

PRRAC

Poverty & Race Research Action Council

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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW, Room 10276
Washington, DC 20410-0500

RE: Proposed Rule, “Affirmatively Furthering Fair Housing,” 88 Fed. Reg. 8516.

Dear colleagues,

The Poverty & Race Research Action Council (PRRAC) commends HUD for reinstating a streamlined version of the Affirmatively Furthering Fair Housing (AFFH) rule and for addressing the primary weakness of the 2015 rule, by including a formal procedure for community members to enforce the AFFH obligation by challenging a program participant’s failure to affirmatively further fair housing.

PRRAC is a civil rights policy organization dedicated to the cause of fair housing, and the urgent need to address the continuing segregation of many low income families of color in high poverty, low opportunity neighborhoods, a condition that is perpetuated by housing, land use, transportation, and education policies at every level of government. Undoing these segregative policies is the primary goal of the affirmatively furthering fair housing provision of the Fair Housing Act.¹

PRRAC’s knowledge and experience with the AFFH obligation and HUD’s implementation of the AFFH rule dates back to our work with the National Commission on Fair Housing and Equal Opportunity (2008),² and multiple related meetings with HUD during the Obama Administration. These discussions also coincided with decisions in the Southern District of New York in the Westchester County cases,³ which highlighted local evasion of the basic obligations of the AFFH certification process, and prompted HUD to confirm its enforcement powers and also to develop a more directive approach for program participants. A 2010 report by the GAO similarly highlighted the weakness of HUD’s standardless “Analysis of Impediments to Fair Housing” process and the related lack of HUD oversight of AFFH compliance,⁴ and helped to

¹ See cases cited in the Preamble to the proposed rule, 88 Fed. Reg. at pp 8521-23 (“Legal Authority”).

² <https://www.prrac.org/national-commission-on-fair-housing-and-equal-opportunity/>.

³ *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 495 F.Supp.2d 375 (S.D.N.Y. 2007); *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, N.Y.*, 668 F.Supp.2d 548, 564-65 (S.D.N.Y. 2009)

⁴ “HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans,” GAO-10-905, Sept. 14, 2010. See <http://www.gao.gov/new.items/d10905.pdf>

push the agency to finally release a proposed rule in 2013,⁵ followed by the final AFFH rule in 2015.⁶ We also participated in local implementation of the 2015 rule, providing assistance to a number of jurisdictions in developing their Assessments of Fair Housing (AFHs) between 2016-2019 (including several jurisdictions that chose to continue using the AFH process after the January 2018 suspension of the 2015 rule). Our comments build on this experience base, as well as on our understanding of the legal underpinnings of the AFFH obligation.

In these comments, rather than engaging in a comprehensive review of the proposed rule, we have chosen to focus on the areas that we consider to be of the highest priority in addressing racial and economic segregation, consistent with the fundamental purpose of the AFFH mandate. References to specific “questions” raised by HUD in the preamble to the proposed rule are also addressed in Appendix A to this letter.

Best practices in the proposed rule

Emphasis on a “balanced approach”: While the primary goal of the AFFH provision of the Fair Housing Act has always been desegregation, in the 2015 rule and the 2023 proposed rule HUD included community reinvestment in segregated, disinvested communities as a complementary strategy to further fair housing. This concept dates back to some of the earliest AFFH cases, in particular *Walker v. HUD*, where the court-ordered remedy for public housing segregation included both aggressive desegregation and substantial investment in community infrastructure.⁷ HUD’s “balanced approach” in the new proposed rule tracks this principle and is exemplary, in two ways:

First, the proposed rule makes it clear that program participants must account for *both* desegregation and community reinvestment. In the implementation of the 2015 rule, too many jurisdictions in segregated regions opted to focus primarily or exclusively on community reinvestment, avoiding the more difficult and controversial steps necessary to reduce segregation and expand access to lower poverty areas for low income families of color. The new rule will make it clear that jurisdictions, PHAs, and states must address both sets of goals. For example, the “Scope of Analysis” in the Equity Plan for all program participants is required to include goals relating to “segregation and integration,” as well as policies and practices that “impede the provision of affordable housing in well-resourced areas of opportunity.”⁸ This requirement is also reflected in the definition of a “balanced approach” which states, “[a] program participant that has the ability to create greater fair housing choice outside segregated, low income areas should not rely solely on place-based strategies consistent with a balanced approach.”⁹

Second, the proposed rule discourages adding *new* low income housing to segregated neighborhoods as part of a balanced approach (in contrast to preservation or remediation of affordable housing in these neighborhoods). Thus, the definition of a “balanced approach”

⁵ US Department of Housing and Urban Development, “Affirmatively Furthering Fair Housing,” 78 Fed. Reg. 43709 (July 19, 2013).

⁶ US Department of Housing and Urban Development, “Affirmatively Furthering Fair Housing,” 80 Fed. Reg. 42271 (July 16, 2015).

⁷ For a summary of the *Walker* litigation and remedial orders, see the plaintiffs’ law firm website, <https://www.danielbesharalawfirm.com/walker-v-hud-dallas-public-housing-desegregation>. See also *Elizabeth K. Julian & Michael M. Daniel, Separate and Unequal: The Root and Branch of Public Housing Segregation*, 23 *CLEARINGHOUSE REV.* 666 (1989).

⁸ 88 Fed. Reg. at p. 8532.

⁹ 88 Fed. Reg. at p. 8531. See also discussion below at pp. 5-6 on the need to clarify this definition.

further instructs that “place-based strategies include actions and investment to substantially improve living conditions and community assets in high-poverty neighborhoods while preserving existing affordable housing stock,” and the cross-referenced definition of “community assets” highlights a full range of community infrastructure and quality of life investments that do *not* include more low-income housing. As HUD is well aware in these definitions, government action to increase segregation and poverty concentration through new low-income housing development in segregated high poverty neighborhoods is directly contrary to the AFFH duty and also constitutes a violation of HUD’s disparate impact rule and HUD’s site and neighborhood standards. We urge HUD to underscore these points as much as possible in the final rule, to avoid the proliferation of plans that purport to support fair housing by increasing segregation.

