



## Program Review

March 2013

# Affirmatively Furthering Fair Housing at HUD: A First Term Report Card

## Part II: HUD Enforcement of the Affirmatively Furthering Fair Housing Requirement<sup>1</sup>

### Introduction

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968, hereinafter “the Act”) prohibits discrimination in a wide range of housing-related transactions, and it also includes an affirmative obligation on the part of HUD and its grantees to “Affirmatively Further Fair Housing” (AFFH). This is the provision of the Act that requires HUD and its grantees to avoid the perpetuation of segregation, and to take affirmative steps to promote racial integration.<sup>2</sup> Compliance with this provision at the state and local level is currently monitored through regular fair housing certifications by grantees, and regular local development and publication of the “Analysis of Impediments to Fair Housing” (AI), which assesses local barriers to integration and steps necessary to overcome these barriers.

Until the Obama Administration, HUD historically has had a very limited enforcement program for ensuring state and local compliance with the AFFH obligation. In 2008 the National Commission on Fair Housing and Equal Opportunity issued a report entitled “The Future of Fair Housing” assessing the state of fair housing in the United States forty years after the

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- 1 This is the second installment of a two-part review of HUD’s efforts to implement its obligation to affirmatively further fair housing. Last month, the Poverty & Race Research Action Council (PRRAC) released a review of HUD housing programs, titled “*Affirmatively Furthering Fair Housing at HUD: A First Term Report Card (Part I: HUD Housing Programs)*.” The present report, produced by the Lawyers’ Committee for Civil Rights Under Law, The National Fair Housing Alliance, and PRRAC, takes the next step and looks at HUD’s record of *enforcement* of the affirmatively furthering obligation among state and local governments (and public housing agencies) receiving HUD funds. These two reports (Parts I and II) will be supplemented in April by the release of the National Fair Housing Alliance’s annual “Trends” report, which looks at HUD’s fair housing enforcement record more broadly.
  - 2 The AFFH mandate is set out in Section 3608 of the Act, and is also included in the Housing and Community Development Act of 1974.

enactment of the Fair Housing Act. With respect to the Act's AFFH requirement, this report concluded that "the current federal system for ensuring fair housing compliance by state and local recipients of housing assistance has failed."<sup>3</sup> Similarly, a 2009-2010 Government Accountability Office (GAO) investigation of compliance by state and local governments with the AFFH requirement found both compliance by the recipients of federal funding and enforcement of AFFH requirements by HUD to be lacking.<sup>4</sup>

Since then, the HUD Office of Fair Housing and Equal Opportunity has been re-energized during the first term of the Obama administration, and there has been significant enforcement of the AFFH requirement by HUD: (1) it has participated in and sought increased AFFH enforcement in several federal court cases involving AFFH issues; (2) it has processed and investigated private fair housing complaints where the allegations included violations of the AFFH requirement; (3) it has significantly increased its review of local Analyses of Impediments to Fair Housing (AIs), and some have been rejected; and (4) it has undertaken several compliance reviews concerning the AFFH requirement leading to voluntary compliance agreements addressing AFFH requirements.

Much work remains to be done, and HUD's actions were not always as robust as they should have been, but the first term saw significant advances in enforcement of the AFFH requirement.

## 1. *The Disparate Impact Rule*

HUD's adoption of the final "disparate impact" rule this month is not technically an implementation of the AFFH requirement, but it is a crucial tool for HUD enforcement of the AFFH requirement.<sup>5</sup> This is because the disparate impact standard is frequently invoked to challenge state and local government policy or action that (in the language of the new rule) "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."<sup>6</sup> In many cases a private disparate impact claim in federal court against a local grantee is the step that triggers HUD AFFH review. HUD's adoption of the disparate impact rule, including the provision recognizing that actions

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3 The Future of Fair Housing: Report of the National Commission on Fair Housing and Equal Opportunity (December 2008), p. 44. Available at [www.prrac.org/projects/fair\\_housing\\_commission/final\\_report.php](http://www.prrac.org/projects/fair_housing_commission/final_report.php)

4 U.S. Gov't Accountability Office, GAO-10-905, Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans (2010). (hereinafter referred to as GAO Report).

5 The rule codifies existing court interpretation that the Fair Housing Act reaches policies and practices that have the effect of discriminating, even if there is no allegation of intent. To prevail on such a claim in a HUD administrative proceeding under the new rule, a complainant must show a significant disparate impact, and also that there are less discriminatory alternatives available to achieve the challenged practice's goal.

