

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

Via regulations.gov

[Date]

Re: Docket No. FR-5173-P-01, Affirmatively Furthering Fair Housing

The National Low Income Housing Coalition (NLIHC) is an organization whose members include state and local housing coalitions, residents of public and assisted housing, nonprofit housing providers, homeless service providers, fair housing organizations, researchers, public housing agencies, private developers and property owners, local and state government agencies, faith-based organizations, and concerned citizens. While our members include the spectrum of housing interests, we do not represent any segment of the housing industry. Rather, we focus on what is in the best interests of people who receive and those who are in need of federal housing assistance, especially extremely low income people.

NLIHC enthusiastically supports the proposed improvements to regulations that carry out the Fair Housing Act's requirement to ensure that all federal agencies administer their programs relating to housing and community development in a manner that affirmatively furthers fair housing. We commend HUD for undertaking a multi-year effort to obtain the views of a wide range of stakeholders. The changes proposed constitute an important step forward toward the goal of equal opportunity.

The National Low Income Housing Coalition applauds the many proposed regulatory improvements, such as replacing the ambiguous Analysis of Impediments (AI) with an Assessment of Fair Housing (AFH) that will have defined elements and that will spell out specific fair housing "issues" that fund recipients must identify, prioritize, and take proactive steps to address. Rather than drafting an AI in a vacuum only to have it sit on a shelf, NLIHC welcomes the proposed rule's requirement to develop the AFH with input from the community and from stakeholder organizations for submission to HUD for review and acceptance prior to receipt of some HUD program funds. The obligation to affirmatively further fair housing will be strengthened by a clearer and more direct inclusion of affirmatively furthering fair housing considerations and the AFH in the Consolidated Plan and PHA Plan processes for establishing fund allocation priorities.

While there are a number of other features of the proposed rule that NLIHC endorses, we take this opportunity to offer suggestions necessary to strengthen a final rule.

A. Section 5.150 Affirmatively Furthering Fair Housing: purpose

The proposed rule frequently refers to reducing racial and ethnic concentrations of poverty, as well as reducing disparities in access to community assets. This could be misconstrued to mean a prohibition on the use of resources in neighborhoods that have such concentrations where community-based development organizations and affordable housing preservation organizations have long worked with residents to improve living conditions.

Although the opening statement of purpose in the proposed rule offers a minor indication that use of resources in racial and ethnic concentrated areas of poverty is permissible, it is far from adequate. The statement reads:

“A program participant’s strategies and actions may include strategically enhancing neighborhood assets (for example, through targeted investment in neighborhood revitalization or stabilization) *or* promoting greater mobility and access to communities offering vital assets such as quality schools, employment, and transportation consistent with fair housing goals.”

Comments

1. In the final rule, the “or” must be an “and”.
2. The final rule must recognize that affirmatively furthering fair housing may entail devoting resources to improve areas of concentrated racial and ethnic poverty by preserving and improving affordable housing, and by implementing investment policies that augment access to essential community assets for protected class residents who wish to remain in their communities – while protecting them from the forces of displacement.

Therefore, the final rule must clearly reinforce the acceptability of the first option of “strategically enhancing neighborhoods” throughout the text of the final rule (not solely in the statement of purpose), including in:

- The definition of “affirmatively furthering fair housing”,
 - The definition of “fair housing choice”,
 - The opening subsection pertaining to the Assessment of Fair Housing, and,
 - The Consolidated Plan and PHA Plan regulation sections regarding certification that a program participant is affirmatively furthering fair housing.
3. The final rule must not allow the expression “strategically enhancing neighborhoods” to preclude use of resources for a project in an area where limited community development funds are not targeted, if resources will preserve an individual affordable housing development at which a majority of residents choose to remain, or if resources will be used for a development project to be created or sponsored by a community-based development organization.

B. Section 5.152 Definitions

“Affirmatively furthering fair housing”

The preamble (FR 43715) states that program participants will assess whether laws, policies, or practices limit fair housing choice, as well as the role of public investments in creating, perpetuating, or alleviating the segregation patterns revealed by the assessment. Examples of such laws, policies, or practices include, but are not limited to zoning, land use, financing, infrastructure planning, and transportation.

Comments

1. The text of the proposed definition of “affirmatively furthering fair housing” refers to “instituting strategies or taking actions”. Perhaps HUD means to imply “laws, policies, or practices”.

