

October 27, 2016

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

Re: Affirmatively Furthering Fair Housing, Assessment Tool for States and Insular Areas,
Docket No. FR-5173-N-08-B (released September 28, 2016)

Dear Secretary Castro,

The undersigned civil rights and public policy organizations are pleased to submit our comments regarding the Assessment Tool for States and Insular Areas. Many of us have previously submitted recommendations regarding the state tool and other AFFH guidance,¹ and this letter focuses specifically on new observations regarding this version of the tool and the accompanying Federal Register discussion. In particular, we write to address the role of states in responding to both state and local fair housing issues; the need for the state AFH to assess additional contributing factors particular to state legal and financial authority, which differs in nature as well as in degree from localities'; and the need for HUD to use the tool to clearly and consistently encourage the use of local data, local knowledge, community participation, and interagency coordination. We also summarize recommendations submitted with regard to the Local Government Assessment Tool that are equally relevant here, including the need for a more comprehensive Insert rubric.²

1. Assessment of state-level and local-level policies

Throughout the tool, the current language instructs the participant to focus on state rather than local policies and practices. (For example, the tool asks that the participants “focus on trends [in demographics, laws, policies, or practices] that affect the state or areas of the state, rather than creating an inventory of local laws, policies, or practices.”) Yet local-level policies and practices are often key indicators of the fair housing impacts of state policies and practices.

There will frequently be patterns or significant instances of local or regional fair housing issues to which the state is best positioned to respond, due to the nature of its legal and funding authority.³ As just one example, it would be appropriate for a state to assess the degree to which localities are attaching inclusionary housing policies to transit-oriented development; such a cumulative inventory would illuminate the potential need for state actions. Additionally, states' responses to local fair housing issues are particularly important given the regional nature of fair

¹ See, e.g., www.prrac.org/pdf/Civil_Rights_Sign-On_State_AFH_Comment_Letter.pdf.

² See letter commenting on Docket No. FR-5173-N-10 (filed Sept. 22, 2016), available at http://prrac.org/pdf/AFFH_Local_Tool_Comments_9.22.16.pdf.

³ This is one of the reasons that we emphatically support HUD's decision to require that the state AFH encompass entitlement jurisdictions (see discussion in Fed. Reg. at 66761). Throughout this letter, we use the term “region” in the sense of a metropolitan region (not a multi-state region, which as Federal Register notes may raise confusion).

housing; problematic patterns in local housing issues may call for states to incentivize or enable regional action.

State participants should not be discouraged from assessing cumulative local laws, policies, and practices when doing so is needed to inform the state's own fair housing policy choices. (To the extent the current language is not intended to discourage this, it reads as confusing, and in some cases likely to solicit a vague response.) On the contrary, states should be instructed to review both state policies *and* significant issues/issue patterns arising among localities. HUD and the participants will need to exert reasonable judgment in making a determination whether a given local-level issue or pattern of issues is significant for a state, but HUD should make it clear that local issues are within the scope of the state AFH. We recommend that HUD include a section within the tool's general instructions discussing how both local-level and state-level information is relevant to the state AFH. These instructions should make clear that the state AFH must still identify goals for which the state itself is responsible.

HUD should also clarify its instructions accordingly throughout the document. For example, the "trends" language could be changed as follows:

Informed by community participation, any consultation with other relevant government agencies, and the program participant's own local data and local knowledge, discuss whether there are any trends in demographics, laws, policies, or practices that may impact R/ECAPS in the State, in the future. *Participants should discuss trends that affect the state or trends that affect areas of the state. Though participants need not generate a comprehensive inventory of local laws, policies, or practices, significant patterns or other information from the local or regional level should also be included as reasonably necessary to assess fair housing.*

2. Public participation and local data and knowledge

a) Consistently prompt use of local data and knowledge and participatory input.