Emphasis on regional scope of analysis for entitlement jurisdictions and PHAs: HUD’s proposed rule establishes the region as a key area of analysis which must be included in the Equity Plan. Fair housing issues obviously do not stop at the borders of a municipality, or the boundaries of a PHA’s area of operation. Local policies can have a discriminatory effect on residents of other jurisdictions, and can also limit the rights of local residents to move to less segregated communities. Actions of regional transportation authorities, school districts, other jurisdictions or PHAs, and state government also impact fair housing within local jurisdictions and these impacts should be acknowledged, and addressed in a grantee’s fair housing analysis and goal-setting, even if the grantee has no direct power over those policies or practices.

Inclusion of a complaint process to address serious noncompliance: This addition to the affirmatively furthering fair housing process is probably the most important and consequential feature of the proposed rule, and is long overdue. HUD has always had the power to enforce the AFFH obligation itself against recalcitrant jurisdictions,¹⁰ and the courts had long assumed the ability of individuals or groups to enforce the AFFH obligation,¹¹ prior to an unrelated decision in 2002 that cut off access to federal courts for hundreds of statutory claims.¹² Since then, the absence of an explicit administrative procedure for individuals to enforce the AFFH obligation has deprived communities of an essential accountability tool. In addition to restoring a basic right under the Fair Housing Act, the inclusion of a complaint procedure supports HUD’s limited oversight and enforcement capacity by giving local advocates an ability to flag unaddressed fair housing issues that need to be addressed.

¹⁰ See, e.g., *City of Westchester v. U.S. Dep’t of Hous. & Urban Dev.*, 116 F. Supp. 3d 251 (S.D.N.Y.), *aff’d*, 802 F.3d 413 (2d Cir. 2015).

¹¹ See, e.g., *N.A.A.C.P. v. Sec’y of Housing and Urban Dev.*, 817 F.2d 149 (1st Cir. 1987); *Latinos Unidos de Chelsea en Accion v. Sec’y of Housing and Urban Dev.*, 799 F.2d 774, 791-93 (1st Cir. 1986); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 429 (1st Cir. 1983); *Alschuler v. Dep’t of Housing & Urban Dev.*, 686 F.2d 472, 477-78 (7th Cir. 1982); *Business Ass’n. of University City v. Landrieu*, 660 F.2d 867, 870-71 (3d Cir. 1981); *Garrett v. City of Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974); *Otero v. NYCHA*, 484 F.2d 1122, 1134 (2d Cir. 1974); *Shannon v. United States Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 818-19 (3rd Cir. 1970).

¹² *Gonzaga University v. Doe*, 536 U.S. 273 (2002). Even after the *Gonzaga* decision, a few federal courts continued to find an implied private right of action in Section 3608, see e.g., *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Housing Authority*, 339 F. 3d 702 (8th Cir. 2003); *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002). However, in the absence of a specific administrative procedure, HUD has declined to take complaints based directly on 42 U.S.C. §3608, thus making the rights conferred under that section unenforceable.

Summary of key areas for improvement

The need for greater specificity in policies and goals in the Equity Plan: As we note below in our discussion of the Equity Plan for PHAs, the proposed rule is missing some of the important specificity that was included in the 2015 rule, and its accompanying Assessment of Fair Housing (AFH) form. While we understand HUD’s decision to jettison the AFH form, we believe that the complete elimination of the “contributing factors” approach swings the pendulum too far in the direction of the standardless “Analysis of Impediments to Fair Housing” approach of prior decades. While local context and creativity are important, it is also important that local agencies not be left guessing, and be given a basic checklist of the kinds of policies and practices that generally create fair housing problems. This is especially true for smaller agencies that may find the open-ended nature of the proposed rule format daunting, and may value a more directive approach, both as to identified policies and proposed goals.

The limited “geographic area of analysis” for states: The proposed rule makes a major error in limiting the geographic area of analysis for state governments to the “county” level. Segregation and disparities in access to opportunity primarily manifest themselves within counties, and across municipal and school district boundaries and school assignment zones, not across county boundaries.¹³ Even in states with dominant county government models, like Maryland, it is hard to imagine what kinds of fair housing analysis might occur at the county level – except perhaps macro-level comparisons of state expenditures in relation to county wealth and racial demographics, or disparities in access to quality schools in states with county-wide school districts.¹⁴ Take Baltimore County, for example – a county level analysis there would not touch on clear issues of segregation and access to community assets inside the county (including state-funded investments). If HUD is expecting states to perform meaningful fair housing analyses, the geographic area of analysis must include, at minimum, comparisons across municipal lines or at least within county boundaries where there are no defined municipal boundaries.

More emphasis on interagency analysis and collaboration: Although the preamble to the proposed rule notes the intimate relationship between housing and school segregation,¹⁵ and includes positive references to collaboration with local school districts and transportation authorities,¹⁶ and the rule itself notes the value of exploring educational policy goals to improve access to opportunity,¹⁷ and even the inclusion of fair housing goals in community plans outside the housing sphere,¹⁸ there is little in the proposed rule itself to *require* outreach or collaboration with non-housing agencies. This is particularly important given the constant interaction between housing and schools in sorting metropolitan areas by race and class. As the Supreme Court noted fifty years ago in the Denver schools case, educational policies, including school assignment policies and school siting, “may have a profound reciprocal effect on the racial composition of

¹³ This is apparent in the caselaw cited by HUD as legal authority for the rule at pp. 8521-23, and in numerous other fair housing cases over the years, e.g., *Hills v. Gautreaux*, 425 U.S. 284, 285 (1976); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *U.S. v. City of Black Jack, Mo.*, 508 F.2d 1179 (8th Cir. 1974); *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 256 (N.D. Tex. 2000). *Inclusive Cmty. Project, Inc. v. U.S. Dep’t Hous. & Urb. Dev.*, 2009 WL 3122610 (N.D. Tex. 2009); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43 (2nd Cir. 2000); *See also S. Burlington Cnty. N.A.A.C.P. v. Mt. Laurel*, 67 N.J. 151 (1975).

¹⁴ Although even in these states, school segregation and educational disparities are usually expressed at the sub-county level.