The final rule must explicitly include a program participant’s laws, policies, and practices in the definition of “affirmatively furthering fair housing”, as well as in Section 5.154 pertaining to the content of an AFH and Section 5.162 regarding review of an AFH.

2. As noted in the comments regarding Section 5.150, the definition of affirmatively furthering fair housing choice must clearly indicate that this may entail devoting resources to improve areas of concentrated racial and ethnic poverty by preserving and improving affordable housing, and by implementing investment policies that augment access to essential community assets for protected class residents who wish to remain in their communities – while protecting them from the forces of displacement.

“Fair housing choice”

Comment

As noted in the comments regarding Section 5.150, the definition of fair housing choice must clearly indicate that “choice” includes residents’ ability to choose to remain in homes and communities where they have long lived and where they have deep and important social, community, and economic ties, even if those communities are racially or ethnically areas of concentrated poverty.

“Fair housing issue”

The text defines a fair housing issue as “ongoing local *or* regional...”

Comment

Elsewhere in the text, for example in the critical section 5.154, the proposed rule uses “local *and* regional”. Because fair housing issues do not stop at the borders between jurisdictions, it is important that the definition of fair housing issue use “and” instead of “or”.

C. Section 5.154 Assessment of Fair Housing (AFH)

Subsection (d) Content

At the opening paragraph (d) the text states, “The AFH *will* address integration and segregation, concentrations...” At subparagraph (d)(2) the text reads, “Based upon HUD-provided fair housing data, available local or regional data, and community input, the analysis *will*:...” And at subparagraph (d)(3) the text reads, “Using an assessment tool provided by HUD, the assessment *will* identify...”

Comment

The preamble (FR 43718) uses the same language but instead of “will” uses “must”. Other 5.154(d) subparagraphs use “must”. NLIHC suggests consistent use of the stronger word “must” at (d), (d)(2), and (d)(3).

Subparagraph (d)(4) Identification of fair housing priorities and general goals

This paragraph builds upon those preceding it in a logical fashion, requiring the AFH to identify and prioritize fair housing “issues” and then to identify the “most significant” fair housing “determinants” [note the plural] related to the priority fair housing issues. Given the most significant determinants, the AFH is required to “set and prioritize one or more goal(s) for mitigating or addressing the determinants”.

Comments

1. Program participants must not be allowed to merely indicate one fair housing goal for a five-year period. The final rule must require program participants to set and prioritize fair housing goals based on all of the most significant fair housing determinants.
2. Any AFH that fails to identify or include fair housing issues and determinants raised through public comment should automatically fail to receive HUD “acceptance”.
3. The final rule should require program participants to establish benchmarks in the AFH for each fair housing goal. For each goal, the AFH must require program participants to list specific actions that will be taken toward achieving the goal, a timetable for each action, and the entity responsible for taking each action. This will provide the public and HUD with expectations for the types of specific proactive steps HUD calls for in the proposed definition of affirmatively furthering fair housing. Without a degree of specificity it is far too easy for a program participant to harbor weak actions or even inaction in nebulous, overly general goals.

Furthermore, a listing of specific actions with timetables and responsible parties will enable the public and HUD to measure annual progress toward realizing fair housing goals, and to assess the extent to which ConPlan and PHA Annual Action Plans comply with the obligation to affirmatively further fair housing choice.

C. Section 5.154 Assessment of Fair Housing (AFH), *continued*

As noted before, the preamble (FR 43715) states that program participants will assess whether laws, policies, or practices limit fair housing choice, as well as the role of public investments in creating, perpetuating, or alleviating the segregation patterns revealed by the assessment. Examples of such laws, policies, or practices include, but are not limited to zoning, land use, financing, infrastructure planning, and transportation.

Comments

The text of the final rule should clearly reflect the preamble's intentions, perhaps at 5.154(d)(3), stating that the AFH must include an assessment of the program participant's:

- i. Laws, policies, and practices, and
- ii. Use of all resources, not just HUD resources available during the preceding five-year period.

D. Section 5.158 Community participation, consultation, and coordination

Subparagraph (a)(2) pertaining to public housing agencies (PHAs) reads, "PHAs must follow the policies and procedures described in 24 CFR 903.7 and 903.19 in the process of developing the AFH, obtaining community feedback, and addressing complaints."

Comments

Section 903.7 details the required content of the PHA Plan; it does not contain policies or procedures for resident and community participation. Section 903.19 is merely a summary provision indicating that a PHA may submit a five-year PHA Plan or Annual Plan after it has conducted a public hearing and considered comments.

