

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL FAIR HOUSING ALLIANCE,
et al.,

Plaintiffs,

v.

BEN CARSON, *et al.*,

Defendants.

Civ. Action No. 1:18-cv-1076-BAH

SECOND DECLARATION OF JANET HOSTETLER

1. My name is Janet Hostetler. I currently serve as Deputy Director of the National Law Center on Homelessness & Poverty. I have a JD from New York University School of Law. I am over the age of eighteen and am competent to make this declaration. I have personal knowledge of the matters set forth herein.

2. I served as Senior Advisor and Chief of Staff in the Office of Fair Housing and Equal Opportunity (FHEO) at the U.S. Department of Housing and Urban Development (HUD) from October 2009 to June 2015, during the development of the Affirmatively Furthering Fair Housing (AFFH) rule. Since leaving HUD, I have continued to follow the development of the rule closely.

3. When I arrived at HUD, the agency was actively considering options for developing a new fair housing planning rule for jurisdictions receiving HUD funds, based in part on our experience in the Westchester County litigation, which had revealed the ineffectiveness of HUD's then current fair housing planning rules, which relied on the "Analysis of Impediments to Fair Housing" (AI).

4. Shortly before I arrived, in July 2009, FHEO hosted a "listening session" on the overall AFFH planning process. I reviewed the notes from the listening session and spoke with several

people who were in attendance – both HUD personnel and outside stakeholders. The overwhelming feedback that emerged from this session was that the AI process was ineffective and was in need of overhaul. Also, in 2009, HUD’s Office of Policy Development and Research released an internal review of the AI process, which I read and discussed with the HUD personnel involved in writing it. The review, based on a nationwide sample of jurisdictions, found that many jurisdictions did not have a recent AI, that the quality of AIs varied widely, with many omitting key analyses of fair housing and fair housing goals, that AIs were not generally accessible to the public, and that HUD did not require AIs to be submitted for review.

5. The decision to move ahead with an overhaul of the fair housing planning process was powerfully influenced in the following year by the release of a Government Accountability Office report to Congress, *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans* (GAO, September 2010), which documented the serious deficiencies in the fair housing planning process associated with the “Analysis of Impediments to Fair Housing.”

6. The GAO report confirmed our internal observations that the AI process did not achieve compliance with grantees’ affirmative fair housing obligations, and thus was not consistent with HUD’s own obligations, under federal law, to affirmatively further fair housing.

7. It also accorded with our conclusions that the AI process lacked any meaningful standards for setting goals and timetables, no clear guidance on format or methodology for assessing issues like segregation, and no process for HUD review. As a result, many jurisdictions were simply ignoring their obligations.

8. In addition to the 2009 “Listening Session,” in 2010-11, HUD sent two senior advisors, representing the Department, on an extensive fact-finding tour to get input from city and county

leaders across the country on how best to design a planning process that would both restore accountability and be workable and effective for local staff and leadership.

9. The final AFFH rule restored accountability to HUD's fair housing oversight through a step by step reporting process focused on clear outcome metrics in the Assessment of Fair Housing (AFH). The rule includes stronger public participation requirements (including a published response to specific public input in the final AFH), and most importantly, a required submission to HUD for review. An essential part of the HUD review process is the procedure for "pass-backs," to help jurisdictions improve submissions that were missing key elements (such as meaningful fair housing goals).

10. In my role of Chief of Staff in the Office of Fair Housing and Equal Opportunity at HUD, I had the opportunity to calculate and discuss with others our calculated estimates for how many AFHs would need to be sent back for additional work before they could be accepted. The rates HUD has reported since the rule went into effect are not surprising and well within our estimates at the time. This was a new process and it was expected that, particularly at the beginning, a number of jurisdictions would need additional feedback. We recognized that HUD had some control over this rate—more and more specific guidance would help more jurisdictions get it right the first time. We also recognized that as more accepted AFHs were available for other jurisdictions to see, rates of non-acceptance in the first round would decrease.

11. In addition to the step by step instructions set out in the Assessment Tool, HUD provided technical assistance to jurisdictions through the AFFH guidebook, regional trainings, and posted FAQs and videos. HUD staff were also on call to answer additional questions that arise as jurisdictions go through the process.

