



September 17, 2013

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0001

Re. [Docket No. FR-5173-P-01] Affirmatively Furthering Fair Housing

To Whom It May Concern:

The Council of Large Public Housing Authorities (“CLPHA”) and Reno & Cavanaugh, PLLC (“Reno & Cavanaugh”) are pleased to submit comments on the Affirmatively Furthering Fair Housing proposed rule.

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of more than seventy large public housing authorities (“PHAs”) own and manage nearly half of the nation’s public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs.

Reno & Cavanaugh represents more than one hundred PHAs throughout the country and has been working with our clients on fair housing issues throughout the years. Reno & Cavanaugh was founded in 1977, and over the past three decades the firm has developed a national practice that encompasses the entire real estate, affordable housing and community development industry.

Like HUD, PHAs are committed to furthering fair housing and pursuing the goals of deconcentration of poverty and increased integration of housing opportunities. We applaud

HUD's efforts in both the advocacy of fair housing as well as the creation of the proposed rule to provide better guidance to grantees regarding their obligation to affirmatively further fair housing. We also appreciate HUD's efforts to clarify and standardize the criteria by which PHAs' fulfillment of their obligation to affirmatively further fair housing is judged.

However, we are concerned that the proposed rule sends mixed messages about how PHAs' current operations comply with their obligation to affirmatively further fair housing; offers inadequate protections to PHAs that strive to meet their obligations; and imposes an unfunded mandate on PHAs that are already suffering from severe budget cuts to their current operations. Our comments are as follows:

1. PHAs need protection from potential litigation stemming from their attempts to meet HUD's competing demands

HUD repeatedly states one of the goals of the proposed rule is to "reduce the risk of litigation for program participants." However, we believe that the proposed rule leaves PHAs vulnerable to increased litigation as they pursue competing goals set by HUD. We strongly encourage HUD to provide PHAs with protection from litigation based on their compliance with the proposed rule or the competing demands of other HUD programs and policies by taking the following steps.

First, we encourage HUD to review its proposed definitions to ensure that they provide a sufficient level of detail and explanation. For example, HUD has not fully defined many important terms, including "integration," "segregation," and "significant disparities in access to community assets," stating that the thresholds for those terms would not be provided until the final rule is published and then would be updated through Federal Register notices. We believe that those thresholds should be provided for review and comment prior to the publication of the final rule. Also, we are concerned that, as HUD changes the thresholds, PHAs could be chasing a moving target, never sure when they are doing enough to satisfy the rule's requirements and their fair housing obligations.

It is also unclear how the proposed rule intends for PHAs to work with persons with disabilities. The rule refers to "deinstitutionalizing" persons with disabilities. However, the rule does not define "institution," perhaps leaving it to the courts to determine whether housing provided to the

disabled as part of a supportive services program or a PHA's designated housing plan is sufficiently community-based to comply with the rule. Consistent with the Olmstead¹ decision, the rule also should recognize that the goal of "deinstitutionalizing" persons with disabilities into community-based settings should only apply when: a) such placement is appropriate; b) the affected person does not oppose such treatment; and c) the placement can be reasonably accommodated, taking into account the available resources and the needs of other individuals with disabilities.

We strongly encourage HUD to modify the proposed language in 24 CFR 903.7(o) to define a PHA's obligation to affirmatively further fair housing as meaning that the PHA will make reasonable efforts to further the goals in its AFH and to avoid taking action that is materially inconsistent with its obligation.

We also encourage HUD to exempt certain agencies from submitting the certifications required under 24 CFR 903.2. PHAs operating under a consent decree pursuant to a court order should be exempt from the proposed rule or be provided a safe harbor for any actions the PHAs take in accordance with the decree that may conflict with the rule. Also PHAs that have received a SEMAP deconcentration bonus² or have otherwise made acceptable deconcentration certifications should be exempt as HUD has already determined that the PHA is acting in accordance with the goals of the proposed rule.

Furthermore, as HUD is aware, PHAs may only conduct activities within their areas of operation, as defined by state or local law. These geographic constraints impede PHAs' ability to implement activities envisioned by a multi-jurisdictional, regional or state Assessment of Fair Housing ("AFH"). For example, a PHA that serves a predominantly minority or high poverty area can only undertake activities within that specific geographic area. The final rule and the form AFH should recognize PHAs' geographic constraints and limit PHAs' liability for issues or activities outside their area of operation pursuant to a jointly-undertaken AFH.