The final rule should instead cite the more detailed resident and public participation subsections:

- 24 CFR 903.13, pertaining to Resident Advisory Board RAB involvement
- 24 CFR 903.17, pertaining to the process for obtaining public comment on PHA plans, and
- 24 CFR 903.21, pertaining to the process for amending or modifying the PHA plan

E. Section 5.160 Submission requirements

Subsection (a)

Subsection (a) proposes timeframes for submission of initial and subsequent AFHs. The preamble asks whether the proposed timeframes will achieve the objective of allowing the results of an accepted AFH to inform a ConPlan or PHA Plan.

Comments

1. The proposed timeframes are appropriate. However, there is a concern about the volume of AFHs that will be submitted by ConPlan entities that have a July 1, program year. According to information provided by HUD's Office of Community Planning and Development, 39% of all ConPlan jurisdictions (471) will be preparing a new five-year ConPlan for July 1, 2015. Another 103 (13% of 2015 submissions) will be preparing new ConPlans for January 1, 2015, and 94 (12% of all 2015 submissions) have an October 1, 2015 program year.

E. Section 5.160 Submission requirements, *continued*

In order to avoid an inordinate influx of AFHs for HUD’s Office of Fair Housing and Equal Opportunity (FHEO) staff to adequately review (see comment on at F below), HUD should stagger the required submission dates over the course of 2015.

2. Also, if the AFFH rule is not finalized in time for the 775 ConPlan submissions (64% of all submissions) scheduled for 2015, HUD should not postpone until the year 2020 their compliance with a final AFFH rule. Rather, HUD should transition these ConPlan submissions to the new AFFH requirements within a one or two year timeframe.

Subsection (c)

Subsection (c) would require PHAs that choose to undertake their own AFH to “update” their AFH annually.

Comments

1. The term “update” should be defined; clearly a PHA would not need to undertake a complete AFH exercise every year. Rather, a PHA should determine whether there have been or will be any significant changes that warrant adjusting fair housing actions, strategies, or goals – as should any program participant.
2. The proposed text makes a reference to 24 CFR 903.15(b) and (c). The text should probably refer to 903.15(a)(2) and (c).

F. Section 5.162 Review of AFH

Subsection (a) General

Comment

The staff of HUD’s Office of Fair Housing and Equal Opportunity (FHEO) have an understanding of the nuances of fair housing issues and determinants, plus they have a more objective, arms-length relationship with program participants because their relationship is not directly linked to program funds such as CDBG and public housing operating funds.

Therefore, the final rule should explicitly state that, after consulting with other HUD program staff, FHEO staff have full authority over the AFH review and acceptance function, as well as the certification that a program participant is affirmatively furthering fair housing. This functional authority should be rooted in regulation, not a Memorandum of Understanding, because it is crucial that FHEO staff maintain this authority over the course of fluctuating priorities of subsequent administrations.

Subsection (b) Standard of review

This subsection mimics the standard of review in the ConPlan regulations, with a slight improvement in subparagraph (b)(2) which defines failure to include as one of the regulation’s required elements, “an assessment that has priorities or goals materially inconsistent with the data and other evidence”.

Comments

Based on advocates’ experience, the ConPlan standard of review is inadequate.

1. Subparagraph (b)(1) gives as an example of an AFH that is substantially incomplete, one developed without the required community participation or required consultation.

This subparagraph should be refined.

- a. Regarding community participation, advocates have experienced ConPlan public participation processes that have a structure which only provides superficial compliance, enabling a jurisdiction and HUD to “check a box” indicating that a hearing was held and that there was some minimal notice that a draft ConPlan or Annual Action Plan is available. Residents and advocates often experience a proforma process, without genuine notice and adequate opportunity to review materials and offer comments, and with little regard for comments or complaints.
- b. Regarding consultation, especially with fair housing advocates and organizations as proposed at 24 CFR 91.100(e), any of the entities indicated at 91.100 should be able to challenge whether consultation was adequate in order to preclude a program participant from only consulting favored entities.

Therefore, this subparagraph must refer to a formal mechanism that enables the public and entities that should be consulted to challenge assertions that community participation or entity consultation was adequate. (See “NLIHC Proposes a New Subsection, page 8)

2. Subparagraph (b)(2) gives as another example of an AFH that is substantially incomplete as one that fails to satisfy a required element.