6 78 Fed. Reg. 11460 (February 15, 2013)

that reinforce or increase segregation may violate the Act, will clarify the applicable law in HUD administrative proceedings, and is a signal that HUD is taking its AFFH enforcement obligations more seriously.

## 2. Major Federal Court Enforcement Actions and Settlements

Federal civil rights litigation brought by private parties plays a crucial role in driving HUD policy and making the AFFH goal a reality. Naturally, HUD's role in these cases tends to be more proactive when HUD is not itself a defendant, but HUD also has an important role to play as a party. We will look at some highlights of the past few years, first in cases where HUD was not an original party, and then in cases where settlements were reached directly with HUD as a party.

### A. Cases brought against state and local defendants

#### *U.S. ex rel. Anti-Discrimination Center of Metro New York v. Westchester County*

The AFFH highlight of the first year of the Obama Administration was the settlement of the False Claims Act case brought by the Anti-Discrimination Center (ADC) against Westchester County, based on the county's having falsely certified compliance with its "affirmatively furthering fair housing" (AFFH) obligations.<sup>7</sup> The landmark consent decree, which was brokered by HUD, included a requirement that Westchester allocate \$51.6 million for the construction and affirmative marketing of 750 units of affordable housing in 31 overwhelmingly white Westchester municipalities, along with broader commitments to challenge exclusionary local zoning and eliminate residential segregation.<sup>8</sup> Unfortunately, Westchester has refused to obey the decree. For instance, the County Executive has repeatedly stated that he will not challenge local zoning, has sited housing in ways that do not AFFH, and, contrary to the decree's terms, vetoed a bill that would have prohibited source-of-income discrimination by landlords.

HUD's enforcement efforts against the county have had positive elements, but have also fallen short. On the one hand, HUD has repeatedly rejected Westchester's "analysis of impediments" to fair housing choice, has temporarily withheld some funds, and obtained court confirmation that the County Executive must sign the source-of-income discrimination bill agreed to in the settlement. On the other hand, HUD has never – despite Westchester's open defiance – moved to hold the County in formal contempt for *any* of its violations of the court order, including the County's refusal to challenge exclusionary zoning and the County Executive's veto of the source-of-income discrimination bill. It has also regularly agreed to "count" housing that does not affirmatively further fair housing. ADC, the original plaintiff in the case, along with the

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7 Stipulation and Order of Settlement and Dismissal, *U.S. ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County*, No. 1:06-cv-2860-DLC (S.D.N.Y. Aug. 10, 2009), <http://www.hud.gov/content/releases/settlement-westchester.pdf>.

8 *Id.* at 6-11.

National Fair Housing Alliance and dozens of other fair housing organizations, have criticized HUD and its monitor for failing to enforce key terms of the decree. Because the successful implementation of the decree can serve as a model for how communities should meet their AFFH obligations, fair housing advocates believe it is essential that HUD and the Justice Department move forward to enforce that decree fully and vigorously.<sup>9</sup>

#### ***Greater New Orleans Fair Housing Action Center v. St. Bernard Parish***

After Hurricane Katrina, St. Bernard Parish enacted a series of discriminatory ordinances, including what was known as the “blood relative” ordinance as shorthand for a housing ordinance which prohibited rental of single-family residences to persons, “other than a family member(s) related by blood.” In a parish that is 93% white and abuts heavily African-American New Orleans neighborhoods, including the Lower Ninth Ward, the discriminatory intent and effect were clear. *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish* was initiated in 2006 challenging these ordinances, and a 2008 consent decree subsequently ordered rescission of the blood-relative ordinance and enjoined the Parish from further violations of the Act.

Thereafter, St. Bernard Parish engaged in a long pattern of recalcitrant behavior which resulted in a series of orders entered from 2009-2012 finding further violations of the FHA and several findings of contempt for violations of the consent decree and other orders. One of these actions was a comprehensive revision by St. Bernard Parish of its zoning ordinances adopted in 2009 and implemented in 2010, which drastically restricted the ability to develop multi-family housing. In October 2009, while one of the contempt motions was pending, HUD informed the Parish that if it continued to proceed with their actions designed to ban multi-family housing, federal funds would be cut off. The Parish then took action that brought it into temporary compliance with court orders.

