

Robert P. Astorino
County Executive

Kevin J. Plunkett
Deputy County Executive

Submitted Electronically

September 17, 2013

Regulations Division
Office of the General Counsel
Department of Housing and Urban Development
Room 10276
451 7th Street, S.W.
Washington, D.C. 20410-0001

**RE: Docket No. FR-5173-P-01
RIN No. 2501-AD33
Affirmatively Furthering Fair Housing**

Dear Sir/Madam:

The following comments are submitted by Westchester County, New York, a HUD entitlement grantee. Historically, the County has been a recipient of Community Planning and Development Funds (“CPD funds”) for the purpose of making those funds available to those cities, towns and villages in the County that have chosen to be members of the Westchester County Urban County Consortium for CPD funding.

Westchester County has litigation pending before the Court of Appeals for the Second Circuit relating to HUD’s refusal to “accept” the County’s Analysis of Impediments and HUD’s plan to reallocate the County’s FY 2011 CPD funds to other jurisdictions on September 30, 2013. (The County’s CPD funds for FY 2012 and FY 2013 are also being withheld, but are not yet the subject of litigation since reallocation is not imminent.)

Westchester County’s recent experience with HUD is instructive as to how the County would anticipate HUD to exercise its discretion and administer HUD funding under the proposed rules.

Comments on Policy and Legal Concerns with the Proposed AFFH Rule

1. It is unlikely that the proposed AFFH rule will reduce the risk of litigation for grantees, notwithstanding HUD’s “aspirations for the proposed rule” that it will reduce the risk of litigation. Under the proposed rule, HUD’s acceptance of a jurisdiction’s AFH

("Assessment of Fair Housing") means only that the program participant's submission contains the required elements of the AFH. It does not mean that HUD has determined that the jurisdiction has complied with its obligation to affirmatively further fair housing ("AFFH"). The County's experience with HUD demonstrates that this could prove problematic for grantees.

When Westchester County settled a false claims case with HUD in 2009, there was a provision in the settlement agreement that the County would submit an Analysis of Impediments ("AI") to HUD that was "acceptable" to HUD. Since that time, the County has made no fewer than eight (8) submissions, none of which have been found acceptable by HUD. Accordingly, HUD has said that the County's certifications are not valid and has withheld the County's allocation of CPD funds for FY 2011, 2012 and 2013.

The AI is unacceptable to HUD due to Westchester County's finding that zoning in its municipalities is not exclusionary. The County's conclusion is based on its analysis of all 853 local zoning district provisions in its 43 municipalities for "restrictive practices" as identified by the federal monitor appointed under the settlement agreement. HUD and the federal monitor directed the County to provide a legal basis for its findings as well as no fewer than six (6) additional zoning analyses with a focus on African-American and Hispanic demographics in the communities.

In doing the additional zoning analyses, the County continued to find that its municipalities do not have exclusionary zoning and that their zoning ordinances complied with both New York State law as articulated by the Berenson line of cases as well as the relevant federal Fair Housing Act cases which look at disparate impact. However, HUD will not release the CPD funds until Westchester County accepts *its* findings: that the municipalities' zoning is exclusionary.

The Assistant U.S. Attorney representing HUD before a panel of the Second Circuit stated: "What the County is being asked to do here is conduct an analysis of exclusionary zoning and take steps to try to get folks to change that zoning." He acknowledged that the County's zoning analysis was fine, but stated that "what HUD has said is: County, you agree to all the following facts about a particular town but then you won't admit the conclusion (that the zoning is exclusionary)." HUD cannot accept the County's refusal to take actions not supported by its analysis and data.

Accordingly, HUD's having the unilateral authority to approve AFHs is a major concern. Westchester County has had a wasteful exchange with HUD, through hours of "technical assistance" on what qualifies an AI as acceptable. HUD should not have the ability to add additional requirements with each additional submission. It should be clear that the impediments identified and actions to be undertaken by the jurisdiction to address those impediments, are defined by the jurisdiction – not by HUD. HUD should not have the ability to tell jurisdictions that they conducted the AFH correctly, but arrived at the wrong conclusion; this is exactly what HUD has done in Westchester County in its review of the County's AI.