2. Proposed rule must clearly state that continued investment in high-poverty, high-minority neighborhoods affirmatively furthers fair housing

¹ Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).

² 24 CFR 985.3(h).

We agree wholeheartedly with HUD’s assertion in the rule’s preamble that “the prospects for individual or familial success are influenced by a variety of neighborhood features far more extensive than just housing.” Consistent with this statement, HUD grantees, especially PHAs and CDBG and HOME grant recipients, are tasked with using federal funds to revitalize high-poverty neighborhoods, including the rehabilitation or new construction of affordable housing.

However, the proposed rule implies that the use of federal funds to invest in high-poverty, high-minority neighborhoods, including participation in the Choice Neighborhoods Initiative, would be inconsistent with a PHA’s obligation to affirmatively further fair housing. We do not believe that HUD, or the spirit of the Fair Housing Act, intends for grantees to abandon efforts to transform high-poverty, high-minority neighborhoods where public investment is most needed.

Furthermore, proposed sites for the new construction or rehabilitation of public³ or subsidized housing⁴ are already subject to site selection standards. Based on the overriding housing needs exception to these standards,⁵ HUD has historically approved new construction or rehabilitation in areas of minority concentration if the site is an integral part of an overall local strategy for the preservation or restoration of the immediate neighborhood or if the site is located in a revitalization area where the neighborhood is experiencing private investment. HUD’s HOPE VI Notices of Funding Availability (“NOFA”), Choice Neighborhood Implementation Grant NOFA and Notice H-81-2, which has technically expired, but which is frequently utilized by courts considering siting issues, all support this concept.

To determine whether the project is part of a neighborhood preservation or restoration strategy, HUD has relied on information regarding overall strategy for the neighborhood such as the jurisdiction’s Consolidated Plan. HUD has also considered information describing the efforts being undertaken to improve the neighborhood, and the amount, if any, of public funds being expended for this purpose, thus demonstrating a continuing commitment to the renewal, revitalization or preservation of the area through targeted expenditures of CDBG funds or other neighborhood improvement programs. In addition, HUD has taken into account how the program is likely to achieve long-term economic viability for the neighborhood in which the site

³ 24 CFR 941.202.

⁴ 24 CFR 891.125 (supportive housing for the elderly and persons with disabilities); 24 CFR 983.57 (housing receiving project-based Section 8 rental assistance).

⁵ 24 CFR 891.125(c)(1)(ii); 24 CFR 941.202(c)(1)(i); 24 CFR 983.57(e)(3)(vi).

is located. Revitalization areas should demonstrate that changes in their economic characteristics are occurring in conjunction with private reinvestment and that there is reason to believe that long-term change in the economic composition of the area will occur as a result of the project.

Such investment in neighborhood revitalization must be permitted regardless of its effect on minority concentration. By making these investments, PHAs create more communities of choice and viable and sustainable mixed-income neighborhoods. Therefore, we strongly encourage HUD to explicitly state in the final rule that affirmatively furthering fair housing includes the investment of federal and other resources in distressed neighborhoods to encourage mixed-income development and to provide infrastructure and services to support protected class members who remain in those neighborhoods. We also encourage HUD to state that examples of affirmative steps that a PHA may undertake at 24 CFR 903.2(d)(2)(ii) under the proposed rule include the new construction or rehabilitation of public or subsidized housing in areas of minority concentration if a) the site is an integral part of an overall local strategy for the preservation or restoration of the immediate neighborhood; b) the site is located in a revitalization area where the neighborhood is experiencing private investment; c) or otherwise satisfies the applicable site selection standards.

3. Proposed rule must address constraints imposed by other programmatic, statutory and regulatory requirements

In the preamble to the proposed rule, HUD explains that the rule “in concert with other HUD policies—is structured to provide direction, guidance, and procedures for program participants to promote fair housing choice.” We welcome HUD’s attempts to clarify how PHAs can meet their obligation to affirmatively further fair housing. However, rather than providing clear guidance about how PHAs can better integrate fair housing choice into their operations, the proposed rule imposes standards and objectives which are vague or which actually conflict with the current framework of statutes, regulations and program requirements that govern PHAs.