This subparagraph should be refined also.

- a. The final rule should substitute “and” for “or” so that it reads, “priorities *and* goals”.
- b. The subparagraph should explicitly list the required elements in order to prevent ambiguity for program participants, the public, and FHEO reviewers.
- c. The one example that is offered, “an assessment that has priorities *and* goals materially inconsistent with the data and other evidence”, should also be refined to include:
 - An assessment that fails to include fair housing issues and determinants raised by community participation or entity consultation.
 - An assessment that fails to include meaningful actions, strategies, and proposed laws, policies, and practices to address fair housing issues and determinants.

F. Section 5.162 Review of AFH, *continued*

NLIHC Proposes a New Subsection

1. The final rule must have a mechanism that provides advocates with means to challenge an AFH sent to FHEO for approval as FHEO reviews it during the proposed 60-day period. Although the AFH submitted for FHEO acceptance is required to have a summary of comments and an explanation of the program participant's reasons for not adopting them, ConPlan experience suggests that such summaries are often not representative of the comments, and the rationales for rejecting comments are inadequate. FHEO staff should have access to all information, especially from the people the Fair Housing Act intends to serve.
2. It is also of the utmost importance that the final rule have a mechanism that enables advocates to appeal to FHEO Headquarters a decision by the local FHEO office to accept an AFH or (later) a certification that a program participant is affirmatively furthering fair housing choice.

Subsection (c) Revisions and resubmissions

This subsection affords a ConPlan jurisdiction 45 calendar days to revise and resubmit an AFH that HUD decided not to accept. The term "revised" is mentioned throughout.

Comment

Because Section 5.164 "Revising the AFH" concerns the very serious requirement to "revise" an AFH when there are significant material changes in circumstances, such as Presidentially-declared disasters, NLIHC suggests the final rule use an alternative term for the types of alterations envisioned in Subsection 162(c); perhaps the term "modified" AFH.

G. Section 5.164 Revising the AFH

Revising the AFH After a Major Disaster

Comment

As suggested by the Fair Housing Center of New Jersey, the proposed rule is not sufficiently specific regarding the process and timeframe for an AFH update after a major disaster. The update process must be integrated with the timeline for the Action Plan under CDBG-DR. CDBG-DR Action Plans should discuss how the required data in the CDBG-DR Notice impacts fair housing determinants identified in the AFH and/or creates new fair housing problems. Grantees should also indicate how the programs in the CDBG-DR Action Plan will address those fair housing problems.

G. Section 5.164 Revising the AFH, continued

Subparagraph (a)(2) Criteria for revising the AFH

The text cites the public participation aspects pertaining to “substantial amendments” to ConPlans and “significant amendments” to PHA Plans, requiring ConPlan jurisdictions or PHAs to “specify the criteria that will be used for determining which significant material changes will require revisions to the AFH”.

Comment

This subparagraph is titled “Criteria for revising the AFH”.

For ConPlan jurisdictions the text merely cites the entire regulation, 24 CFR part 91; it should specifically cite Subsections 91.105(c)(1) for entitlements, 91.115(c)(1) for states, and 91.505(b) for both.

The PHA Plan regulation citations in this subparagraph all refer to the resident and public participation sections of the PHA Plan regulations (24 CFR 903.13, 903.17, and 903.21), not the appropriate PHA Plan regulation, which is 903.7(r)(2)(ii).

Subsection (b), “Community participation” does cite the correct sections of the PHA Plan regulations.

Subsection (c) Submission to HUD

The text requires a PHA that has to submit a revised AFH to make the revision public and send it to HUD again at the time a PHA Plan substantial amendment must be submitted to HUD pursuant to 24 CFR 903.23.

Comment

Section 903.23 does not refer to any timeframe; rather it details what HUD does in its review process. The final rule should cite 903.21.

H. Section 5.166 Recordkeeping

Subsection (a) General

The text requires program participants to make all records in this section available to HUD, and specifically lists basic information such as: information relating to the AFH such as statistical data and studies; records demonstrating compliance with the required consultation and community participation; and, records demonstrating the actions taken to affirmatively further fair housing.

Comment

The final rule should add that such basic information must also be made available to the public. The references to public access to records in the ConPlan regulations at 24 CFR 91.105(h) for entitlements and 91.115(g) for states are not adequate.