While isolated sections of the tool prompt the use of local data and knowledge and community participation, such language should be used more consistently throughout the tool (including encouragement of inter-agency consultations). As the instructions already make clear that the pursuit of such data and knowledge need not be burdensome, this emphasis – rather than being repetitively stated throughout the tool – should be balanced by encouraging the consideration of relevant data, knowledge, and participatory input as appropriate throughout. Without doing so, the tool suggests to the reader that the AFH review will not take seriously the failure to consider such information, even when it is necessary and available as defined by the regulation.

For example, we recommend that the following language:

"Note to Public: Where HUD has not provided data for a specific question and program participants do not have local knowledge or local data, as outlined in 24 C.F.R. § 5.152, that is relevant to answering the question, participants may note the lack of such available information. Program participants should not leave the response blank."

...be replaced by language stating:

“Where HUD has not provided data for a specific question, or to supplement the HUD-provided data, program participants are encouraged to provide local knowledge or local data, as outlined in 24 C.F.R. §5.152. This includes the consideration of information provided by community participation. Other agencies may also be useful sources of local data and local knowledge. In most cases, HUD expects that the participant will be able to provide substantive answers supported by these sources. The participant should otherwise explain the lack of such information, but may not leave the response blank.”

Additionally, we specifically recommend that the “additional information” and “contributing factors” section be prefaced by a statement that local data and knowledge, interagency consultation, and community participation is likely to be helpful (consistent with HUD’s language elsewhere, for example in the “Disparities in Access to Opportunities” section). These are broad areas where HUD’s list of potential issues is not intended to be exhaustive and scoping will be particularly useful.

With regard to the availability of data from other agencies, we recommend that the language be adjusted to clearly and consistently convey HUD’s expectation that the participant proactively take steps to incorporate such information where it fits the description of 24 C.F.R. §5.152. HUD has done this for portions of the Opportunities Indices section, stating, e.g., “Program participants can reference studies or reports issued by other State agencies, and these studies or reports may be necessary and relevant for the completion of the AFH.” This is an excellent step, but such language should be incorporated into the general instructions for use of local data and local knowledge, and other relevant sections of the tool. (Contrast the current language in “Note to States on Use of Local Data and Local Knowledge” at p. 23.)

HUD has noted that it intends to provide further guidance on these topics, and we recommend that such guidance include templates for cross-agency collaboration, as well as methods for incorporating data, knowledge, and participatory input throughout numerous areas of the tool. We also recommend that HUD remind participants that mechanisms for interagency coordination (around programmatic initiatives, grant formulation, and enforcement) and data-sharing should be considered when formulating fair housing strategies and actions.

b) Opportunity Indices

By focusing its language *solely* on a review of state policies, the tool will fail to identify local policies that states are best positioned to address. (As in, e.g., “Informed by community participation, any consultation with other relevant government agencies, and the program participant’s own local data and local knowledge, discuss whether there are State programs, policies, or funding mechanisms that affect disparities in access to employment.”) In keeping with our recommendations in (1), above, we emphasize the need for the state tool to include consideration of both when identifying issues and problems, using a reasonable determination of what local information is significant.

Additionally, local data and knowledge and community participation should be prompted in the disparity assessment subsections of the opportunity assessment, not only the policy identification subsections. For example, in determining access to environmentally healthy neighborhoods, such data, knowledge, and participatory input will be key to a meaningful assessment encompassing issues beyond air quality.

For (2)(b) (“additional information”), regarding other potential categories of disparities, we recommend that HUD explicitly include “local data and local knowledge” in addition to “community participation” as a source. This would prompt the participant to proactively include relevant information, including information which it or its fellow agencies are best positioned to provide, rather than placing this burden in entirety on community members.

3. Contributing Factors

As we note above, consideration of both local *and* state information will be integral to a complete and meaningful state AFH. HUD should expand the list of contributing factors to reflect the state role in creating and addressing fair housing issues, beyond simply “scaling up” from the local tool. For example, HUD should add discussions of the following:⁴

- a) Lack of interagency coordination.
- b) Lack of state incentives, or existence of state regulatory barriers, impacting *regional cooperation*, such as coordinated land use, service sharing, and tax sharing.
- c) State regulatory and legislative constraints or lack of support, in areas such as land-banking, brownfields redevelopment, etc.
- d) Effect of state legal standards and codes, in areas such as foreclosure, bankruptcy, eminent domain, tax foreclosure, lending and loan modification, etc.
- e) Lack of enforcement resources, for related areas such as environmental and civil rights protections, in addition to fair housing enforcement.
- f) State taxation policies, which are relevant to consider in addition to revenue distribution.