- A. Public housing development – PHAs that wish to engage in “development related activities” are already constrained by the permitted uses of Capital Funds and operating subsidies; site and neighborhood standards, as discussed in Comment #2; the Faircloth Amendment, which limits the number of public housing units a PHA may own or

operate; and decisions by HUD through its Special Applications Center, which has adopted a very restrictive test for demolition and disposition activity, as well as an informal policy that requires one-for-one replacement of public housing units demolished or disposed. These constraints compel PHAs to maintain the same number of public housing units on existing sites, even if they are in high-poverty, high-minority neighborhoods, which, under the proposed rule, would be inconsistent with a PHA's obligation to affirmatively further fair housing. We urge HUD to add an explicit statement in the final rule that undertaking development activities on existing public housing sites, including as part of a broader revitalization effort or to complement private investment, is consistent with a PHA's obligation to affirmatively further fair housing.

- B. Housing Choice Vouchers ("HCV") – According to HUD's website, the HCV program "places the choice of housing in the hands of the individual family." While PHAs can and do make efforts to recruit participating landlords in diverse areas and to inform voucher holders about housing opportunities in low-minority areas, ultimately, voucher holders make housing choices based on a number of different considerations, including but not limited to proximity to existing family and social networks, employment opportunities and religious institutions; access to public services, including public transit; and landlord willingness to participate in the program. PHA recruitment activities are also constrained to the PHA's area of operation, as defined by state or local law.

Additionally, voucher holders are limited to housing that meets a payment standard based on fair market rents ("FMRs") which HUD establishes. In many areas, recent budget cuts have forced PHAs to lower payment standards in order to avoid having to terminate families from the program, and HUD is now decreasing FMRs in certain areas as well. This limits the pool of housing opportunities available to voucher holders and often makes it more difficult to lease up in higher opportunity areas.

Especially in this time of severe cuts to HCV administrative fees, we urge HUD to add an explicit statement in the final rule that defines a PHA's undertaking of recruitment activities to encourage participation by landlords in low-poverty, low-minority areas within the PHA's jurisdiction; cooperation in HUD-funded regional voucher mobility

programs; and information campaigns to inform voucher holders of housing opportunities in these areas as meeting the requirement to act in a manner consistent with its obligation to affirmatively further fair housing.

C. Low Income Housing Tax Credits (“LIHTC”) - Through their Qualified Allocation Plans and consistent with statutory language in Section 42, which governs the LIHTC program, states provide preferences to LIHTC applications that propose to develop affordable housing in qualified census tracts and “the development of which contributes to a concerted community revitalization plan.”⁶ These preferences offer the opportunity to develop new affordable, mixed-income housing in neighborhoods in need of new investment and in coordination with broader community-based efforts. PHAs often participate in LIHTC developments, including those in high-poverty, high-minority areas, by contributing land, funds for the development of public housing units or project-based vouchers. As previously stated in our Comment #2, we believe that the revitalization of high-poverty, high-minority areas, especially through the development of mixed-income housing, is a fundamental component of furthering fair housing. Again, we urge HUD to make an explicit statement that a PHAs’ involvement in a LIHTC development that is also part of an overall local strategy for the preservation or restoration of the immediate neighborhood or located in a revitalization area where the neighborhood is experiencing other private investment is consistent with its obligation to affirmatively further fair housing.

D. Designated housing for seniors and the disabled – The proposed rule states that PHAs must also design their tenant selection and admission policies and development activities to reduce concentrations of disabled tenants. We believe this statement conflicts with HUD programs carried out by PHAs that provide transitional housing, permanent supportive housing and other housing restricted to elderly persons or the non-elderly disabled, including those having experienced homelessness. These programs often require that recipients live in close proximity so that integrated services can be provided in a coordinated and cost effective manner. We urge HUD to add an explicit statement in the final rule that a PHA that undertakes development activities that will provide housing

⁶ 26 USC 42(m)(b)(ii)(III).

or services to elderly persons or persons with disabilities is acting in a manner consistent with a PHA's obligation to affirmatively further fair housing. We further ask that HUD add an exemption or safe harbor to the final rule for the development of housing restricted to persons with disabilities in accordance with current mixed-population regulations or a HUD-approved designated housing plan⁷ or as part of a HCV initiative to serve underserved disabled populations.