I. Section 91.100 Consultation; local governments

Section 91.110 Consultation; states

Subsection 100(e) Affirmatively furthering fair housing [for entitlements]

Subparagraph 110(a)(2) [for states]

Comments

1. The intent of these new provisions would be clearer if the long paragraph is divided into subparagraphs. For example:
 - (e) Affirmatively furthering fair housing. The jurisdiction shall consult with community and regionally based organizations that represent protected class members, and organizations that enforce fair housing laws, such as State or local fair housing enforcement agencies (including participants in the Fair Housing Assistance Program (FHAP), fair housing organizations, and other nonprofit organizations that receive funding under the Fair Housing Initiative Program (FHIP), and other public and private fair housing service agencies, to the extent that such entities operate within its jurisdiction. This consultation will help provide a better basis for the jurisdiction's AFH, its certification to affirmatively further fair housing and other portions of the consolidated plan concerning affirmatively furthering fair housing.
 - (1) This consultation must occur with any organizations that have the capacity to engage with data informing the AFH and be sufficiently independent and representative to provide meaningful feedback to a jurisdiction on the AFH, the consolidated plan, and their implementation.
 - (2) A Fair Housing Advisory Council, or similar group, that includes community members and advocates, fair housing experts, housing and community development industry participants, and other key stakeholders is an acceptable method, among others, to meet this consultation requirement.
 - (3) Consultation must occur throughout the fair housing planning process, meaning that, at a minimum, the jurisdiction will consult with the organizations described in this paragraph (e) in the development of both the AFH and the consolidated plan.
 - (4) Consultation on the consolidated plan shall specifically seek input into how the goals identified in an accepted AFH inform the priorities and objectives of the consolidated plan.
2. The sentence discussing a Fair Housing Advisory Council should be clarified. It could be interpreted to allow a jurisdiction to meet the consultation requirement by only engaging a hand-picked advisory council while avoiding consultation with any of the fair housing organizations listed at the beginning of the entire section (such as FHIPs and other public and private fair housing service agencies).
3. The last line of text for Section 91.110(a) is "With respect to public housing:" and proceeds to subparagraph (1) which appropriately discusses consultation with PHAs. However, subparagraph (2) does not discuss PHA consultation; it concerns consultation with fair housing organizations.

J. Section 91.105 Citizen participation plan; local governments
Section 91.115 Citizen participation plan; states

Section (b)(2) Development of the AFH and the consolidated plan

The text continues the 1994 regulatory language regarding “publishing” the proposed AFH.

Comment

In addition to the traditional methods such as making copies available at public places, the final should require jurisdictions to post the proposed AFH and all relevant data and other information used in drafting the proposed AFH on a readily identifiable page of the jurisdiction’s website.

The final rule and future guidance should also suggest that notice of the availability of the proposed AFH and related information be via social media and other future electronic means.

The other sections of the ConPlan regulations at which “notice” is required and documents must be made available should also include language regarding posting on the readily identifiable webpage and use of social media and other electronic means. These include: 105(c) and 115(c) amendments, 105(d) and 115(d) performance reports, 105(e) and 115(e) public hearings, and 105(g) and 115(f) availability to the public of final documents.

K. Section 91.215 Strategic plan; local governments
Section 91.315 Strategic plan; states

Subsection (a)(5)(i) requires jurisdictions to describe how the priorities and objectives in the Strategic Plan will affirmatively further fair housing by setting forth strategies and actions consistent with the goals and other elements in the AFH.

Comment

Subsection (a)(5)(ii) continues, requiring jurisdictions to identify additional objectives and priorities for affirmatively furthering fair housing not addressed in (i). It is not clear what is being required; perhaps several examples are warranted.

L. Section 91.225 Certifications; local governments
Section 91.355 Certifications; states

Subparagraph (a)(1) Affirmatively furthering fair housing

Comments

1. As previously stated, the final rule must reinforce a balanced approach to affirmatively furthering fair housing by assigning equal importance to preserving affordable housing and investment in distressed communities, as well as promoting mobility. Therefore, the final sentence should be modified to include language stating that preservation of affordable housing and investment in areas of racial and ethnic concentrations of poverty are not actions necessarily materially inconsistent with the obligation to affirmatively further fair housing.

L. Section 91.225 Certifications; local governments, Section 91.355 Certifications; states, *continued*

2. Also as previously stated at NLIHC’s comments regarding HUD review of the AFH, it is of the utmost importance that the final rule have a mechanism that enables advocates to appeal to FHEO Headquarters a decision by the local FHEO office to accept a certification that a program participant is affirmatively furthering fair housing choice. Subparagraph (a)(1) should consist of the proposed text at (i), modified as suggested in #1 above, with a new, separate (ii) describing the suggested mechanism for public challenge to a certification.