In the midst of the ongoing private litigation, HUD filed a Secretary-initiated complaint on January 28, 2011, as authorized by 42 U.S.C. § 3610(a), alleging that the Parish violated the FHA by enacting and implementing the zoning revisions which were designed to continue to exclude African-Americans from residing in the Parish.<sup>10</sup>

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9 Recently, the court’s monitor made more findings of Westchester’s ongoing non-compliance with the consent decree in a February 25, 2013 report. Despite this, the federal government’s unaccountable reluctance to seek contempt sanctions against the County has continued in the second term. For more on the Westchester case and to view key documents please visit the Anti-Discrimination Center’s website, <http://www.antibiaslaw.com/westchester-false-claims-case>; See letter from civil rights advocates available at, [http://pracc.org/full\\_text.php?item\\_id=12991&newsletter\\_id=0&header=Current%20Projects](http://pracc.org/full_text.php?item_id=12991&newsletter_id=0&header=Current%20Projects).

10 While this was a welcome development in the case, it was also surprising that it took more than two years to be filed.

The HUD complaint officially commenced a HUD investigation into the Parish's actions and placed considerable pressure on the Parish to stop its discriminatory and obstructive actions because it jeopardized about \$91 million in federal funding already committed to Parish projects.<sup>11</sup> On March 17, 2011, HUD applied further pressure in letters to both the Parish and the State threatening to cut funds unless St. Bernard rescinded the zoning revisions. On April 5, 2011 the Parish capitulated and repealed the zoning revisions. Thereafter, on January 20, 2012, upon completion of its Secretary-initiated investigation and the processing of 10 individual complaints, HUD referred the matter to the Department of Justice, which initiated a pattern-or-practice fair housing lawsuit in federal court on January 28, 2012.

## **B. Cases brought against HUD**

In two of the three major fair housing cases brought against HUD during prior administrations and settled by the Obama Administration, both HUD and the Justice Department's Civil Division extensively delayed the settlement process, which unnecessarily delayed relief to plaintiff class members. However, in the end, the settlements in each of these cases were victories for fair housing and helped to advance HUD policy goals.

### ***Thompson v. HUD***

After years of litigation and seemingly endless settlement discussions, in the fall of 2012 HUD and the plaintiffs in *Thompson* finally reached a comprehensive settlement of the Thompson public housing desegregation case (a class action originally filed in 1995).<sup>12</sup> This settlement will continue the successful Baltimore Housing Mobility Program, which has been in existence for over 10 years and allows families to move to high-opportunity areas in the Baltimore region.<sup>13</sup> As of today more than 2,000 families are housed through the mobility program. Through the settlement, up to 400 families will be helped each year from 2012 through 2018, for a total of 2,600 additional special mobility vouchers.<sup>14</sup> Additional initiatives that HUD will provide under the settlement include: incentives for the development of FHA-insured multifamily housing developments in opportunity areas that set aside units for voucher families, development of an on-line housing search locator to help families find affordable housing within the Baltimore region, sponsorship of a study to analyze housing opportunity throughout the Baltimore region, and conducting civil rights reviews.<sup>15</sup>

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11 In fact, at that time the Parish temporarily capitulated and allowed the affordable housing development which was the subject of the private lawsuit to proceed. See *New Orleans Times-Picayune*, February 2, 2011.

12 Settlement agreement, *Thompson v. U.S. Dep't of Housing and Urban Development*, Case No. MJG-95-309 (D. Md. 2012).

13 LORA ENGDAHL, *NEW HOMES, NEW NEIGHBORHOODS, NEW SCHOOLS: A PROGRESS REPORT ON THE BALTIMORE HOUSING MOBILITY PROGRAM* (2009), <http://prrac.org/pdf/BaltimoreMobilityReport.pdf>.

14 NAACP Legal Defense and Educational Fund, Inc., *Baltimore Public Housing Families Win Settlement in Fair Housing Lawsuit*, <http://www.naacpldf.org/press-release/baltimore-public-housing-families-win-settlement-fair-housing-lawsuit>.

15 These civil rights reviews will cover a range of housing plans and proposals submitted to HUD for approval, involving federally funded housing and community development programs in the Baltimore region. In these reviews, HUD will pay particular attention to the impact of the proposals, individually and collectively, on the creation of meaningful housing choices across the Baltimore region.

