

Lessons Learned from Westchester: Affirmatively Furthering Fair Housing

by Michael Allen, Relman & Dane, PLLC

Tennessee Fair Housing Matters Conference

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Contact Information

Michael Allen
Relman, Dane & Colfax, PLLC
1225 19th Street, N.W., Suite 600
Washington, D.C. 20036-2456
202/728-1888, ext. 114
FAX: 202/728-0848
E-mail: mallen@relmanlaw.com
Website: www.relmanlaw.com

AFFH Statutory Authority

- FHA requires HUD to “administer [housing] programs...in a manner affirmatively to further the policies of [the Fair Housing Act],” including the general policy to “provide, within constitutional limits, for fair housing throughout the United States.”
– 42 USC §3608(e)(5).

“No Certification, No Money”

- 42 U.S.C. §5304(b)(2): “Any grant under [the CDBG program] shall be made only if the grantee certifies to the satisfaction of the Secretary that ... the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 [42 U.S.C. 2000a et seq.] and the Fair Housing Act [42 U.S.C. 3601 et seq.], and the grantee will affirmatively further fair housing.”

Executive Order 12892 (1994)

- “[A]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of the [Fair Housing] Act....” §2-202
- See also Executive Order 11063, Nov. 20, 1962, §102; Executive Order 12259, Dec. 31, 1980, §1-202

CDBG/Con Plan AFFH Regs

- A grantee is “required to submit a certification that it will affirmatively further fair housing, which means that it will (1) conduct an analysis to identify impediments to fair housing choice within the jurisdiction; (2) take appropriate actions to overcome the effects of any impediments identified through that analysis; and (3) maintain records reflecting the analysis and actions in this regard.”
– 24 C.F.R. § 570.601(a)(2)
– 24 CFR § 91.225(a).

Preventing the Increase of Segregation

- "...the affirmative duty placed on the Secretary of HUD by § 3608(d)(5)... requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. **Action must be taken to fulfill, as much as possible, the goal of open integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.**"
 - *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973).

Refraining From Discrimination is Not Enough

- "...every court that has considered the question has held or stated that Title VIII imposes upon HUD an **obligation to do more than simply refrain from discriminating** (and from purposely aiding discrimination by others)... This broader goal [of truly open housing] ... **reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.**"
 - *NAACP v. Sec'y of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987).

Same Obligation Imposed on Grantees

- "When viewed in the larger context of Title VIII, the legislative history, and the case law, there is no way—at least no way that makes sense—to construe the boundary of the duty to [AFFH] as ending with the Secretary.... **[t]hese regulations unambiguously impose mandatory requirements on the [recipients] not only to certify their compliance with fair housing laws, but actually to comply.**"
 - *Langlois v. Abington Housing Authority*, 234 F.Supp.2d 33, 73, 75 (D.Mass. 2002)

AFFH Enforcement Mechanisms

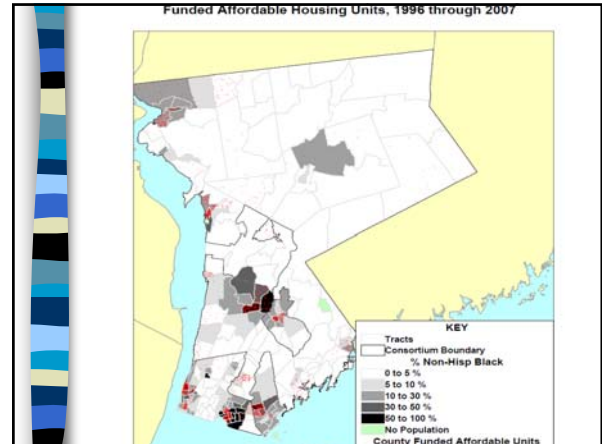
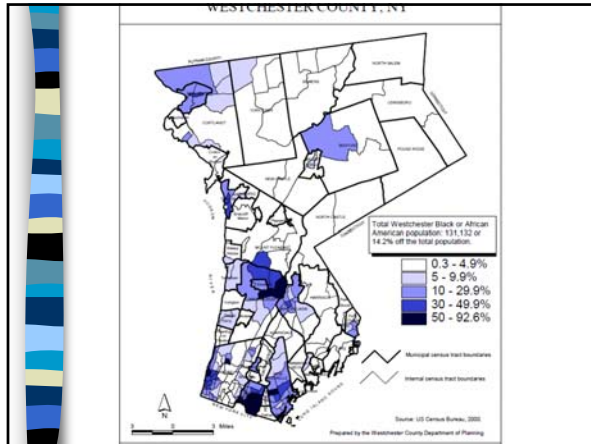
- No Private Right of Action re: §3608
- Administrative Complaint to HUD
- Administrative Procedures Act (for lawsuits against HUD)
- Section 1983 (for lawsuits against recipients)
- False Claims Act (for lawsuits against recipients)