¹⁵ 88 Fed. Reg. at p. 8552.

¹⁶ 88 Fed. Reg. at p. 8523.

¹⁷ 88 Fed. Reg. at p. 8566.

¹⁸ 88 Fed. Reg. at p. 8562.

residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.” *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 202–03 (1973) citing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 20-21 (1971).¹⁹ Likewise, the link between transportation policy and fair housing is well established.²⁰ We recommend that engagement with local, regional, or state school and transportation agencies be included as a mandatory part of the community engagement / community consultation requirements of the rule. This could easily be included in Sections 24 CFR §91.100 and 24 CFR §91.110.

The need for more specific prompts for fair housing issues and fair housing goals for PHAs: As we will discuss below, there is a need for much greater specificity in the data provided and the questions asked of public housing agencies (PHAs). This will be especially important for small and medium sized PHAs that lack data and policy analysis staff. The open ended nature of the currently proposed PHA Equity Plan may be frustrating for many smaller PHAs, who will likely not object to a more directive approach.

Definitions

In this section, we will provide input on several definitions in the proposed rule, with recommendations for changes consistent with law and social science evidence.

Affordable Housing Opportunities: In subsection (3)(i), referencing the *location* of affordable housing, we recommend that HUD include “locations that do not increase or perpetuate segregation,” in order to be consistent with the spirit of the AFFH mandate, the case law defining the AFFH mandate (and cited by HUD in the preamble to the proposed rule) and the HUD site & neighborhood standards. Also, in subsection (1)(i), we recommend clarifying that “low-income” includes the full range of HUD’s definitions of low-income, including both “extremely low-income” and “very low income.”

Balanced approach: We appreciate the clarification here, and elsewhere in the rule, that program participants must include steps to promote desegregation and mobility, in addition to community reinvestment. However, the phrasing of the important last sentence (cited earlier) may mislead some program participants, and should be clarified. It currently reads: “A program participant *that has the ability to create* greater fair housing choice outside segregated, low-income areas should not rely solely on place-based strategies consistent with a balanced approach” [emphasis added]. We assume it is not HUD’s intent to allow program participants in segregated areas to avoid identifying goals to reduce segregation, and elsewhere in the proposed rule, HUD acknowledges the need to look beyond a program participant’s specific programs and area of operation. For example, a PHA with a limited area of operation for its voucher program could have a goal to encourage more families to port to nearby communities, or a small, highly segregated city in a wealthy region could seek to encourage state investment in affordable housing in higher opportunity areas, or could identify a goal of entering into cooperative

¹⁹ See also *U.S. v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2nd Cir. 1987) (school board’s neighborhood school policy and city’s segregated housing practices contributed to school segregation); *Booker v. Bd. of Educ. of City of Plainfield, Union Cnty.*, 45 N.J. 161 (1965); *Holland v. Bd. of Pub. Instruction of Palm Beach Cnty.*, 258 F.2d 730 (5th Cir. 1958); *Dowell v. Sch. Bd. of Okla. City Sch.*, 244 F. Supp. 971 (W.D. Okla. 1965) *aff’d*, *Bd. of Educ. of Okla. City v. Dowell*, 375 F.2d 158 (10th Cir. 1967), etc.

²⁰ See, e.g., Deborah Archer, “Transportation Policy and the Underdevelopment of Black Communities,” 106 *Iowa L. Rev.* 2125 (2021).

arrangements with other towns, PHAs, or the regional transportation district to expand housing choice. A more consistent phrasing of this sentence would be: “A program participant that has the ability to create greater fair housing choice outside segregated, low-income areas (*including outside of its own jurisdiction, or through regional strategies*) should not rely solely on place-based strategies consistent with a balanced approach.”

Community engagement: As also noted below, the most successful AFFH planning processes have involved input from community members and other interested parties at the very beginning of the planning process, before any drafts are developed. We recommend that this best practice be incorporated into the definition: “a solicitation of views and recommendations from members of the community and other interested parties, *beginning at the outset of the planning process*, consideration of...”

Fair housing choice: To encompass the full range of tools available to housing providers, including PHAs, the description of “enabled choice” should be amended to include assistance to overcome barriers: “...realistic access to sufficient information, services, *assistance to overcome barriers*, and other options...”

Fair housing issue: In the list of examples, it will be helpful to include “displacement caused by public or private redevelopment,” as this is among the most serious fair housing issues affecting low income families in protected classes in many American cities.

Fair housing strategies and actions: The awkward working of this definition is misleading in at least two ways: first because it implies that fair housing strategies and actions are limited to things that can be incorporated into subsequent planning documents, and second, because it implies that the only fair housing strategies and actions are funding strategies that can be deployed by a program participant. These ambiguities are inconsistent with the letter and spirit of the AFFH obligation, and can be fixed with some simple wordsmithing.

Geographic area of analysis: As noted above, for states or Insular areas, the implication that states are only required to analyze fair housing issues at the county level, with the “option” to look at lower areas of geography, is contrary to law, social science, and common sense.

Integration: The definition of racial integration should be improved to include integration “within a region,” not just “within a community.” Much contemporary segregation occurs across municipal and school district lines,²¹ and common indices of segregation and integration include regional analyses.²²

Racially or ethnically concentrated areas of poverty (R/ECAPs): “Racially or Ethnically Concentrated Areas of Poverty” are not defined in the proposed rule, but are defined outside the rule by the HUD data and mapping tool as areas with greater than 40% poverty or three times the average poverty rate for the metropolitan area and greater than 50% non-white population (with lower racial concentration thresholds for non-metropolitan areas).²³ Although this formula works

²¹ See discussion at note 13, above.

²² See, e.g., “Measurement of Segregation by the U.S. Bureau of the Census,” in *Racial and Ethnic Residential Segregation in the United States: 1980-2000* by Weinberg, Iceland, and Steinmetz, posted at <https://www.census.gov/content/dam/Census/library/working-papers/2003/demo/massey.pdf>.

