decision-making processes to construct and maintain patterns of residential segregation.

VII. Conclusion

OCA respectfully submits the foregoing recommendations for HUD to integrate into the final AFFH Rule.

Respectfully submitted,



Erin Boggs
Executive Director
Open Communities Alliance

⁶² Proposed AFFH Rule at 8539.

⁶³ See Thomas, *supra* note 12.

Thomas Silverstein
Rubin Danberg Biggs
Gabriel Gassman
Charles Y. Jiang
Jerome N. Frank Legal Services Organization