4. Goals and Priorities

The AFH will be most effective where specific actors are publicly accountable for the implementation of its goals and strategies. The instructions for the “Goals” chart should be

⁴ See, e.g., Lavea Brachman, “New State and Federal Policy Agendas: Realizing the Potential of America’s Legacy Cities and Their Regions,” in *Rebuilding America’s Legacy Cities* (American Assembly, Columbia University, 2012), available at http://americanassembly.org/sites/default/files/download/publications/chapter_10_and_case_study.pdf.

provide that, where possible, the AFH not only state which participant is responsible, but also identify the responsible departmental agency or other entity.

5) Update R/ECAP Data

We recommend that HUD regularly update the R/ECAP data it provides to participants. For example, the current R/ECAP data dates back to 2010. More current data is needed in order to participants to accurately assess and respond to conditions and engage in planning.

6. Additional Recommendations

A number of the undersigned organizations submitted comments on the local tool which we recommend be incorporated into the state tool.⁵ These include:

a) Community participation; consultation

HUD should expeditiously provide guidance regarding community participation, in particular the need to reach out to multiple groups of stakeholders (in education, environmental health, fair housing, and other fields). HUD should also provide guidance regarding the rule's *consultation* provision, 24 C.F.R. 91.100 (requiring consultation with local and regional agencies and governments, and with "organizations that have relevant knowledge or data to inform the AFH and that are sufficiently independent and representative to provide meaningful feedback to a jurisdiction on the AFH, the consolidated plan, and their implementation... at various points in the fair housing planning process").

b) Local data and local knowledge

HUD should incorporate the rule's "local data and knowledge" component as part of its evaluation of whether the AFH is complete, with a section in which participants describe their efforts to obtain local data and knowledge (similar to the community participation section). We appreciate that the scope and sophistication of such data or knowledge will vary depending on the participant's resources. However, as contemplated by the language of the rule, such data and knowledge will in many cases be necessary for a complete AFH.⁶ The State Tool should communicate the responsibility to assess and fulfill this need, with participants documenting strategies such as (for example) outreach to other government agencies. We also urge HUD to issue guidance on recommended practices for the use of local data and knowledge, to include institutionalizing informational pipelines among agencies and enforcement entities; providing lists of common resources to consult; and collaborations with local stakeholders.

⁵ See full discussion of these recommendations at: http://prrac.org/pdf/AFFH_Local_Tool_Comments_9.22.16.pdf.

⁶ See 24 C.F.R. § 5.152, defining "local data" and "local knowledge."

c) Future AFHs should evaluate incorporation of goals into planning processes

As well as being used to establish goals and actions, the AFH process is intended to inform planning processes.⁷ Taken together, these outcomes are at the very heart of the regulation: it is incumbent upon HUD to ensure that the AFH delivers concrete mechanisms for progress and accountability. This section should evaluate whether, and how, the participant has implemented the regulation's provision regarding "planning processes." Participants should be asked to describe relevant fair housing strategies, which of the plans listed in the regulation (as well as others) incorporate such strategies, and whether they have institutionalized mechanisms or relationships (such as interagency partnerships) that facilitate this process.

d) Contributing factors

Transportation: We recommend that the tool explicitly prompt examination of policies around approval, financing, and civil rights oversight, as well as how the design and results of transportation policies may impact other development or preservation issues. The state's full transportation system and funding policies, encompassing its road and highway programs, should be subject to inquiry.