²³ <https://hudgis-hud.opendata.arcgis.com/datasets/HUD::racially-or-ethnically-concentrated-areas-of-poverty-r-ecaps/about>.

fairly well in highlighting the most segregated tracts in most cities and regions, the use of the 40% poverty threshold in the formula is based on an important but outdated study²⁴ that is no longer applicable to many metropolitan areas, and should be lowered to 30% (high poverty), consistent with current research.²⁵ HUD should also continue to provide a R/ECAP definition or guidelines for use by program participants in regions without traditional “high” poverty neighborhoods or in high cost/high wage regions where low-income families above the poverty line are concentrated in distinct racially/ethnically identifiable neighborhoods. Finally, to adequately map contemporary concepts of segregation, we also recommend that the data and mapping tool be adapted to help identify “racially or ethnically concentrated areas of affluence,” to highlight high-income, predominantly white communities within metropolitan areas.²⁶

Content of the Equity Plan

Equity Plan content for all program participants

Disaggregating subsidized housing data: If program participants are expected to undertake a meaningful reflection of their role in creating and perpetuating racial and economic segregation, the first step is to look at both the demographics and site and neighborhood characteristic of each subsidized housing development in each separate housing program in their region. In what census tract are developments subsidized by each federal and state housing program located, and who is living in those developments, in relation to neighborhood racial and economic demographics? Once this baseline analysis is done, program participants should assess what policies and practices they have in place to either perpetuate or reverse these patterns, and what other constraints is the program participant operating under that presents a challenge to promoting greater housing choice and integration?

Access to community assets: We appreciate the positive message of this section – with its focus on bringing more and better community assets into disadvantaged communities. However, this section leaves out an important area of fair housing analysis: “exposure to community harms.” These adverse influences that are often present in high poverty, disinvested communities, include high crime rates, substandard schools, unemployment, lack of access to quality transportation, and exposure to environmental toxicity. This section of the rule would be one place to include discussions relating to environmental justice, a field closely linked to underlying patterns of residential segregation.²⁷

²⁴ William Julius Wilson, *The Truly Disadvantaged* (1987).

²⁵ See literature cited in “AFFH letter on data questions,” <https://www.regulations.gov/comment/HUD-2023-0009-0300>

²⁶ See the California AFFH mapping tool for an example: <https://affh-data-and-mapping-resources-v-2-0-cahcd.hub.arcgis.com/>.

²⁷ See *S. Camden Citizens Action v. N.J. Dep’t of Env’t Prot.*, 145 F. Supp. 2d 446 (D.N.J. 2001) (air pollution permit for cement processing facility would have a racially discriminatory impact), *rev’d*, 274 F.3d 771 (3rd Cir. 2002), *remanded to*, 254 F. Supp. 2d 486 (D.N.J. 2003) (holding plaintiffs “stated a claim of intentional discrimination under Title VI and Equal Protection Clause”); *Rosemere Neighborhood Assoc. v. U.S. EPA*, 581 F.3d 1169 (9th Cir. 2009) (claiming EPA failed to timely process a complaint alleging the city’s failure to use EPA funds to address the environmental needs in racially concentrated areas of poverty); *Californians for Renewable Energy v. U.S. EPA*, 2018 WL 1456211 (N.D. Cal. 2018) (granting summary judgment claims regarding “decisions by state and local agencies to grant permits approving operation of environmentally hazardous facilities in minority communities violate the Title VI’s prohibition against discrimination by public funders”); *Franks v. Ross*, 293 F. Supp. 2d 599 (E.D.N.C. 2003) (Title VI claim alleging landfill predominately affected African American communities).

Equity Plan content for states

States are in a unique and powerful position to affirmatively implement the goals of the Fair Housing Act. As we have observed,

The state is a unique leverage point at which patterns of segregation can be disrupted, because of its direct control over the key drivers of modern school and housing segregation—powers over local land use and zoning, local education policy, local tax structures, regional transportation policy, regional planning structures, infrastructure investment, and even over the permeability and legal consequences of local boundary lines. States also play a major role in distribution of funding to local governments, school districts, and housing developers, and are uniquely positioned to encourage regional cooperation and interagency coordination. Specifically with regard to housing and education policies, the state is exceptionally well situated to overcome state-created local fragmentation and resource hoarding that undergirds and sustains segregation.²⁸

Administration of the Low Income Housing Tax Credit: HUD should confirm that inclusion of the LIHTC program in the Equity Plan is mandatory for states. It is clear that the AFFH obligation extends to Treasury Department programs and to the LIHTC program, as 42 USC §3608 (d) states that “[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter.”²⁹ The AFFH duty likewise extends to state and local agencies administering federal programs, *Otero v. New York City Hous. Auth.* 484 F.2d 1122, 1133 (2d Cir. 1973). *See also In Re Adoption 2003 Low Income Housing Tax Credit Qualified Allocation Plan*, 369 N.J. Super. 2, 848 A.2d 1 (N.J. App 2004) (holding that the AFFH obligation applies to state administration of the LIHTC program).

Other policies affecting fair housing: HUD should also make clear that the analysis states are required to undertake includes *all* state policies impacting housing and community development, not just programs administered by state housing agencies. Such policies would include land use and zoning laws, landlord-tenant laws, plans of conservation and development, infrastructure investment (including roads, transit, sewers and water), school funding and school construction spending, property tax systems, and housing authority jurisdictional boundaries.³⁰

Data: States should be provided with or prompted to obtain the full range of data pertaining to housing and urban development that is held by state “non-housing” agencies, including: data on school district boundaries, school district racial, economic, and language characteristics, as well as student performance and school funding data;

²⁸ Megan Haberle and Philip Tegeler, “Coordinated Action on School and Housing Integration: The Role of State Government,” 53 *University of Richmond Law Review* 949, 952 (2019).

²⁹ The federal courts have repeatedly confirmed that the AFFH obligation extends to other federal agencies involved in housing and urban development. *See Jorman v. Veterans Admin.*, 579 F. Supp. 1407 (N.D.Ill.1984) (Veterans’ Administration); *Jones v. Office of Comptroller of the Currency*, 983 F. Supp. 197, 204 (D.D.C. 1997); *Albany Apartments Tenants Assoc. v. Veneman*, No. Civ. 01-1976, 2003 WL 1571576 at *10-11 (D. Minn. 2003) (Department of Agriculture).