Baltimore has served as a great example of how housing mobility programs can improve the lives of participants. We hope that HUD will look to the Baltimore Housing Mobility Program as a solution to housing segregation that other communities can implement.

### **The Road Home Program (*Greater New Orleans Fair Housing Action Center, et al v. HUD*)**

The “Road Home Program” was created in Louisiana after Hurricane Katrina to provide residents whose homes were destroyed with rebuilding grants.<sup>16</sup> A total of \$13.41 billion in Community Development Block Grant (CDBG) funds were allocated to Louisiana.<sup>17</sup> Approximately \$11 billion of the CDBG funds were devoted to the Road Home Program, which disbursed rebuilding grants to homeowners, among other activities.<sup>18</sup> However, the grants provided were based on the lesser of two amounts: the home’s value or the cost to repair the home. This formula had a discriminatory impact on African-Americans because homes in African-American neighborhoods had a lower market value than comparable homes in white neighborhoods, even if repair costs were the same. As a result, homeowners in white neighborhoods received more rebuilding resources, while many homeowners in African-American neighborhoods found themselves without sufficient resources to rebuild.

In 2008, the Greater New Orleans Fair Housing Alliance, the National Fair Housing Alliance, and five African-American homeowners in Orleans Parish, with legal representation from the NAACP Legal Defense Fund and local and law firm counsel, sued the State of Louisiana and HUD over the discriminatory effect of the Road Home formula. In 2010, the District Court enjoined the State from using the pre-storm value of a home to issue grants.<sup>19</sup> In 2009, the Road Home program eliminated a cap on grant funding to provide more full relief to eligible low- and moderate-income homeowners who were victims of the discriminatory formula, resulting in roughly \$480 million in additional funds to primarily African-American homeowners. In 2011, New Orleans homeowners, HUD, and the State of Louisiana reached a settlement agreeing to pay \$62 million in supplemental grants to homeowners whose initial grant award was based on the pre-storm home value and not the cost to repair.<sup>20</sup>

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16 See Pub. L. No. 109-148, 119 Stat. 2680, 2779-81 (Dec. 30, 2005); Pub. L. No. 109-234, 120 Stat. 418, 472-73 (June 15, 2006); Pub. L. No. 110-116, 121 Stat. 1295, 1343-44 (Nov. 13, 2007).

17 See Pub. L. No. 109-148, 119 Stat. at 2779-81; Pub. L. No. 109-234, 120 Stat. at 472-73 (a total of \$10.41 billion was allocated to Louisiana for disaster recovery expenses in 2005 and 2006); see Pub. L. No. 110-116, 121 Stat. at 1343-44 (allocating an additional \$3 billion in CDBG to Louisiana making the total allocation \$13.41 billion).

18 *Id.*; See also The Road Home Program at [www.road2la.org](http://www.road2la.org).

19 *Greater New Orleans Fair Hous. Action Ctr., et al. v. HUD, et al*, 723 F. Supp. 2d 1, 9 (D.D.C. 2010).

20 *Greater New Orleans Fair Hous. Action Ctr., et al. v. HUD, et al.*, No. 1:08-1938, Settlement (D.D.C. July 7, 2011), <http://portal.hud.gov/hudportal/documents/huddoc?id=RoadHomeSettlement.pdf>.

### ***Mississippi State Conference NAACP v. HUD***

After Hurricane Katrina, Mississippi received \$5.5 billion in CDBG disaster recovery funds from the same program as in Louisiana,<sup>21</sup> and over \$3 billion of these funds were initially allocated to housing recovery by Mississippi, including programs addressing the housing needs of low- and moderate-income households. However, in January 2008 HUD approved a plan submitted by the State diverting \$600 million from these housing recovery programs to fund a major expansion of the Port of Gulfport, an expansion unrelated to the hurricane. On December 10, 2008 the Mississippi Chapter of the NAACP, the Gulf Coast Fair Housing Center and four African-American homeowners, represented by the Lawyers' Committee, its Mississippi affiliate, the Mississippi Center for Justice (MCJ) and law firm counsel, sued HUD for non-compliance with the requirement that 50% of CDBG disaster recovery funds benefit low- and moderate-income persons, and for accepting a plan that failed to meet the State's duty to affirmatively further fair housing, as required by the Fair Housing Act.