- E. Tenant selection and admissions – The proposed rule requires that PHAs design their tenant selection and admissions policies to reduce the concentration of tenants and other assisted persons by race, national origin, and disability. Thus, we read the proposed rule to require, for example, that PHAs who serve primarily minority populations, and whose waiting lists are predominantly minority, must disregard their current, color-blind selection policies and instead increase the selection of non-minority residents for housing assistance regardless of their relative needs for assistance. If, in accordance with the proposed rule, PHAs change their current policies to give preference to non-minorities, we fear that PHAs could be vulnerable to challenges under the Fair Housing Act due to the disparate impact these preferences would have on members of protected classes. We also fear that the proposed changes to tenant selection and admission policies may raise constitutional issues regarding equal protection and due process. We urge HUD to clarify this language and provide guidance for PHAs on how they can adjust tenant selection and admissions policies in a manner that is consistent with the proposed rule, while not violating other requirements of the Fair Housing Act.

4. Proposed rule should clarify when a PHA has or will meet its obligation to affirmatively further fair housing

In the preamble to the proposed rule, HUD declares that the rule “will more clearly define the core goals involved in fulfilling program participants’ affirmatively furthering fair housing mandate.” We agree that the current regulations offer muddled guidance, and we appreciate that HUD recognizes this problem and is attempting to provide clarification. However, we are concerned that, while the proposed rule provides some additional clarifying points, it still leaves

⁷ Section 7 of the U.S. Housing Act of 1937.

PHAs at a loss when trying to determine when they are fulfilling their obligations to affirmatively further fair housing. Our concern is heightened by the rule's statement that HUD's determination that a jurisdiction has fulfilled the AFH requirements does not equate to a determination that a jurisdiction has complied with its obligation to affirmatively further fair housing.

We recognize that HUD wants to empower communities to make local determinations of fair housing needs and strategies, but PHAs still need more specific guidance about how to demonstrate that they have met their obligations to affirmatively further fair housing while participating in other HUD programs. In particular, this clarity is essential to avoid costly litigation that would otherwise be required to reconcile HUD's conflicting standards. For example, 24 CFR 903.2(b)(2) provides exemptions for certain development activities from deconcentration of poverty and income mixing requirements. Using these exemptions as a guide, we believe that the following public housing development activities should be exempt or provided a safe harbor from the requirements to reduce concentrations of tenants and other assisted persons by race, national origin, and disability:

- a) redevelopment on public housing sites owned by a PHA before the effective date of the rule;
- b) public housing developments operated by a PHA with fewer than 100 public housing units;
- c) public housing developments operated by a PHA which house only elderly persons or persons with disabilities, or both;
- d) public housing developments operated by a PHA which consist of only one general occupancy, family public housing development;
- e) public housing developments approved for demolition or for conversion to project-based or tenant-based assistance, including conversions under the Rental Assistance Demonstration program or any equivalent program;

- f) public housing developments which include public housing units operated in accordance with a HUD-approved mixed-finance plan; and
- g) large redevelopment efforts intended to revitalize neighborhoods and reduce poverty.

5. PHAs should not be penalized for undertaking their own AFHs and should be held to same five-year cycle as other grantees

We understand that HUD intends for the proposed rule to encourage grantees, including PHAs, to closely coordinate on the AFH planning process. However, in some jurisdictions, such coordination is simply not feasible due to political pressures or other factors. Similarly, it may be infeasible for a PHA to offer a dissenting opinion to a local government's AFH, as suggested by HUD, because such a move could damage fragile relationships within the jurisdiction. Despite these limitations, the proposed rule penalizes PHAs that undertake their own AFHs by requiring that these PHAs submit annual updates and thus incur even more financial and staff costs.

Furthermore, PHAs that undertake their own AFH would be subject to a constant process of planning, tracking, and reporting. This annual reporting requirement offers PHAs limited time to implement their strategies, reflect their efforts and provide thoughtful analysis of the outcomes, thus negating HUD's stated purposes for the AFHs. Progress on the types of goals that the rule envisions is best measured over a long period of time, so tracking year to year has limited value to either the PHAs or HUD.

We strongly oppose the proposal that requires PHAs undertaking their own AFH to update them on an annual basis. Instead we urge HUD to allow these PHAs to update their AFHs on the same five-year cycle required of other grantees and in conjunction with the PHA Plan's approval process.

6. Proposed rule's unfunded mandates would likely impose greater financial burden than HUD's estimate

In its Regulatory Impact Analysis of the proposed rule, HUD estimates that the increase in annual compliance costs would be in the range of \$3-9 million. The proposed rule would impact more than 5,000 governmental agencies that receive HUD funds.⁸ Under HUD's estimate of \$3-9 million, annual compliance costs would be only \$600-1,800 per program participant.