³⁰ *See generally*, “How States Can Affirmatively Further Fair Housing: Key Leverage Points and Best Practices” (PRRAC, January 2022), <https://prrac.org/pdf/affh-for-states.pdf>.

public transportation routes; maps of sewer lines; plans of conservation and development; local municipal zoning rules and town-by-town affordable housing totals.

Cross-agency coordination: consultation and collaboration with sister state agencies should be required in Section 91.110 of the rule, including state (and regional) agencies with jurisdiction over education policy, transportation policy, environmental policy, conservation and development policy, and land use policy.³¹

Zoning and land use: Suggested fair housing issues and goals for states should address exclusionary planning, infrastructure, and land use requirements directly, as these state controlled systems are the basic building blocks of metropolitan segregation. For example, suggested goals could include the elimination or reduction of local exclusionary zoning laws (minimum lot size requirements, minimum square footage requirements, prohibitions on multi-family homes, limits on the height of buildings, off-street parking prohibitions, landscaping requirements, etc.); adoption of fair share legislation requiring each municipality in a region to contribute to the region's affordable housing needs, with accompanying power for developers to overcome unreasonable local zoning barriers; and extension of sewer and bus lines to facilitate affordable multifamily housing development.

Housing insecurity and renter protections: Any new AFFH rule must incorporate enforceable and clear guidelines for states to strengthen renters' rights and ensure housing security. The lack of renter protections is a fair housing issue indelibly tied to the advancement of racial justice that guides AFFH. Nationally, 58 percent of Black households and 51 percent of Latino households rent their homes compared to just 28 percent of white households.³² Due to discrimination in real estate practices, predatory lending, lower household incomes, pervasive housing discrimination, and a lack of deeply affordable housing, Black and Latino households disproportionately face higher rents, predatory practices, unsafe conditions, and homelessness.³³ As the White House recently noted, evictions "disproportionately affect Black women and their children."³⁴ Even low income families lucky enough to receive Housing Choice Vouchers face rampant discrimination,³⁵ and the majority of states do not prevent landlords from

³¹ See Poverty and Race Research Action Council et al, letters "re reissuance of interagency guidance on housing and school integration," <https://www.prrac.org/wp-content/uploads/2023/02/Letter-to-Secretary-Cardona-re-interagency-guidance.pdf> and <https://www.prrac.org/wp-content/uploads/2023/02/Letter-to-Secretary-Buttigieg-re-interagency-guidance.pdf> (February 2023).

³² People's Action et al., "Executive Order on Protecting Tenants and Stabilizing the American Economy," November 2022, <https://peoplesaction.org/wp-content/uploads/2023/01/Updated-Final-1.23-Rent-Regulations-Executive-Order-w-Sign-ons.pdf>.

³³ *Ibid.* See also the "White House Blueprint for a Renters Bill of Rights," January 2023, <https://www.whitehouse.gov/wp-content/uploads/2023/01/White-House-Blueprint-for-a-Renters-Bill-of-Rights.pdf>.

³⁴ "Biden-Harris Administration Announces New Actions to Protect Renters and Promote Rental Affordability," January 25, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/25/fact-sheet-biden-harris-administration-announces-new-actions-to-protect-renters-and-promote-rental-affordability/>.

³⁵ Mary K. Cunningham, et al., "A Pilot Study of Landlord Acceptance of Housing Choice Vouchers," Urban Institute, August 20, 2018, <https://www.urban.org/research/publication/pilot-study-landlord-acceptance-housing-choice-vouchers>. These families are also disproportionately Black and Latino – see National Low Income Housing Coalition, "Housing Spotlight: Who Lives in Federally Assisted Housing?," November 2012, <https://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf>.

denying households based on source of income.³⁶ Additional prompts for state equity plans should be added to reflect crucial tenant protections – or lack thereof. For example, data analysis could include eviction data by race, presence or absence of good-cause eviction laws, availability of access to counsel, of presence or absence of protections against exorbitant rent increases. Fair housing goals could include prompts relating to good-cause eviction protections, right to counsel in eviction proceedings, enhanced habitability standards, rent protections, and strong protections for tenants’ right to organize.

Equity Plan for Public Housing Agencies (PHAs)

Based on our prior work with public housing authorities/agencies, our primary concern with the Equity Plan outline for PHAs is that it lacks sufficient detail and is not prescriptive enough in the content of each agency’s analysis and goal setting. The open-ended nature of the questions may be helpful for large PHAs with significant in-house planning capacity, but for most PHAs the structure of the proposed Equity Plan will be overly challenging, and without greater detail and direction, it will not lead to meaningful goals. More detail and specificity in the questions posed does not mean more work for PHAs – in fact, a more detailed list of prompts will be easier for most PHAs to accomplish, particularly if HUD improves the data and maps generated for PHAs. An example of such a checklist is set out in our AFFH guidebook for PHAs in California, *Public Housing Authorities and the New California AFFH Law: How to Spot Key Fair Housing Issues and Set Goals* (PRRAC & NHLP, July 2021).³⁷ Ideally, such a checklist would be included in the rule itself, although it could also be incorporated into an AFFH guidebook for PHAs.

If HUD maintains the current structure of the proposed rule, we recommend at least improving this section by adding the following prompts to enhance the usefulness of the exercise for PHAs and ensure that key fair housing issues are not overlooked.

Examples of greater specificity in the data that HUD could provide, and questions that PHAs could be asked to answer, include:

Geographic area of analysis: In the first sentence of Section (e), on p. 8564, the proposed rule states “PHAs must include in their Equity Plan an analysis of the area in which the PHA operates.” This opening directive contradicts language at the end of the same paragraph, directing PHAs to also look at issues within their region, and it also conflicts with the definition of “geographic area of analysis” at §5.152.

Demographics (p. 8564): in analyzing the demographics of all categories of PHA owned or administered housing,³⁸ it is crucial that HUD clarify that development-by-development demographic analysis is required, including demographics of both residents and neighborhood. Without the ability to compare across developments, no meaningful fair housing analysis is possible.

³⁶ Poverty & Race Research Action Council, “Appendix B: State, Local, and Federal Laws Barring Source-of-Income Discrimination,” Updated March 2023, <https://www.prrac.org/pdf/AppendixB.pdf>.