M. Section 91.330 Monitoring; states

Section 91.230 for entitlements adds these jurisdictions’ responsibility for monitoring activities carried out in furtherance of the ConPlan, “including strategies and actions that address fair housing issues and goals identified in the AFH”.

Comment

Section 91.330 for states should also be amended to include the reference to the AFH.

N. Section 91.520 Performance reports

Comment

The proposed rule would modify the ConPlan regs in various places to weave in AFH and AFFH; however, a key section of the ConPlan regs was not included – Section 91.520 Performance Reports. The existing rule does require jurisdictions to describe actions taken to affirmatively further fair housing.

The final rule should require annual performance reports to indicate actions carried out to mitigate or address each of the benchmarks set for the fair housing goals in the AFH, describe the results of those actions, specify which fair housing issues were impacted and how they were impacted, and describe strategies for correcting for actions that were not successful.

O. The Proposed AFFH Rule and PHA Plans

Comments

1. The Administration’s Intent To Eliminate Annual PHA Plans

NLIHC supports the augmented references to affirmatively furthering fair housing and greater integration of the Assessment of Fair Housing in the PHA Plan regulations text. However, NLIHC is very concerned about the apparent disconnect between the stated intent of the proposed rule to better ensure that the AFH informs the PHA Plan and the Administration’s statements in several portions of its FY2014 Congressional Justification documents. At three places the Administration proposes to “...eliminate the requirement that PHAs complete and submit PHA Annual Plans.” Although these documents indicate that HUD would provide a replacement, it is far from clear that any replacements would adequately comport with the AFFH intent of the proposed rule. How will any replacement enable residents and the community to assess a PHA’s progress toward achieving its fair housing goals for affirmatively furthering fair housing?

O. The Proposed AFFH Rule and PHA Plans

2. Insufficient Integration of the AFH in the PHA Plan

NLIHC is heartened by the proposed rule's intent to have the AFH inform the PHA Plan process. However, unlike the proposed changes to the ConPlan's public participation provisions, the proposed rule does not insert references to the AFH in the key provisions of the PHA Plan rule, especially those relating to resident and public participation. The AFH and consideration of its goals with respect to a PHA's programs, policies, and practices should be integrated into the following:

- 903.6, pertaining to information in the five-year PHA Plan
- 903.13(a)(1) and (2), pertaining to the Resident Advisory Board's (RAB's) role in making recommendations regarding the development of the PHA Plan and any significant amendments.
- 903.13(c), pertaining to the PHA's obligation to consider the RAB's recommendations in preparing the final Annual Plan and any significant amendment to the Annual Plan.
- 903.13 (c)(2), pertaining to a RAB's claim that a PHA failed to provide adequate notice and opportunity to comment about a proposed Annual Plan or significant amendment.
- 903.17, regarding obtaining public comments on the five-year PHA Plan and Annual Plan.
- 903.19, regarding the point at which a five-year PHA Plan or an Annual Plan is ready to be submitted to HUD.
- 903.21, regarding significant amendments to a five-year PHA Plan or Annual Plan.
- 903.25, pertaining to HUD's response to complaints regarding PHA noncompliance with its PHA Plan.

P. Section 903.2 Deconcentration of Poverty in Public Housing Developments

Subparagraphs (a)(3)

The proposed AFFH modification to subsection 903.2(a) would add subparagraph (3) suggesting that a PHA's policies that govern its development related activities, including rehabilitation and modernization, should be designed to reduce racial and national origin concentrations.

Comment

Although reducing racial and national origin concentrations of poverty is an appropriate goal, it is important that the final rule also expressly respect the choice of existing residents who wish to remain in their homes and communities while benefitting from rehabilitation and modernization of their public housing developments. There must be language in (a)(3) that recognizes that development related activities honoring the housing choices of existing residents is not contrary to the spirit of affirmatively furthering fair housing choice. HUD's current endeavors, the Choice Neighborhoods Initiative and the Rental Assistance Demonstration, embody the importance of improving the public housing stock for current residents.