The County's experience is that HUD's decisions will be predetermined by their statistical data, and that CPD grantees will find it difficult to have their AFHs approved if they disagree with HUD's numbers, interpret them differently, or fail to tailor their proposed actions to HUD's predetermined solutions. Finally, if the grantee's proposed actions fall within the jurisdiction of political subdivisions that disagree and choose not to take the proposed actions in their municipalities, a grantee might be required by HUD to sue the offending municipality, as HUD wants Westchester County to do.

2. HUD's proposed AFFH rule raises concerns of federalism. Under New York State's Constitution, cities, towns and villages, but not counties, have jurisdiction over local zoning and land use. The local municipality determines the appropriate comprehensive plan including the regional need for affordable housing. Westchester County has no jurisdiction over local zoning. However, that fact has not stopped HUD from demanding that the County be willing to sue its municipalities, if necessary, to compel zoning changes based on HUD's judgment of what "restrictive practices" constitute exclusionary zoning. The so-called restrictive practices identified to the County include limits on the size, type, height and density of buildings, and even extend to restrictions on density around reservoirs which are the source of New York City's drinking water.

Forced to concede that each municipality in Westchester County has places where multi-family housing can be built, the Assistant U.S. Attorney recently argued that it is within the discretion of the Secretary of HUD to determine whether there is sufficient multi-family space to meet the need. Land use policies such as zoning enable communities to plan for a balanced community. HUD maintains that its Secretary is the final arbiter of those local decisions, not the local municipalities. HUD's view completely oversteps constitutional boundaries for federal intrusion into local affairs. Once again, the County believes the actions of HUD with Westchester provide a glimpse of how HUD will act toward other grantees trying to maintain local control over land use and zoning.

3. HUD's proposed AFFH rule links what it terms segregation to zoning. However, to do this, HUD redefines "segregation." Segregation is no longer based on unlawful discriminatory behavior. The proposed definition does not recognize that people may *choose* to live in a homogenous community without any action or intent to exclude any other individual from that community. Under the proposed rule, segregation exists as a *geographic area* "with high concentrations of a particular race, color, sex familial status, national origin, or with a disability in a jurisdiction" compared to the jurisdiction as a whole, based on data sources determined by HUD to be statistically valid.

Accordingly, merely based on HUD-supplied statistics, communities will find themselves identified as "segregated" and they will be expected to address this through changes to their zoning to allow multi-family housing to be constructed in order to facilitate those with disproportionate housing needs (defined as low, moderate and middle income families) to be moved into the community. Zoning dictates what can be built; not who lives there. HUD's proposed AFFH rule is designed to change that. HUD's proposed rule states clearly that the actions that a grantee should consider are: "*modifying local*

regulations and codes, constructing new developments, creating new amenities, and facilitating the movement of people.”

In short, HUD anticipates that a grantee would take these actions to reduce racial and ethnic concentrations of poverty in order to overcome “historic patterns of segregation” and “reduce disparities in access to key community assets.” HUD’s tool to accomplish race and ethnic based economic integration is the proposed AFFH rule. The target is local communities, and the tactic is to attack local zoning.

4. HUD’s proposed AFFH rule presents a wide range of other legal issues. First among these issues is disparate impact. In February 2013, HUD finalized a rule “where a facially neutral housing practice (that) actually or predictably results in a discriminatory effect on a group persons,” is prohibited under the Fair Housing Act. However, the Supreme Court has not directly considered whether the language of the Fair Housing Act supports a disparate impact standard. This is noted in a Joint Staff Report from the House Committee on Oversight and Government, which is sharply critical of the current Administration, including senior officials at HUD, for actions taken in St. Paul, MN to prevent a case on this issue, known as the *Magner* case, from getting to the Supreme Court. The Supreme Court has taken *certiorari* in a second case, known as the *Mt. Holly* case from New Jersey, where the disparate impact standard in housing can be ruled upon. However, since both Congress and the Supreme Court have evidenced interest in examining and resolving the issue of disparate impact in the context of the Fair Housing Act, it is premature for HUD to make it the underpinning of a new definition of segregation and a new proposed AFFH rule.