³⁷ <https://prrac.org/pdf/affh-for-ca-phas.pdf>.

³⁸ Including public housing, former public housing that the PHA retains an ownership stake in, Housing Choice Vouchers, project based vouchers, and any special-purpose vouchers administered by the PHA.

Demographics: in addition to looking at the racial and family size characteristics of participants in relation to the broader housing market, PHAs should be required to compare these data to the demographics of families on the waiting lists for public housing and Housing Choice Vouchers (including any site-based waiting lists). This comparison is useful to expose potential discriminatory screening criteria, lapses in affirmative marketing, or waitlist management issues. PHAs should also be asked to track admissions denials and evictions by race, language, and disability.

Housing Choice Voucher program: key missing data includes search times and success rates by race/family size/ disability; number of reasonable accommodation requests for exception payment standards and number granted; and gap between current payment standards and Small Area FMRs in low poverty areas of the jurisdiction and region.

For local policies and practices impacting fair housing, HUD can be much more specific in setting out common PHA policies and practices that often have fair housing impacts, without creating additional burdens on PHAs. In fact, listing these common issues will make it much easier for PHAs to comply with the rule without having to resort to expensive consultants. For example, the following types of questions will be easy for most PHA executives to answer:

Admissions: Does the PHA arrange its waitlist on a first-come, first-served basis (within the local preferences) or does it use a lottery? Are there local residency preferences? What kind of affirmative marketing does the PHA use when the waitlist is opened up? What is the PHA's criminal records screening policy?

Housing Choice Voucher policies: What is the average length of time between the Request for Tenancy Approval and the signing of the lease and HAP contract? Does the PHA use exception payment standards (including Small Area FMRs) in higher cost neighborhoods or communities? How does the PHA manage a limited area of operation by partnering with other nearby PHAs? Do reasonable rent determinations prevent families from moving into higher cost areas?

Public housing policies: are there any house rules that may disproportionately affect residents in protected classes? Are there policies in place to address tenant on tenant harassment? Have partnerships been established with local domestic violence organizations in compliance with the Violence Against Women Act? Are PHA guest policies reasonable and non-discriminatory?

Evictions and hearings: Are PHA's hearing policies accessible to all residents? Do residents have access to their tenant files and an opportunity to address mistakes during hearings?

RAD properties: do residents receive regular notice of their rights to move after one year, and receive the next available voucher? Are these residents prioritized for housing mobility assistance if available?

Public housing redevelopment: The AFFH lens has often been applied to the process of public housing redevelopment, particularly where properties are subject to demolition

and residents are displaced.³⁹ If relocation is required, have residents been offered relocation options in well-resourced areas? If the public housing development is in a R/ECAP area, have any off-site replacement units been planned in lower poverty neighborhoods? Have all residents been informed of their right to return to a redeveloped unit? If the redevelopment is funded in part through the LIHTC program, it is accompanied by a concerted community revitalization plan?

Likewise, the fair housing goals required of PHAs should not be a guessing game. While some PHAs have unique circumstances, many others have similar fair housing issues and a similar set of potential fair housing goals. To streamline the rule, HUD should offer PHAs a specific set of goals to choose from, while at the same time giving PHAs flexibility to address their unique circumstances. A simple set of fair housing goals might include:

Tenant selection and affirmative marketing:

- > replace date and time of application with lottery system for setting waitlist.
- > provide multiple means of applying when waitlists are opened, and keep the application period open for a reasonable period of time.
- > affirmatively market the availability of units or vouchers to low income families in communities outside the PHA area of operation.
- > eliminate local preferences that have the effect of limiting housing opportunities for people of color or families with children.

Public housing and public housing redevelopment:

- > ensure that all residents have the opportunity to return to rebuilt or rehabilitated units.
- > provide affirmative relocation services to all displaced residents to ensure they have options to move to low poverty, less segregated neighborhoods and communities.
- > For developments in high poverty neighborhoods, locate a significant portion of replacement housing units off-site, in low-poverty, non-racially concentrated areas.

Housing Choice Voucher program:

- > Adopt exception payment standards based on Small Area FMRs in low poverty neighborhoods.
- > Enter into inter-agency agreements with neighboring PHAs to facilitate portability or direct administration of vouchers across jurisdictional lines.
- > Provide housing mobility counseling and housing search services for families seeking to move to well-resourced areas.
- > Where permitted, offer security deposit assistance to families seeking to move to well-resourced areas.
- > Partner with local legal aid and fair housing groups to assist families in asserting their rights under state or local source of income discrimination laws.
- > Improve inspection times and paperwork processing times to encourage greater

³⁹ See, e.g., *Garrett v. Hamtramck*, 503 F.2d 1236 (6th Cir. 1974); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3rd Cir. 1977); *Sanders v. U.S. Dep't of Hous. & Urb. Dev.*, 872 F. Supp. 216 (W.D. Pa. 1994); *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702 (8th Cir. 2002); *Wallace v. Chi. Hous. Auth.*, 289 F. Supp. 2d 710 (N.D. Ill. 2003).

landlord participation.

> Ensure that all residents of PBV-assisted units and public housing converted under the RAD program are given regular notice of their rights to move using a portable Housing Choice Voucher.

Community engagement

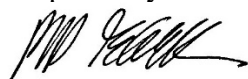
Our key recommendation on HUD’s proposed AFFH community engagement procedures is to emphasize working with residents and advocates very early in the process – *before* a draft plan is developed – so that community input actually contributes to the Equity Plan and is not purely reactive. This early engagement, and the formation of community advisory groups early in the plan development process, was a feature of some of the more successful AFFH plans in 2016-17. Community input should also be solicited at multiple junctures, including around goal formulation.

We also urge HUD to avoid fully conflating the AFFH community engagement process with other community input processes like the Consolidated Plan and the PHA Plan. The AFFH planning process has both a broader and more specific focus, and will not receive the attention it requires if it becomes merely subsidiary to other planning processes.