Environmental health: The availability of legislative and regulatory equity mechanisms, such as health impact assessments and cumulative impact analysis, should be noted as a potential contributing factor.

e) Civil rights enforcement

In addition to assessing fair housing enforcement, participants should be instructed to assess other civil rights enforcement. Just as housing is intertwined with other aspects of social equality and opportunity, our nation's body of civil rights protections work in concert. Enforcement of these laws directly impacts access to opportunity and other fair housing aims. Participants should therefore explicitly be instructed to examine the sufficiency of enforcement infrastructure in related areas, such as Title VI of the Civil Rights Act and environmental protections. As with fair housing enforcement, the AFH should include queries into pending complaints, resources, and efficacy of anti-discrimination protections, enforcement, and remedies.

f) Inserts

We recommend that the Inserts require a more substantive examination of the opportunity indices and require participants to identify contributing factors. While we understand that these participants lack the capacity of lead jurisdictions, these fundamental elements of the AFH are needed to identify fair housing issues and actions within the participants' responsibility. In particular, these "secondary" participants should be explicitly instructed to examine their own policies and processes to identify whether they contribute to segregation, lack of access to opportunity indices, or other fair housing issues. These participants are best positioned to make

⁷ See 24 C.F.R. § 5.154, "...identifying goals to affirmatively further fair housing and to inform fair housing strategies in the consolidated plan, annual action plan, the PHA Plan and any other plan incorporated therein, and community plans including, but not limited to, education, transportation, or environmental related plans."

these inquiries, and they have no less of an obligation to address fair housing barriers—particularly those raised by their own programmatic structures—than do larger entities. These sections should be amended to provide that:

- Opportunity indices include the same sub-questions as in the main tool. In identifying “programs, policies, or funding mechanisms that affect disparities in access to low poverty neighborhoods [or other index],” the insert will not be overly burdensome if the participant is instructed to focus on its own programs.
- Both PHA and small local government participants should identify contributing factors. These participants, not the lead participants, are likely to be best positioned to identify the salient factors embedded within their own programs or borders.
- PHAs should examine a more comprehensive list of programmatic barriers. The current list is cursory and fails to address common issues that may severely curtail housing choice, but are firmly within even a small PHA’s capacity to identify. These include source of income and other discrimination, availability of landlord outreach programs, low payment standards, portability restrictions, inspection delays, refusal to extend search times, lack of notice to families of their choices, lack of assistance to families in locating housing in opportunity areas, and geographic concentration of apartment listings provided to HCV families by the PHA.
- With regard to community participation, joint participants should adopt explicit measures to ensure that the participation process includes the focused solicitation of information and recommendations pertinent to each individual participant, as well as the combined AFH.

Thank you for your consideration of these recommendations.

Sincerely,

Megan Haberle
Philip Tegeler
Poverty & Race Research Action Council
Washington, DC
mhaberle@prrac.org
718-614-9804

Thomas Silverstein
Lawyers’ Committee for Civil Rights Under Law
Washington, DC

Deborah Goldberg
National Fair Housing Alliance
Washington, DC

Hilary O. Shelton
NAACP
Washington, DC

Melvin Wilson
National Association of Social Workers
Washington, DC

Isaiah R. Wilson
National Black Justice Coalition
Washington, DC

Seema Agnani
National CAPACD
Washington, DC

Stella Adams
National Community Reinvestment Coalition,
Washington DC

L. Dara Baldwin
National Disability Rights Network
Washington, DC

Kyle Williams
National Urban League
Washington, DC

Alan Jenkins
The Opportunity Agenda
New York, NY

Emily Thaden
Grounded Solutions Network
Portland, OR

Patricia Fron
Chicago Area Fair Housing Alliance

Robert García
The City Project
Los Angeles, CA

Allison Elgart
Equal Justice Society
Oakland, CA

Shelbi Day
Family Equality Council
New York, NY

Andrea Juracek
Housing Choice Partners
Chicago, IL

Erin Boggs
Open Communities Alliance
Hartford, CT

Michael Rawson
The Public Interest Law Project
Oakland, CA

Debra Gardner
Public Justice Center
Baltimore, MD