A second legal consideration is that grantees will have no assurance that their local laws and regulations, considered compliant with federal law today, will not be challenged as unlawful by HUD. In Westchester County’s litigation with HUD, at issue is whether Congress has authorized HUD to impose criteria for allocating or denying CPD funds based on the existence of policies in a jurisdiction that are not in violation of federal law. Under the proposed AFFH rule’s definition of segregation and HUD’s new rule relating to disparate impact under the Fair Housing Act, grantees may find HUD claiming that their local laws, regulations and policies are violations of federal law.

A letter to the Court from the Assistant U.S. Attorney, relating to HUD’s decision to reallocate the County’s FY 2011 CPD funds, takes exactly this position. The relevant statute, 42 U.S.C. §12711, states that “the Secretary (of HUD) shall not establish any criteria for allocating or denying funds made available under programs administered by the Secretary based on the adoption, continuation, or discontinuation by a jurisdiction of any public policy, regulation, or law that is...(2)not in violation of any Federal law.” The Assistant U.S. Attorney argues that this limit on the Secretary’s decision to deny Westchester funds does not apply because exclusionary zoning “violates federal law, specifically the Fair Housing Act.” In HUD’s view, since the federal monitor has concluded that seven communities have exclusionary zoning, a conclusion with which Westchester County strongly disagrees, there is a violation of federal law that allows the Secretary to deny funds.

Under the proposed AFFH rule, grantees can anticipate that HUD will claim authority to determine whether a jurisdiction's local laws, regulations and policies violate federal law. This in turn will permit HUD to deny funding. Local jurisdictions would then be compelled to change their zoning to accommodate low and moderate housing development that satisfies HUD's judgment as to the right demographic and economic balance in the community.

Third, HUD cites a number of cases with respect to how affirmatively furthering fair housing encompasses more than anti-discrimination mandates under the Fair Housing Act, including the *Otero* case which was decided by the Second Circuit in 1973. It notably does not cite or discuss a 1988 Second Circuit decision, namely the *Starrett City* case where it was held that the goal of achieving integration in housing cannot be accomplished through maintenance of fixed racial quotas in violation of the Fair Housing Act. HUD quotes a statement of then Senator Walter Mondale, the Fair Housing Act's co-sponsor. It appears in the 1972 *Trafficante* opinion, where he noted that "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns'." However, Senator Mondale's full sentence in the Congressional Record is "There will, however, be the knowledge by Negroes that they are free – *if they have the money and the desire* – to move where they will; and there will be the knowledge by whites that the rapid, block-by-block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns." HUD's statement of legal authority for the proposed AFFH rule must be viewed as legal advocacy, not a balanced look at the law.

5. The anti-poverty programs that HUD has traditionally administered should focus on concentrations of poverty without regard to protected class status under the Fair Housing Act. HUD's proposed AFFH rule prioritizes racial and ethnic concentrations of poverty, and proposes a framework under the Fair Housing Law whereby protected classes with disproportionate housing needs are moved into asset-rich communities with quality schools, employment and public transportation. However, the CPD program administered by HUD is not only for the benefit of protected classes under the Fair Housing Law. HUD's recent report entitled Worst Case Housing Needs 2011: Report to Congress, states that forty-eight percent (48%) of new worst case housing needs households were among *white*, 28% among Hispanic, and 13% among black households. HUD's proposed rule, which by its terms is about fair housing, should not subvert its primary mission to address poverty without regard to race or ethnicity.

6. When it comes to cost, HUD has no idea how much its new rule will cost, or whether it will even work. As observed by Westchester County Executive Robert P. Astorino, in a recent opinion in the Wall Street Journal, "The only economic analysis HUD has provided concerns how much it will cost communities to comply with the paperwork. HUD estimates \$3 million to \$9 million. The agency has not published any estimate of other effects, such as on local real-estate markets or local budgets. As stated

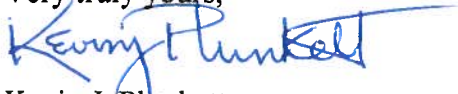
in the Federal Register, ‘HUD cannot quantify the benefits and costs of policies influenced by the rule.’”