In 2010, negotiations with HUD and the State were undertaken. With HUD's support and leadership, a settlement of the case was reached on November 8, 2010 in the form of a State plan approved by HUD which reallocated over \$132 million in CDBG disaster recovery and other funds to a program named the Neighborhood Home Program (NHP) which was designed to address the unmet housing recovery needs of low-income homeowners and renters. Implementation of the plan is ongoing. In January 2013, approximately 4,600 low-income households, of which 55% were African-Americans, had their homes fully repaired, exhausting the \$132 million NHP fund. An estimated 1,500 eligible households had not been served, but in response to HUD's insistence, the State has agreed to create an additional reserve fund to cover the housing needs of all homeowners determined eligible for assistance under the NHP.

### ***3. Administrative Complaints Alleging AFFH Violations***

The Fair Housing Act, as amended in 1988, provides a process for the filing of privately initiated administrative complaints with HUD that ultimately can result in administrative charges that can be heard before a HUD administrative law judge or in federal court.<sup>22</sup> HUD's increased enforcement of the AFFH requirement in the Obama Administration is reflected in its processing and investigation of administrative complaints based on 42 U.S.C. § 3604, Title VI of the 1964 Civil Rights Act and the 1974 Housing and Community Development Act that also include § 3608-based claims. According to information obtained from HUD, at least 14 privately initiated complaints that included § 3608-based claims were pending as of April

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21 See fn. 11

22 These complaints can range from routine claims of intentional race or disability discrimination to disparate impact type claims involving admission procedures, etc. See 42 U.S.C. §§ 3610-13. Complaints based on § 3608 have historically not been accepted by HUD. However, HUD now is accepting and investigating such complaints on the basis of accompanying claims of violations of FHA, Title VI of the 1964 Civil Rights Act, and Section 109 of the Housing and Community Development Act of 1974.

2011,<sup>23</sup> and 16 were pending in February 2013. At least two complaints have resulted in significant settlements, as follows:

### ***Texas disaster recovery***

In December 2009, the Texas Low Income Housing Information Service and Texas Appleseed filed a HUD administrative complaint, alleging that the State of Texas was discriminating in connection with the use of \$3.1 billion in disaster relief funding after Hurricane Ike, and failing in its obligations to affirmatively further fair housing. The complainants alleged that the formula Texas used in allocating funds among local jurisdictions was not related to the extent of the damage caused by the hurricane, and would impede recovery efforts in those areas hardest hit by the hurricane, which had significant numbers of African-American and Latino households. From the time of the complaint's filing through May 25, 2010, when the parties entered into a HUD-approved Conciliation Agreement,<sup>24</sup> HUD indicated it would withhold as much as \$1.7 billion in funding if the State did not comply with its AFFH obligations. Pursuant to the Conciliation Agreement, the State agreed to (1) reallocate \$1.7 billion in disaster recovery funds to ensure that the hardest-hit areas were served and so that at least 55% of funds were dedicated to the needs of low- and moderate-income households; (2) update the State's Analysis of Impediments to Fair Housing (AI); (3) allocate disaster and annual block grant funds in a manner consistent with AFFH obligations; (4) establish procedures requiring sub-recipients to collect and report AFFH data on a quarterly basis to the State; (5) set aside recovery funds for affordable housing;<sup>25</sup> and (6) provide more fair housing training for sub-recipients of federal funding.<sup>26</sup>

The conciliation agreement also requires Texas to complete its Analysis of Impediments update in two phases. Phase I was approved by HUD in 2011 and required public input in identifying impediments to fair housing. Phase II was scheduled to be completed by December 2012,<sup>27</sup> and was required to include a study of state and local policies, practices, and codes that limit

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23 See Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 Ky. L.J. 125, 166, fn. 252 (2011-2012). In addition to those discussed in detail herein, the jurisdictions charged with a failure to AFFH in these administrative complaints include (1) Waukesha County, WI (alleging a failure to comply with its AFFH duties by allowing its constituent communities to use their land use powers to block affordable housing); (2) two Maryland complaints — one against the state and the other against Baltimore County, challenging a policy which permitted a local veto of Low Income Housing Tax Credits ("LIHTC") projects that have the effect of limiting the development of affordable housing for families with children in high-opportunity, majority white areas; (3) Jefferson Parish, LA; (4) State of Louisiana; (5) Atlanta, GA; and (6) Huntington Township, NY.

24 Conciliation Agreement, *Texas Low Income Housing Information Service v. State of Texas*, Case No. 06-10-0410-8 (U.S. Dep't of Housing and Urban Development May 25, 2010), [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_4305.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_4305.pdf).