P. Section 903.2 Deconcentration of Poverty in Public Housing Developments, *continued*

Subparagraphs (d)(3)(i)(A) Validity of certification

The existing subparagraph indicates that a PHA's certification that it is affirmatively furthering fair housing is subject to challenge if it "Does not reduce racial and national origin concentrations in developments or buildings and is perpetuating segregated housing".

Comment

Again, there is danger that this provision could be interpreted to preclude the use of capital funds or other resources to rehabilitate, modernize, or otherwise improve the living conditions for existing residents of public housing who choose to remain in their homes and communities. This item must be modified accordingly.

Q. Section 903.7(o) Civil rights certification

Subsection 903.7(o)(1)

Comments

As previously stated, the final rule must reinforce a balanced approach to affirmatively furthering fair housing by assigning equal importance to preserving affordable housing and investment in distressed communities, as well as promoting mobility. Therefore, the final sentence of this subparagraph regarding certification that a PHA is affirmatively furthering fair housing should be modified to include language that states that preservation of affordable housing and investment in areas of racial and ethnic concentrations of poverty are not actions necessarily materially inconsistent with the obligation to affirmatively further fair housing.

Subsection 903.7(o)(3)(vi)

A PHA will be considered in compliance if it meets the seven factors listed under (3).

Comment

Item (vi) is, "Complies with any contribution or consultation requirement..."

The word "contribution" is confusing. Perhaps the words should be "any resident and public participation or consultation requirement..."?

R. Section 903.7(r)(1) Annual Performance Reports

Comment

The final rule does not modify the PHA Plan performance reporting regulations. The final rule should require annual performance reports to indicate actions carried out to mitigate or address each of the goals in the AFH, describe the results of those actions, and specify which fair housing issues were impacted and how they were impacted.

S. Section 903.15 Relationship of the PHA Plan to ConPlan and AFH

Subsection 903.15(a)

Comment

There should be an additional option available to PHAs, that of explicitly allowing one or more PHA in a region to work together to develop a joint AFH. Each PHA should maintain its own obligation to affirmatively further fair housing and to set its own PHA-specific goals and report on its progress in meeting these goals.

Subparagraph 903.15(a)(1) Option 1

This provision offers a PHA the choice of working with a local jurisdiction to develop a joint AFH. A PHA choosing this option would be required to work with the jurisdiction in which 60% of its “hard units” are located.

Comments

1. Given the growing predominance of Housing Choice Vouchers, “hard units” should not be the sole consideration for the AFH; rather the full portfolio of a PHA’s federally assisted units, vouchers, project-based vouchers, and RAD converted units whether PBV or PBRA.
2. PHAs choosing Option 1 should have the discretion to decide which ConPlan jurisdiction to work with in developing a joint AFH, provided the PHA has some “hard units” or some vouchers in the same geographic area as the ConPlan jurisdiction, and provided the joint AFH covers all of the PHA’s hard units and vouchers.

Subparagraph 903.15(a)(2) Option 2

Comment

Any PHA in a metropolitan area administering a Housing Choice Voucher program that chooses Option 2 should be required to consider the entire metropolitan area as its geographic scope for the AFH and in certifying that it is affirmatively furthering fair housing choice.

T. Section 903.17 Obtaining public comment on the PHA Plan

The proposed rule at Section 5.150(a)(2) requires PHAs to follow policies and procedures for obtaining resident input when developing the AFH (although inaccurately and incompletely offering provisions of the PHA Plan regulations, see item D in this letter).

Comment

The revised ConPlan regulations provide a new subparagraph 91.105(a)(4) addressing Limited English Proficiency concerns. The PHA Plan regulations should be revised in a similar fashion by inserting similar text at Section 903.17(b)

U. Moving to Work Demonstration PHAs

PHAs granted broad flexibility under the Moving to Work Demonstration (MTW) are not subject to the PHA Plan requirements. They are, however, required to comply with fair housing laws.

Comment

The final rule should specifically refer to MTW agencies, requiring them to follow all of the relevant AFFH/AFH provisions, but with reference to MTW Annual Plans and Annual Reports.

V. Responses To Several Questions Posed by HUD

Question 8, Other Planning Efforts

Two other sets of plans and programs should be coordinated with the fair housing planning effort contemplated by the proposed rule: The Low Income Housing Tax Credit (LIHTC) Qualified Allocation Plan, and the Department of Transportation's (DOT's) Metropolitan Transportation Plan (MTP) and/or Transportation Improvement Plan (TIP).