In regard to community engagement for PHAs, we recommend that HUD specifically emphasize the engagement of families with Housing Choice Vouchers. These families are often overlooked where PHAs use their Resident Advisory Boards as the primary source of resident input. Some PHAs have been successful in bringing HCV families together remotely, through Zoom or similar digital platforms.⁴⁰

Thank you for the opportunity to comment on the proposed rule. We look forward to the day when affirmatively furthering fair housing becomes a routine and central part of planning and compliance for HUD program participants!

Respectfully submitted,



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⁴⁰ See “Genuine Engagement with Housing Choice Voucher Families” (PRRAC and Mobility Works, July 2021), <http://www.prrac.org/pdf/genuine-engagement-with-hcv-families.pdf>.

⁴¹ We would like to thank Maura Graham, JD candidate at the SUNY University at Buffalo School of Law, for her legal research assistance and also Megan Haberle of the National Community Reinvestment Coalition for her helpful feedback on our final draft.

APPENDIX A: SELECTED QUESTIONS POSED BY HUD IN THE PROPOSED RULE

We have addressed many of HUD's specific questions in the main text of our letter, but we will respond specifically here to several questions for ease of reference.

- 1. Are there ways in which HUD can further streamline this proposed rule or further reduce burden, while continuing to ensure an appropriate and necessary fair housing analysis that would enable program participants to set meaningful goals that will affirmatively further fair housing?*
- 2. Does HUD's removal of the requirement to identify and prioritize contributing factors still allow for a meaningful analysis that will allow program participants to set goals for overcoming systemic and longstanding inequities in their jurisdictions? If not, how can HUD ensure that such an analysis occurs without imposing undue burden on program participants?*

As we noted in the text of our letter, small and medium sized PHAs should a) be given as much pre-loaded data as possible reflecting common PHA fair housing challenges, and b) be given more direction in analyzing their public housing and voucher policies and practices, which generally follow similar patterns, and c) a more explicit set of policy goals to choose from. This approach will significantly reduce burdens on PHAs and also lead to more meaningful and complete responses.

This analysis/approach would also apply to smaller entitlement jurisdictions.

- 3. HUD intends to continue to provide much of the same data it made available in connection with the implementation of the 2015 AFFH Rule through the AFFH-T, which is available at <https://egis.hud.gov/affht/>, while exploring possible improvements to the existing AFFH-T Data & Mapping Tool. HUD is also exploring other approaches to facilitating program participants' data analysis and making HUD-provided data as useful and easy to understand as possible for program participants and the public. HUD seeks comment on the following related questions:*

Our organization participated in a detailed response to these data questions, which we support. See "AFFH Comment Letter on Data Questions," at <https://www.regulations.gov/comment/HUD-2023-0009-030>.

- 5. In what ways can HUD assist program participants in facilitating the community engagement process so that the Equity Plans program participants develop are comprehensive and account for issues faced by members of protected class groups and underserved communities that program participants may not necessarily be aware of?*

As noted above, HUD should require program participants to engage community representatives at the beginning of the AFFH planning process, rather than asking them to respond to a draft that has already been started.

Also, the proposed rule fails to name legal services organizations specifically. This is especially important in providing input to PHAs and local governments, since legal services lawyers generally have more expertise in federal housing programs (and

impacts of those programs on clients) than many other groups in the community. And unfortunately, because of federal restrictions on legal services advocacy, some programs are reluctant to engage in local advocacy unless they are invited to participate. For these reasons, we recommend specifically including “legal services programs” in every place in the rule where fair housing groups, community organizations or advocates are mentioned as part of the community engagement and community consultation processes.

6. HUD seeks comments on whether the definition of “Affordable Housing Opportunities” is sufficiently clear. HUD also seeks comment on whether the definition should apply to both rental and owner-occupied units. Are there other categories of affordable housing that should be explicitly referenced in this definition?

As noted in the text of our letter above, in subsection (3)(i), referencing the *location* of affordable housing, we recommend that HUD include “locations that do not increase or perpetuate segregation,” in order to be consistent with the spirit of the AFFH mandate, the caselaw defining the AFFH mandate (and cited by HUD in the preamble to the proposed rule) and the HUD site & neighborhood standards.

Also, in subsection (1)(i), we recommend clarifying that “low-income” includes the full range of HUD’s definitions of low- and moderate- income, including both “extremely low-income” and “very low income.”

7. HUD has provided a new definition of “Geographic Area of Analysis,” which is intended to provide program participants and the public a clear understanding of the types and levels of analysis that are needed by different types of program participants. Does this definition clearly articulate the geographic areas of analysis for each type of program participant and are the levels of analyses for the types of program participants appropriate to ensure Equity Plans are developed and implemented in a manner that advances equity?

8. f. What is the proper regional analysis program participants should undertake in order to identify fair housing issues and set meaningful fair housing goals? Should different program participants have different required regional analyses (e.g., States vs. local governments; non-statewide PHAs)?

As noted in the text of our letter, the geographic area of analysis for states is unworkable and inconsistent with caselaw and social science – the required area of analysis should be, at a minimum, at the municipal level. The geographic level of analysis should be mandatory, not depend on the discretion of the state government.

8. k. Are there areas of analysis that HUD should include for PHAs that it has not included in this proposed rule that would better assist PHAs in meeting their obligation to affirmatively further fair housing? This may include analysis addressed to PHA-specific programs, such as public housing, vouchers, Moving To Work, or other PHA programs, as well as by type of PHA, such as troubled or qualified PHAs?

See our detailed comments in the text of the letter on items missing from the PHA Equity Plan section of the proposed rule.

10. HUD has included several new definitions in this proposed rule and requests feedback on whether they should be drafted differently, whether there may be additional definitions that are not included that would be useful, and whether any definitions included in this proposed rule are unnecessary.

See discussion in the text of our letter above, at pp. 5-7.

12. HUD requests feedback on whether including the definition of “Balanced Approach” is helpful in understanding how to connect funding decisions to advancing equity within communities and how this definition can be modified or improved in order to more clearly make that connection.

See discussion in the text of our letter above, at pp. 2-3.

15. HUD requests specific feedback on new sections §§ 5.170 through 5.174 and whether the compliance procedures and procedures for effecting compliance can be further clarified and improved.

