

Affirmatively Furthering Fair Housing Lawsuit: Overview

May 30, 2018

Background Information:

The National Fair Housing Alliance, Texas Appleseed, and Texas Housers filed suit on May 8, 2018, in the Federal District Court in the District of Columbia to challenge the U.S. Department of Housing and Urban Development's decision to suspend key portions of the Affirmatively Furthering Fair Housing Rule (AFFH). Plaintiffs are represented in this case by the Lawyers' Committee for Civil Rights Under Law, the Poverty and Race Research Action Council, the NAACP Legal Defense and Educational Fund, the American Civil Liberties Union, the Public Citizen Litigation Group, and the law firm of Relman, Dane, and Colfax, PLLC.

On January 5, 2018, HUD had originally suspended the obligation of over 900 jurisdictions to comply with the AFFH rule until after the fall of 2020, effectively delaying implementation of the rule for 5-7 years, based on the jurisdiction's 5-year plan cycles. Then, in May, in response to this lawsuit, HUD withdrew the January suspension notice, and instead withdrew the Assessment of Fair Housing form, accomplishing the same result as the earlier suspension, since the Assessment form is necessary to comply with the rule. Plaintiffs have accordingly amended their complaint and other court pleadings.

The AFFH provision of the Fair Housing Act is arguably the most important provision of the Act, as it requires HUD and recipients of federal funding to work to affirmatively further fair housing and reduce segregation in communities across America. This provision aimed to correct for the government's historical sponsorship of racial segregation, through redlining, public housing concentration, and other measures.

For too long, this requirement went unfulfilled as a result of HUD's failure to ensure that jurisdictions receiving federal funds create plans with concrete goals that effectively further fair housing and reduce segregation. Before 2015, HUD relied on the inadequate "Analysis of Impediments" process. The AI process lacked a system for oversight and gave vague, optional suggestions to localities, and (as HUD was aware) it was often treated as an empty exercise or shirked altogether. The net result was that localities often created plans with vague, unmeasurable goals or goals that, even if followed through upon, would do little to further fair housing or reduce segregation. Meanwhile, housing segregation and discrimination have gone unaddressed and remain severe problems for communities throughout the nation, continuing to raise barriers to opportunity, community diversity, and equality for all.

The AFFH Rule and Suspension:

In 2015, HUD issued the Affirmatively Furthering Fair Housing (AFFH) Rule. The Rule dramatically improves the process by requiring that jurisdictions receiving federal funding create concrete, data-driven solutions whose accomplishment can be measured. This process enables local flexibility and creativity, while at the same time providing accountability for federal spending and progress in civil rights. Under the Rule, HUD reviews each Assessment of Fair Housing (AFH) submitted by a jurisdiction to ensure that it fulfills these functions. If the AFH fails to do so, HUD returns the AFH to the jurisdiction with specific instructions for improvement.

The Lawsuit:

Plaintiffs assert that HUD's action violates the Administrative Procedure Act (APA) for several reasons. The action was arbitrary, capricious, and contrary to law, in that the reasons HUD gave for suspending key portions of the Rule directly conflict with the facts showing that the AFFH Rule was working. HUD ultimately approved nearly all of the AFHs submitted to it in the first year, after providing initial non-acceptances with individualized guidance to approximately one-third of those early participants—thereby committing jurisdictions to take meaningful steps to affirmatively further fair housing. In addition, HUD suspended the rule without undertaking the notice and comment procedures that the APA requires in order to ensure transparency and true public input. Finally, in reinstating the failed Analysis of Impediments process, the action directly conflicts with the Fair Housing Act's requirement that HUD affirmatively further fair housing.