25 *Id.* at 9-16.

26 *Id.* at 6-19.

27 Texas Department of Housing and Community Affairs, Analysis of Impediments to Fair Housing Choice, <http://www.tdhca.state.tx.us/program-services/fair-housing/analysis-impediments-2010-2.htm>.

housing choice; community opposition to affordable housing; and site selection policies affecting housing affordability.<sup>28</sup> The last time Texas submitted an Analysis of Impediments was 2003, despite having submitted multiple certifications that they were affirmatively furthering fair housing choice. HUD's intervention in Texas's AI process should become a model for federal oversight.

HUD has also been diligent in monitoring implementation of this agreement. The City of Galveston resisted one requirement of the agreement – to adopt a plan that replaces public housing units lost during Hurricane Ike. But after HUD threatened to reassess federal funding the City was receiving if the plan was not approved, Galveston agreed to rebuild most of the low-income housing destroyed by the hurricane at the end of August 2012.<sup>29</sup>

### ***Sussex County, Delaware***

In late 2010, a private affordable housing developer filed an administrative complaint against Sussex County, Delaware alleging that the County violated the FHA by (1) blocking a proposed housing development for low- and moderate-income households on the basis of race and national origin and (2) disregarding its AFFH responsibilities.

After an extensive investigation, HUD made findings that the County had violated Title VI of the Civil Rights Act and the AFFH obligation, and entered a Voluntary Compliance Agreement (VCA), effective November 28, 2012. Because the Department of Justice has primary jurisdiction on matters involving zoning and land use, HUD referred the FHA violations to the Justice Department, which concurrently filed a complaint and consent decree in federal court in Delaware on that same date. Working together, HUD and DOJ reached a creative resolution. The VCA requires the County to develop a priority fair housing plan to address impediments to fair housing choice, strategies to integrate affordable housing into all communities in the county, and an evaluation of certain predominantly minority communities for future infrastructure and community development efforts. The federal court consent decree requires the County to review the proposed affordable housing development under nondiscriminatory criteria, pay the nonprofit developer \$750,000 in damages and attorney's fees, and comply with other civil rights obligations during the four-year term of the decree.

## **4. HUD Review of AIs**

The 2010 GAO Report, "Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans," focused on an examination of the requirement that state and local governments develop the "Analysis of Impediments to Fair Housing" (AI, the primary local planning tool for assessing AFFH barriers, activities, and

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28 *Id.*

29 Galveston Daily News, August 28, 2012, [http://galvestondailynews.com/news/article\\_84f89c79-c5f9-5098-a40c-923014b1e5f2.html](http://galvestondailynews.com/news/article_84f89c79-c5f9-5098-a40c-923014b1e5f2.html)

compliance). The GAO also assessed HUD's process for reviewing the AIs. The GAO report found significant weaknesses and lack of clarity in the AI process and concluded that HUD's requirements for AIs were "minimal" and that its "limited approach to establishing AI regulatory requirements, and its limited oversight and enforcement approaches, may help explain the various weaknesses in the documents that we have identified."<sup>30</sup> This was confirmed by a 2009 HUD internal report.

In its response to the report, HUD pointed to a "renewed commitment to AFFH" and an increased "level of AFFH review and technical assistance."<sup>31</sup> Assistant Secretary for Fair Housing and Equal Opportunity John Trasviña wrote to the GAO on September 3, 2010 that starting in FY 2010, HUD had reviewed the AIs of more than 300 jurisdictions.<sup>32</sup> More recent information provided by HUD indicates that it has conducted 46 AFFH compliance reviews (see section below), and has reviewed the AIs of 293 additional jurisdictions. This information also indicated that in 128 of these reviews, there were written comments describing the AI as incomplete or inaccurate, and in 11, HUD indicated that it challenged the AFFH certification.

An example of one of these reviews occurred in Danville, Illinois, where a review of Danville's AFFH compliance in May 2010 led to a finding that Danville was in non-compliance based on its failure to prepare an AI. In November 2010 the Sargent Shriver National Center on Poverty Law and Relman, Dane, & Colfax filed an administrative complaint alleging that Danville had repeatedly certified that (1) it had conducted an AI when it had not done so, or had filed an incomplete AI; and (2) was obstructing homeless service providers' ability to apply for federal funds to create affordable housing. In addition, Danville was promoting policies that had the effect of discriminating and perpetuating segregation, including drafting a Consolidated Plan claiming that the City had "too much" affordable housing that it intended to reduce significantly.