12. As part of the rule implementation, and to reduce the reporting burden on local jurisdictions, HUD also provided a data and mapping tool, which includes uniform national data

to help local planners quickly assess local levels of segregation, disparities across neighborhoods communities, and unmet housing needs in their jurisdiction.

13. Based on my knowledge of the law, the tool, and the available guidance, I do not believe that the Assessment Tool is the cause of the deficiencies in some of the AFHs. Even in HUD's notice published on May 18, 2018 titled *Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments*, HUD repeatedly acknowledged that many communities got it right- and those that did not required additional clarity. Changing the questions of the Assessment Tool will not, for example, make community participation or fair housing goals less important for the purposes of the Fair Housing Act.

14. Furthermore, to the extent there is any lack of clarity, the most expedient way for HUD to increase the rate of jurisdictions complying with the legal requirements of the Fair Housing Act in the first round of their AFH submission would be to publicly post final, accepted AFHs for other jurisdictions to see. HUD could also release guidance on specific questions that appear to be causing confusion for some jurisdictions. Both of these approaches are preferable to suspending or revising the tool itself. There are several reasons for this.

15. The first reason is that it will be difficult to increase acceptances by changing the tool in a significant way, without stepping outside the requirements of the Fair Housing Act. The Fair Housing Act is a strong, and important, civil rights requirement. We knew jurisdictions were largely not complying with AFFH requirements but also that many jurisdictions did not have extensive resources or expertise to come into compliance on their own. It took a large number of staff, from six or more different HUD program offices, over two years to create the first tool. Every question asked, every piece of data made available was scrutinized closely for ways to make it simpler or easier to answer, while balancing the need to comply fully with the Fair Housing Act. Assuming that HUD will have the same purposes and goals going forward, it will

take significant time to make significant adjustments to the tool—particularly if HUD complies with its legal responsibility to ensure an accepted AFH is fully consistent with the Fair Housing Act.

16. An additional, albeit related, reason is that guidance could be provided in a much timelier manner than could a new tool. Any change to the tool involves multiple offices within HUD and a time-consuming departmental clearance process that generally takes months to complete. In addition to the offices within HUD that are directly involved in AFFH, the office that oversees the paperwork reduction requirements would also have a number of procedural steps to complete. Once a new tool has cleared the relevant offices at HUD, it would be required to be reviewed further by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). In my experience, that process also generally takes months to complete. After OMB clearance, HUD will still need to publish the proposed tool in the Federal Register twice to collect public comments, first for 60 days and then again for 30 days. Even after the new tool was finalized, HUD would presumably need to re-create existing guidance and technical assistance (TA) resources.

17. In contrast, additional guidance, utilizing the current tool, could be provided without significant cost or delay. Guidance would not need to be reviewed by OMB or subject to public comment. Guidance, however, could help jurisdictions understand the new requirements and assist them in fully complying with the Fair Housing Act and the AFFH regulation. HUD has spent considerable time and resources on some of the initial guidance, trainings, and technical assistance, as was contemplated by the Final Rule. This sunk cost does not need to be repeated (unless the tool is changed) and can be built upon. Much of the clarity identified as necessary by stakeholders could be developed in-house at HUD by subject matter experts, or completed externally by other such experts through HUD's Technical Assistance budget. Now that the first

round of AFHs have been submitted and reviewed, there is a better understanding of the questions jurisdictions have and the areas where additional clarity is required. The cost (and delay) of posting final accepted AFHs on the web would be negligible.

18. One of the strengths of the AFH process is its emphasis on local solutions. Jurisdictions are required to assess the extent and the causes of local patterns of segregation and neighborhood disparities, but the selection of specific strategies and goals to address these local problems is up to the jurisdiction. The Assessment Tool and pass-back system, and the learning experience the pass-back system affords, provide a mandatory structure that ensures these goals are meaningful and specific, while still enabling local flexibility. Supplemental guidance, for example providing additional examples of goals and metrics, as well as publicly posted successful examples from a range of jurisdictions, could be produced with relatively little time and cost.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this declaration.

Executed within the United States on May 29, 2018.



Janet Hostetler