We believe that these figures grossly underestimate the compliance costs for affected grantees, especially for PHAs, most of which lack the in-house capacity required to analyze the HUD-provided data and then to track the determinants. One CLPHA member recently participated in an intra-agency planning exercise similar to the one described in the proposed rule and stated that its portion of the planning costs was \$7,000, not including staff time. Conversations with other members suggest that such an amount may be towards the low end of the range of costs, but using that figure as a conservative guide, the nation's 4,200 PHAs across the country could face nearly \$30 million in out-of-pocket compliance costs just to complete or update the AFH. This rough estimate would rise even higher if some PHAs are unable to coordinate with their local governments and have to produce annual plans by themselves.

In addition to the costs involved in preparing the AFH, PHAs would also likely incur costs for the increased use of consultants to analyze and apply the HUD-provided data, conducting additional activities in order to achieve the goals set out in the AFH, and assessing the impact of the PHA's activities on fair housing determinants. Few PHAs have in-house staff qualified to make these assessments.

HUD's estimate also fails to take into account additional costs that grantees will incur to implement the AFH goals. For example, a grantee could face significant costs to acquire land for development of affordable housing outside high-poverty areas or to provide services to elderly or disabled persons living in dispersed housing. In particular, it is unclear how, in the current funding climate, HUD could provide funds to PHAs to replace public housing currently sited in high-poverty, high-minority areas or increase the FMRs so voucher holders can afford housing in low-poverty, low-minority areas.

As discussed above, we believe that this rule makes grantees vulnerable to substantial and burdensome litigation costs as their activities are challenged for being out of compliance with the

⁸ This estimate is based on 4,200 PHAs and 1,209 CDBG grantees.

proposed rule or other, conflicting HUD requirements. HUD's estimate of compliance costs also appear to omit estimates of any potential litigation costs grantees will incur.

In contrast to HUD's estimate, we believe that the annual compliance costs for the proposed rule could likely exceed tens of millions of dollars for PHAs alone. In the proposed rule HUD did not mention any new funding opportunities to help PHAs or local jurisdictions offset these costs. At the same time, PHAs face dwindling federal subsidies for their current operations, including a \$3.4 billion cumulative loss of federal funding (ignoring losses due to inflation) to operate and maintain public housing developments since Fiscal Year 2010 and a current proration of 69% for HCV administrative fees. The proposed rule will likely require that PHAs divert funds to compliance at the detriment of their regular operations.

7. HUD needs to provide more advanced data in order for program participants to provide meaningful feedback

We appreciate HUD's intention to lessen the burden of preparing an AFH by providing program participants with relevant nationally-uniform data. We also appreciate HUD's acknowledgement that proposed data has limitations and will require ongoing review for potential improvements. We value the flexibility that the proposed rule provides for program participants to supplement or replace HUD-provided data with local alternatives. However, in order to comment effectively on the data metrics themselves, program participants need to know more about HUD's intentions for the structure of the AFH analysis and about the details of the assessment tool that will be provided in order to facilitate identification of determinants. Participants need to be able to work with and manipulate the data as they would in an AFH analysis in order to provide practical and constructive feedback. We look forward to working with PHAs to provide meaningful feedback once HUD can provide data that can be manipulated and analyzed, rather than simply viewed spatially.

8. Lingering uncertainties and numerous outstanding issues require that HUD issue second proposed rule

Our comments above lay out the issues we have identified with the rule as currently crafted. However, even if HUD is able to adequately address these issues, the proposed rule still has

many underdeveloped parts that require attention. First, the rule does not sufficiently explain the mechanics of the AFH review process, including which HUD office(s) will be responsible for the review or how HUD will coordinate the current mismatch for the AFH, Consolidated Plan and PHA Plan submission schedules. Second, the rule does not describe the standards by which HUD will review the AFHs and the subsequent performance by PHAs and other grantees to achieve goals set forth in the AFHs. Finally, if HUD determines by some unknown standard that a grantee has not made sufficient progress on its AFH goals, the proposed rule does not explain how HUD intends to enforce the AFH. Additional information on these points is essential to understanding how HUD intends for this process to work, and grantees should be afforded the opportunity to review and comment on HUD's proposed processes.

In light of our substantial comments and other unsettled issues, we strongly recommend that HUD consider our comments and those from other interested parties, release a revised version of the proposed rule and allow for a second round of comments before finalizing the rule.

Thank you for the opportunity to comment on the Affirmatively Furthering Fair Housing proposed rule. If you have any questions, please do not hesitate to contact us.

Sincerely,



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