Thereafter, HUD provided technical assistance to Danville and persistently pushed for compliance by Danville with its AFFH certification. By letters of May and July, 2011 and January 2012, HUD rejected AIs submitted by Danville as incomplete, and provided detailed analyses of Danville's continued failure to produce an adequate AI. In April 2012 HUD again expressed concerns with the Danville AI and threatened disapproval of Danville's CDBG Action Plan unless an adequate AI was submitted. At this point, Danville finally submitted an adequate AI. The Shriver Center's complaint was conciliated in June 2012 by amendment of the Consolidated Plan to remove the offensive language and implement approval of the AI, fair housing training, and a process that the mayor had for issuing certificates of consistency permitting homeless shelters to apply for federal funding.

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30 GAO Report, pp. 31-32.

31 Id. at 33.

32 See GAO Report, at 46-47

## 5. HUD Compliance Reviews

Information provided by HUD indicates that during the Obama Administration, it has initiated 46 compliance reviews.<sup>33</sup> At least two of these reviews resulted in significant Voluntary Compliance Agreements, which included significant AFFH requirements, discussed below.

### **Marin County, CA**

As the result of a 2009 compliance review of Marin County's Community Development Block Grant program initiated by HUD, preliminary findings of non-compliance by Marin County were reported in several areas, including the duty to AFFH. The compliance review found that in a county that is majority white, African-American and Latino populations were concentrated in two areas.<sup>34</sup> Additionally, the county had failed to update its AIs since 1994.<sup>35</sup> This led to a December 2010 Voluntary Compliance Agreement that required the County to take several steps designed to affirmatively further fair housing, which, among other provisions required a study to identify and overcome fair housing barriers, such as community resistance to fair housing choice in neighborhoods and the continued development of low-income affordable housing in neighborhoods with high minority concentrations. The county also agreed to update its AIs with the help of "racial and ethnic minority citizens and persons with disabilities."<sup>36</sup> Furthermore, the county agreed to identify and analyze the causes of "lower racial and ethnic minority residency in the County relative to the adjacent counties."<sup>37</sup> As part of Marin County's AFFH obligation, they agreed to undertake eight steps identified by HUD to meet the AFFH goal.<sup>38</sup>

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33 "Compliance Reviews" are periodic internal assessments by HUD Fair Housing staff of local agency compliance with civil rights statutes that they enforce including Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Section 109 of the Housing and Community Development Act of 1974.

34 Rachel Dornhelm, *Marin Struggles to Meet Fair Housing Laws*, KQED, November 30, 2011, <http://www.kqed.org/a/kqednews/RN201111300630/a> (article states that the majority of Latinos live in San Rafael's Canal area or near it and African-Americans mostly live in Marin City). See *Marin County Analysis of Impediments to Fair Housing Choice at Chapter 6* (2011). <http://www.co.marin.ca.us/depts/CD/main/comdev/FEDERAL/ai/aich6.pdf> (also identifying Marin City and San Rafael as the two areas where the majority of African-American and Latino residents of Marin County reside).

35 *Marin County Analysis of Impediments to Fair Housing Choice* (2011).

36 Voluntary Compliance Agreement between HUD and the County of Marin at pg. 7 (2010).

37 *Id.*

38 *Id.* (The eight steps are: 1) solicit input from community leaders, public interest groups, and others during the CDBG planning cycle; (2) advertise to community members their rights to fair housing and to redress allegations of housing discriminations; (3) refer housing discrimination complaints and any inquiries about possible violations of fair housing laws to HUD; (4) implement actions to address impediments to the development of affordable housing as identified in the AI; (5) educate realtors, condominium and cooperative boards, and landlords with respect to fair housing laws; (6) assess whether a pattern in the past 10 years or more exists in the development of CDBG and HOME affordable housing that perpetuates segregation of racial and/or ethnic minority groups; (7) make reasonable efforts to collect and maintain race, ethnicity, gender, and disability data of residents of any affordable housing; and (8) provide comprehensive information that is readily available to the public on rental and homeownership housing programs and affordable housing.)