7. Finally, HUD should be precluded from denying disaster relief to jurisdictions due to disputes about the AFH and the actions identified therein. It is unconscionable that HUD uses disaster relief funds as leverage in bona fide disputes with local jurisdictions. This is occurring with respect to Westchester County in connection with Super Storm Sandy relief funds and we are aware it has happened in other jurisdictions in past years.

HUD’s letters to Westchester County, and other relevant documents, are attached, and evidence the range of demands HUD has made with respect to local zoning in Westchester County. Further, throughout our comments, certain words are italicized for emphasis.

Also attached to this letter is an Appendix that consists of Westchester County’s comments on several of the 19 questions posed by HUD in the Federal Register. The comments highlight the practical limitations, impacts and unreasonableness of the proposal.

Very truly yours,



Kevin J. Plunkett
Deputy County Executive

Cc: Hon. Robert P. Astorino, County Executive

Attachments: (1) Appendix
(2) Related correspondence and documents

**APPENDIX TO WESTCHESTER COUNTY'S
COMMENTS DATED SEPTEMBER 17, 2013**

Administrative Concerns with Respect to the Proposed AFFH Rule

Below are Westchester County's comments on several of the 19 questions posed by HUD in the Federal Register. The comments highlight the practical limitations, impacts and unreasonableness of the proposal.

1. Specific request for comment on data metrics. The field of geo-coded data is rapidly evolving and, as HUD works to refine data related to access important community assets, it welcomes suggestions for improvement. Such comments can include the description of cases or situations where the indicators may or may not appropriately portray neighborhood qualities. Are the nationally uniform data that HUD is providing to assist in the assessment of segregation, concentration of poverty, and disparities in access to community assets appropriate? Do these data effectively measure differences in access to community assets for each protected class, such as people with disabilities? To what extent, if at all, should local data, for example on public safety, food deserts, or PHA-related information, be required to supplement this nationally uniform local and regional data?

Poverty and disparate housing needs are color-blind and impact households based on economic factors rather than race, ethnicity or other protected class factors. Further, communities differ in all areas in the proximity and inclusion of schools, grocery and retail stores and public transportation. How such areas differ make each area less desirable to some but more desirable to others. To establish national data metrics so as to define a perfect community that is not "segregated," as that word is newly used by HUD, is impossible. In fact, HUD appears to require urban sprawl as a guiding policy to achieve balance.

Will communities be allowed to come to their own conclusions about the existence of segregation or is HUD requiring that each community identify segregation within their community based on HUD's use of the word?

HUD should be required to provide complete detailed population breakout by race and ethnicity so as to provide the full picture of a community's population, including people who define themselves by non-standard categories including multi-racial. Will HUD provide specific guidelines for the categorization of individuals of mixed descent?

2. HUD requests comments on how the goals and priorities arising out of the AFH would influence local regulations, siting decisions, infrastructure investments, and policies, in comparison to the existing processes using the AI.

HUD has not drafted a template for how it expects municipalities to review local

regulations. However, there is an implication that HUD expects communities to reach a predetermined conclusion. HUD is not clear in defining how many actions it expects a community to undertake to overcome identified impediments and on whether HUD will require that the AFH be used to direct investments in infrastructure.

3. To what extent would the AFH and related public engagement and planning processes increase or decrease paperwork cost for program participants?

HUD should provide the answer to this question before proceeding with the proposal. The fact that HUD has estimated the cost to complete the paperwork requirements of the proposed rule (between \$3 million and \$9 million) is alarming itself. If HUD cannot quantify the benefits and costs of policies that will be influenced by this rule, then it should not be enacted.

4. What experiences do HUD program participants have with the policy interventions considered in the Regulatory Impact Analysis? What outcomes were observed? What data is available related to those outcomes?