See discussion in the text of our letter above, at p. 3.

16. This proposed rule provides a stronger link between the regulatory requirements for implementing the AFFH mandate and program participants’ subsequent planning processes in order to better ensure that all programs and activities are administered in a manner that affirmatively furthers fair housing, including by taking into account how to allocate funding to effectuate that obligation. HUD requests comments on how HUD can further ensure that program participants are adequately planning to carry out activities necessary to advance equity in their communities. Specifically, are certifications and assurances requirements in this proposed rule, along with the new regulatory provision at § 5.166 sufficient to achieve this objective, and if not, what additional regulatory language can be added that would achieve this objective?

A minimally adequate Equity Plan will encompass programs, policies, and issues that go beyond the programs covered in the Consolidated Plan or the PHA Plan and its appendices. For this reason, it is important to emphasize throughout the rule that the Equity Plan is not simply a planning tool to inform other planning documents, but that it is also a freestanding document, and that the program participant will be held accountable for progress, with annual reporting completely separate and independent from annual Action Plans or CAPERs.

18. Are there other types of “Community Assets,” that should be included in the new definition and the analysis of disparities in access to opportunity for purposes of the Equity Plan? If so, which assets should be included that are not currently included in this proposed rule?

The rule fails to adequately record community “harms” – such as violent crime rates, pedestrian deaths, food deserts, air pollution, lead levels in the air and soil, and other environmental health threats. Environmental health issues, in particular, are central to a complete AFFH assessment. As the President’s April 21 Executive Order on

environmental justice notes, “[c]ommunities with environmental justice concerns face entrenched disparities that are often the legacy of racial discrimination and segregation, redlining, exclusionary zoning, and other discriminatory land use decisions or patterns.”⁴² The new Executive Order goes on to say that “each agency should make achieving environmental justice part of its mission” [emphasis added], including, *inter alia*, taking steps to “address disproportionate and adverse human health and environmental effects (including risks) and hazards unrelated to Federal activities, including those related to climate change and cumulative impacts of environmental and other burdens on communities with environmental justice concerns....identify, analyze, and address historical inequities, systemic barriers, or actions related to any Federal regulation, policy, or practice that impair the ability of communities with environmental justice concerns to achieve or maintain a healthy and sustainable environment....identify, analyze, and address barriers related to Federal activities that impair the ability of communities with environmental justice concerns to receive equitable access to human health or environmental benefits.....consider adopting or requiring measures to avoid, minimize, or mitigate disproportionate and adverse human health and environmental effects (including risks) and hazards of Federal activities on communities with environmental justice concerns, to the maximum extent practicable, and to address any contribution of such Federal activities to adverse effects — including cumulative impacts of environmental and other burdens — already experienced by such communities.”⁴³ This new Executive Order requires HUD to include stronger environmental justice analysis and goals in the final AFFH rule.

21. What forms of technical assistance could HUD provide that would better position program participants and their communities to develop their Equity Plans and ultimately implement and achieve the fair housing outcomes set therein?

HUD should empower its technical assistance providers to subcontract directly with legal services attorneys and other fair housing experts in selected communities to provide on-the-ground technical assistance to community based organizations in the AFFH process.⁴⁴

23. c. Are there other ways in which HUD can alter the required analysis for small program participants that meaningfully reduce burden while ensuring an appropriate AFFH analysis such that these program participants can establish meaningful fair housing goals?

23 e. Would it be appropriate to modify the goal-setting requirements for smaller PHAs and consolidated plan participants and, if so, what modification would be appropriate?

See our comments at pp. 4-5 of the main letter, above. In general, we recommend that HUD provide static data sets to smaller program participants spelling out their basic fair housing issues, and provide them with a set of basic fair housing policy prompts and fair housing goals to choose from.

⁴² “Executive Order on Revitalizing Our Nation’s Commitment to Environmental Justice for All” (White House, April 21, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/04/21/executive-order-on-revitalizing-our-nations-commitment-to-environmental-justice-for-all/>.

⁴³ *Ibid.*

⁴⁴ *Cf.* Paul Davidoff, “Advocacy and Pluralism in Planning,” 31 *Journal of the American Institute of Planners* 331-338 (1965)

28. *With respect to the proposed AFFH enforcement scheme, proposed § 5.170 would provide that complaints alleging the failure of a program participant to affirmatively further fair housing must be filed with HUD within 365 days of the date of the last incident of the alleged violation.... a. Is 365 days an appropriate time limit? Are there specific considerations that argue for a longer or shorter time limit?*

Yes – one year is appropriate, and the time limit should not be shortened.

29. *A large amount of Federal funding flows through States to local jurisdictions, and HUD is interested in hearing about how States can utilize those funds to affirmatively further fair housing. HUD recognizes the unique planning responsibilities of States, as well as the wide variation in data, including with respect to the varying sizes and geographies of States (e.g., urban and rural areas). HUD specifically seeks comment on the data needs and tools that may be useful to States in conducting their Equity Plans.*

29 a. *How can States encourage broader fair housing strategies at the State level and in localities, and what changes, if any, are needed to the proposed rule that could improve its effectiveness as a tool for States to further fair housing goals?*

29 b. *Are there data that HUD could provide to States to assist and facilitate the fair housing analysis required by § 5.154?*

29 e. *Given the unique role that States play, does the analysis and content required in the Equity Plan provide States with sufficient opportunities to coordinate both within the State (e.g., across various departments, offices, or agencies as well as with local jurisdictions) and, as appropriate, with neighboring States?*

See discussion in the text of our letter above, at pp. 8-10.

31. *Certain definitions in this proposed rule contain language explaining how the defined term applies to the analysis required by § 5.154 and the type of analysis that HUD expects to be included in an Equity Plan. HUD seeks comment on whether the inclusion of this type of language in the regulations is helpful and provides additional clarity regarding how the defined term should be used for purposes of developing an Equity Plan.*

The definition section of the AFFH rule will be extremely helpful in guiding participants' analysis – without these precise definitions, there would be too much flexibility in the meaning of these terms, permitting them to be interpreted by program participants in ways that might undermine HUD's intent, and leading to difficulties in HUD review and enforcement.