The Fair Housing Act orders all federal departments to administer their programs and activities relating to housing and community development in a manner to affirmatively further the purposes of the Act, and orders all federal departments to cooperate with the HUD Secretary.

Treasury Department

Given the size of the LIHTC program and studies indicating LIHTC-financed projects are often located in areas of concentrated racial and ethnic poverty, the LIHTC program and its Qualified Allocation Plan (QAP) process should be included in the AFH analysis and AFFH certification consideration. The statute requires QAP selection criteria to include, among other factors, the location of proposed projects and the needs of two protected classes, special needs populations and families with children.

Department of Transportation

DOT's Metropolitan Transportation Plan (MTP), is a planning document that considers goals, strategies, and projects with a 20-year time horizon; it is updated every five years. The Transportation Improvement Plan (TIP) is a statement of proposed transportation investments that is updated every four years. Metropolitan Planning Organizations, which have a comprehensive public participation process, are responsible for these planning endeavors. There is also a parallel statewide process.

Transit-Oriented Development, the siting of transit lines and transit stops, bus routes and frequency, and ensuring new roads do not lead to segregation are examples of issues that could be informed by coordination of AFH and MPO planning.

A key component of DOT practice, "Environmental Justice", is rooted in Title VI of the Civil Rights Act of 1964. The Federal-aid Highway Act of 1970 requires assurances that "possible adverse economic, social, and environmental effects relating to any proposed project on a Federal-aid system have been fully considered in developing such project..." Among the adverse effects, the statute lists destruction of

community cohesion and the availability of public facilities and services, and injurious displacement of people and businesses.

Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (February 11, 1994) states "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."

DOT Order 5610.2 (February 3, 1997) implements EO 12898 by summarizing and expanding upon it, describing the process for incorporating environmental justice principles in all DOT programs, policies, and activities. The EO’s term “adverse human health or environmental effects” is explicitly expanded to include interrelated social and economic effects. “Adverse effects” means “the totality of significant individual or cumulative human health or environmental effects, including interrelated social and economic effects”, which may include: displacement; destruction or disruption of community cohesion or a community’s economic vitality; destruction or disruption of the availability of public and private facilities and services; increased isolation, exclusion or separation of minority or low income individuals within a given community or from the broader community; and, adverse employment effects.

Question 9, Disproportionate Housing Need in ConPlan and AFH

NLIHC thinks a disproportionate housing need analysis should be in both the AFH and the ConPlan because the ConPlan regulation calls for the analysis to be based on the income categories of extremely low income, low income, moderate income, and middle income. Given the overwhelming gap in housing affordable to extremely low income households, without an analysis in the ConPlan, it would be even easier for jurisdictions to set ConPlan priorities that do not address the crucial need for housing programs and policies that serve extremely low income people.

Question 14, Improving the ConPlan Public Participation Requirements

The ConPlan public participation requirements, which the proposed rule would modify to incorporate the AFH, could be improved in several ways to foster more genuine and complete public participation.

- Given the amount of information in a draft AFH or draft ConPlan, a 60-day public review and comment period is warranted. Not only is there much to read and assess, community-based organizations need time for their members to process comments before presenting them at a hearing or later in writing. [Sec. 91.105(b)(4)]
- There must be an adequate amount of time between the availability of a draft AFH or draft ConPlan and a public hearing to obtain public comments about it, perhaps 30 days. Advocates have experienced public hearings about draft ConPlans within the current 30 day review and comment period, affording the public only one or two weeks to review the draft and prepare testimony. [Sec. 91.105(b)(3)]
- There must be a reasonable amount of time between the hearing about the draft AFH or ConPlan and submission to HUD for review, perhaps one to two weeks. Advocates have experienced ConPlans or PHA Plans submitted to HUD a day or two after a public hearing, not a sufficient amount of time for the jurisdiction or the PHA to have considered public or resident comments. [Sec. 91.105(b)(5)]
- In 1994 advocates called for a period of 60 days to review ConPlan performance. Given the importance of AFFH performance, there must be more than a 15-day review period. At a minimum 60 days is suggested in light of the next point – the need for a performance report hearing.

- There must be a separate public hearing for the performance reports pertaining to the AFH and ConPlan. The CDBG statute, the basis for the ConPlan public participation regulations, calls for “public hearings to obtain citizen views and to respond to proposals and questions at all stages of the community development program, including at least the development of needs, the review of proposed activities, and review of program performance” [42 USC 5304 (a)(3)(D)]