HUD has demanded that Westchester County produce an acceptable analysis of zoning regulations in effect in 31 cities, towns and villages in the county. However, HUD has not been able to provide Westchester County with an example of an “acceptable” zoning analysis or even an outline of issues of topics to be addressed. Instead, the County’s eight submissions have been rejected by HUD. The preparation of these analyses required over 4,000 hours of county staff time. Further, Westchester County has no control over land use regulations. Westchester’s experience has been that HUD’s demands are arbitrary, capricious and without relevance on objective standards. Ironically, in the new rules HUD admits past use of AI’s has been ineffective. Nevertheless the agency has withheld over \$17 million from Westchester County based on HUD’s pronouncement that Westchester’s AI is not acceptable.

5. Are there nonfinancial incentives that HUD should consider to encourage regional collaboration among local governments and greater engagement with public housing planning; for example, bonus points for specific grant programs?

There are nine Public Housing Authorities (PHAs) and 15 Section 8 Housing Choice Voucher programs in Westchester County. None are County agencies or programs. PHAs need to work with the County only for the PHA Plan certification for consistency with the Consolidated Plan. Some PHAs have never requested the certification of consistency, yet it appears HUD has approved their funding indicating that HUD does not impose its compliance obligations on the PHAs. Further we note that varying fiscal years and program timeframes would make a requirement to align all programs practically impossible.

6. In terms of the cooperation of Consolidated Plan jurisdictions and PHAs, what are the best models and approaches and other considerations to facilitate that joint participation? What is the best method for Consolidated Plan program participants

to use to begin their engagement with PHAs in the AFH process? Would a letter or other similar solicitation of involvement be sufficient?

With the cost of conducting an AFH an unknown, there should be no expectation that entities will commit to joint participation. If HUD provided funding for a regional AFH, then the various entities may consider cooperation.

8. Are there other planning efforts (for example, in transportation, education, health, and other areas) or other federal programs, such as the Low-Income Housing Tax Credit, that should be coordinated with the fair housing planning effort contemplated by this rule, and, if so, how and what issues would be best informed by this coordination? In recognition of the interdependent nature of how communities develop and what influences community progress related to the goals set forth in this rule, what are the appropriate scope of activities that should be considered “activities relating to housing and urban development” under the Fair Housing Act for purposes of this rule?

Coordination with other federal agencies should not be required. Under the proposal, just getting all HUD entitlements to cooperate and line up consolidated planning processes would be a monumental task. Asking jurisdictions also to line up with additional federal agencies is not feasible.

9. An analysis of disproportionate housing needs is currently required as part of the Consolidated Plan, and this proposed rule would make disproportionate housing needs an element of the AFH as well. If a disproportionate housing needs analysis is part of the AFH, should it remain in the Consolidated Plan as well? Is this analysis most appropriate in either the AFH or the Consolidated Plan, or is it appropriate, as the current proposed rule contemplates, to have the analysis in both places, assuming the analysis is the same for both planning exercises?

If the AFH is a component of the Consolidated Plan, the analysis of disproportionate housing needs should be covered once.

10. Are there appropriate indicators of effectiveness that should be used to assess how program participants have acted with regard to the goals that are set out?

The same performance report contained in Section 91.250 Performance Reports and 91.525 Performance Review by HUD of the Consolidated Plan regulations should be the same one used to assess how program participants have acted with respect to the goals they set out for affirmatively furthering fair housing. In fact, comments on progress of affirmatively furthering fair housing are included within the Consolidated Annual Performance and Evaluation Report (CAPER). This should continue to be a self-evaluation that is then reviewed by HUD.

We have also seen that HUD doesn't review CAPERs with any consistency. Some years, a review letter comes within six months of the CAPER submission; other years there has

been no letter at all. Jurisdictions across the country report similarly mixed responses from the various HUD field offices. Why wouldn't HUD hold all jurisdictions to the same level of review?

11. What forms of technical assistance would be most useful to program participants in undertaking the AFH called for in the proposed rule?