## ***Joliet, IL***

Since 2005 the City of Joliet has been embroiled in long-standing litigation accusing it of using its eminent domain power to destroy a HUD-subsidized and predominantly African-American housing complex for racial reasons. While the litigation was pending, HUD reviewed the City's 2010 Consolidated Plan and, by letters sent in December 2009 and January 2010, rejected the civil rights certifications and disapproved the Plan. This resulted in a letter agreement entered into in June 2010 by which the City agreed to stay the eminent domain and code enforcement actions concerning the housing complex and to produce a new AI that would be subject to HUD approval and in compliance with the Fair Housing Guide for AFFH. An AI was subsequently submitted to HUD by the City and then reviewed by HUD. In a detailed letter of May 25, 2011, HUD rejected the AI. Since then HUD has rejected Joliet's CDBG Action Plans for 2011, 2012, and 2013. By letter of February 12, 2013, HUD wrote Joliet informing it that if the outstanding AFFH certification problems were not resolved, HUD may take action to recapture \$1.3 million in funding from the 2011 grant.

As was the case in the Sussex County matter discussed above, HUD and the Department of Justice have been coordinating enforcement actions against Joliet. In August 2011, the Department of Justice sued the City alleging that the City's eminent domain actions violate the Act. The complaint also includes a claim that the City's actions violate the Housing and Community Development Act (HCDA), which prohibits discrimination in any program funded in whole or in part by HUD funds granted under the HCDA, which includes CDBGs. The Department's case was consolidated with other cases against the City, one of which was brought by the Shriver Center. In addition to challenging the eminent domain actions of the City, the complaint also includes allegations that the City has downzoned land on the west side of the City so as to eliminate the possibility of building new family affordable housing, and has used covert racial expressions in furtherance of its discrimination.

## ***Conclusion***

This review has shown that private fair housing enforcement is critical in identifying state and local grantees that are failing to affirmatively further fair housing, and in helping HUD to monitor and enforce the AFFH duty borne by its grantees. The cases and data discussed above represent a new effort by HUD to take this enforcement obligation seriously. But (as discussed last month in Part I of this Review), after almost four years of planning and design, HUD still has not published an AFFH regulation to better define the AFFH monitoring and enforcement process.<sup>39</sup> Moreover, it is not clear that the proposed rule under consideration will establish a complaint process that will give private parties the ability to participate in the enforcement

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39 HUD began the process of formulating a regulation in 2009. In January 2010, a senior HUD official told Congress that "the department was working on a proposed regulation to enhance AFFH compliance." A tentative time frame for proposing this rule was given as December of 2010 (GAO Report at 29–30), but it keeps being pushed back.

process as they do now. The lack of a clear complaint process has been a major hindrance to AFFH enforcement and it needs to be addressed in any new regulation.

As the GAO noted back in September 2010: “In the absence of such regulatory requirements, the usefulness of requiring AIs as a tool to affirmatively further fair housing is diminished.” We are now into 2013 and HUD still has not produced a proposed rule. Thus, while HUD’s AFFH enforcement in the first term of the Obama Administration deserves positive marks, the lack of a proposed or final AFFH regulation remains a major piece of unfinished business for the second term.



**The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee)**, a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. We are celebrating our 50th anniversary in 2013 as we continue our quest of "Moving America Toward Justice." The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law, particularly in the areas of fair housing and fair lending, community development, employment; voting; education and environmental justice. For more information about the LCCRUL, visit [www.lawyerscommittee.org](http://www.lawyerscommittee.org).

**About the National Fair Housing Alliance**

Founded in 1988, the National Fair Housing Alliance is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. Headquartered in Washington, D.C., the National Fair Housing Alliance, through comprehensive education, advocacy and enforcement programs, provides equal access to apartments, houses, mortgage loans and insurance policies for all residents in the nation. For more information, see [www.nationalfairhousing.org](http://www.nationalfairhousing.org).

**About the Poverty & Race Research Action Council**

The Poverty & Race Research Action Council (PRRAC) is a civil rights policy organization based in Washington, D.C. Founded in 1989 by national civil rights and poverty law organizations, PRRAC's primary mission is to help connect advocates with social scientists working on race and poverty issues, and to promote a research-based advocacy strategy on structural inequality issues. PRRAC's current work focuses on the importance of "place" and the continuing consequences of historical patterns of housing segregation and disinvestment for low income families in the areas of health, education, employment, and incarceration. PRRAC also publishes the bimonthly newsletter/journal *Poverty & Race*. For more information, see [www.prrac.org](http://www.prrac.org).