Anytime HUD has offered templates of what it is looking for, the product of the entitlements has been better and more complete. Templates should be considered here to cover all the required components. HUD should post AFHs on the HUD website so others can see what has been done and the public can see what the jurisdiction has committed to do. HUD should invest in the training of the field office staff so that questions asked of staff can be answered, and answered with consistency. This effect is doomed to failure unless objectivity, transparency and consistency can be ensured by HUD.

14. Are there aspects of incorporation of the new AFH community participation and consolidation process into analogous aspects of the existing Consolidated Plan process that could be improved? For example, is 15 days sufficient now for public comment on the Consolidate Plan program participants' annual performance report?

The rule should allow the continued public comment of 30 days on the jurisdiction's CAPER.

16. If the AFH is not acceptable after the back-and-forth engagement provided for in 5.162 of the proposed rule because of disagreements between program participants collaborating on an AFH, what process should guide the resolution of disputes between program participants?

HUD having the unilateral authority to approve AFHs is a major concern. Westchester County has had a wasteful exchange with HUD on what qualifies an AI as acceptable. HUD should not have the ability to add additional requirements with each additional submission. It should be clear that the impediments identified and actions to be undertaken by the jurisdiction to address those impediments, are defined by the jurisdiction – not by HUD. HUD should not have the ability to tell jurisdictions that they conducted the AFH correctly, but arrived at the wrong conclusion; this is exactly what HUD has done in Westchester County in its review of the county's AI.

It is important that the AFH be submitted with the Consolidated Plan. As a separate submission, if HUD disagrees with any portion of the AFH, and that disagreement continues beyond the timing expected within Section 5.162 of the proposed rule, the disagreement may undermine the ability of a jurisdiction to submit a Consolidated Plan. Submission of the Consolidated Plan is time barred after August 15 of each year, so the failure of a grantee to submit a Consolidated Plan by that date – regardless of the

beginning of their grant year – eliminates that grantee’s ability to apply for and receive their CPD funding for that fiscal year.

17. Should there be an end date for the technical assistance and back-and-forth engagement provided for in Section 5.162 if a portion of an AFH that involves multiple program participants can be accepted, thus allowing an individual program participant to be accepted?

Yes. As mentioned above, there are significant penalties to a jurisdiction if they aren’t able to submit their Consolidated Plan in a timely basis. The Westchester County AI experience has negatively impacted the county’s poorest neighborhoods and residents through HUD’s withholding of several years of entitlement CPD funds.

18. For program participants that have recently conducted a comprehensive AI, should HUD waive or delay implementation of the AFH requirement for those program participants?

Yes. Grantees should not be required to create a new AFH if an AI was completed within four years of the date that an Interim or Final AFFH rule is issued.

19. Section 5.164 of the proposed rule recognizes that events outside the control of a program participant may require revising the AFH during the course of a 5-year planning cycle. This is especially true in the case of a significant natural disaster, although the rule contemplates other similar material changes in circumstances that might likewise require revising the AFH. What process and challenges will a program participant face when an unexpected occurrence, such as a natural disaster, dictates that it take actions that may be contrary to its applicable plan contents? What impact might a natural disaster or similar type of occurrence have on a program participant’s compliance with the AFH?

A jurisdiction’s first responsibility early on in the aftermath of a disaster is to deal with the victims and to analyze the impact of the disaster on the availability of housing (what is available for use and locating the nearest safe environments). A disaster that destroys many housing units could disrupt the jurisdiction’s AFH compliance for a long period of time as neighborhoods, schools, amenities and places of employment could be destroyed. Making changes to the AFH and the Consolidated Plan will not be on the list of immediate actions and should not be expected to be, or required to be, by HUD.

The AFH can be written to include the types of disasters that might be expected in the region and include the action required to change to a disaster plan. As HUD already has prepared for CDBG-DR funding, HUD should consider an AFH template specifically for disaster areas.

Most importantly, HUD should be precluded from denying disaster relief to jurisdictions due to disputes about the AFH and the actions identified therein. It is unconscionable that HUD uses disaster relief funds as leverage in bona fide disputes with local jurisdictions. This is occurring with respect to Westchester County in connection with Super Storm Sandy relief funds and we are aware it has happened in other jurisdictions in past years.