U.S. ex rel. Anti-Discrimination Center v. Westchester County

- County received \$52 million+ in CDBG, HOME, ESG funds from 2000-2006
- Receipt of funds required repeated AFFH certifications
- Litigation brought under the False Claims Act: AFFH certifications were false because County did not consider race-based impediments to fair housing choice
 - Treble Damages
 - Share available to "relator"

40 Consortium Municipalities

- County as a whole has 16% African-Americans
- 40% of Consortium Municipalities have African-American populations of 1% or less
- **60% of Consortium Municipalities have African-American populations of 3% or less**
- A handful of municipalities have African-American populations above 16%: Yonkers, New Rochelle, Mount Vernon, White Plains, Peekskill, Greenburgh



Westchester AI

- 2000 and 2004 Analyses of Impediments (“AIs”): “The [Fair Housing Plan] describes the housing needs of handicapped persons, larger/smaller families [and] extended families....”
- AIs do not identify any impediments on the basis of race, color, national origin or any other protected class, even though County is part of one of the most segregated regions in the country
- No mention of housing discrimination or residential segregation

Allegations of the Complaint

- Westchester excluded consideration of impediments to fair housing based on race when it was required by statute to consider them.
- Westchester did not engage in any independent analysis or exploration of impediments to fair housing choice
- Westchester refused to identify or analyze community resistance to integration on the basis of race and national origin as an impediment.

Allegations of the Complaint

- As a matter of policy, County **refused to monitor** the efforts of participating municipalities to further fair housing and did not inform them that Westchester might withhold federal funds if the municipality did not take steps to further fair housing.
- Throughout the false claims period, Westchester **never required a participating municipality to take any steps** to increase the availability of affordable housing or otherwise affirmatively further fair housing.

County’s Defense

- Nowhere in the statute itself or in the implementing regulations is race mentioned specifically as an impediment to fair housing that grantees were required to consider
- Westchester states that “income is arguably a better proxy for determining need than race when distributing housing funds.”
- Race is “not among the most challenging impediments” to fair housing

Decision on Motion to Dismiss

- “In the face of the clear legislative purpose of the Fair Housing Act, enacted pursuant to Congress's power under the Thirteenth Amendment as Title VIII of the Civil Rights Act of 1968, to combat racial segregation and discrimination in housing, **an interpretation of ‘affirmatively further fair housing’ that excludes consideration of race would be an absurd result.**”
– *Westchester*, 495 F.Supp.2d 375, 387-88 (S.D.N.Y. 2007)

HUD *Fair Housing Planning Guide*

- “The HUD Guide is firmly rooted in the statutory and regulatory framework and consistent with the case law, and it is persuasive on the issue addressed in this Opinion.” 495 F.Supp.2d at 387

Court Relies Upon *Guide* Provisions to Define AFFH Obligations

- “HUD interprets the objective affirmatively to further fair housing to mean, among other things, to ‘[p]rovide opportunities for **inclusive patterns of housing occupancy regardless of** race, color, religion, sex, familial status, disability and national origin.’ HUD Guide at 1-3.” *Id.* at 387.

Court Relies Upon *Guide* Provisions to Define AFFH Obligations

- “An analysis of impediments under this duty involves an ‘**assessment of conditions, both public and private, affecting fair housing choice for all protected classes.**’ [HUD Guide] at 2-7.” *Id.* at 387.

Court Relies Upon *Guide* Provisions to Define AFFH Obligations

- “Such impediments are ‘**actions, omissions or decisions**’ which ‘**restrict housing choices**’ or the availability of housing choices’ ... based on ‘race, color, religion, sex, disability, familial status, or national origin,’ [HUD Guide] at 2-8, including ‘[p]olicies, practices, or procedures that appear neutral on their face,’ [HUD Guide] at 2-17.” *Id.* at 387.

Court Relies Upon *Guide* Provisions to Define AFFH Obligations

- “HUD's suggested analysis-of-impediments format includes a housing profile describing ‘**the degree of segregation and restricted housing** by race, ethnicity, disability status, and families with children; [and] **how segregation and restricted housing supply occurred.**’ *Id.* at 2-28.” *Id.* at 387.

Summary Judgment Decision

- “[T]he central goal of the obligation to AFFH [is] to end housing discrimination and segregation.” *U.S. ex rel. Anti-Discrimination Center v. Westchester County*, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009), at *14.
- “[A] determination that affordable housing is the greatest impediment does not absolve the County from its requirement to analyze race-based impediments to fair housing.” *Id.* at *13.

Summary Judgment Decision

- “The County has simply not shown that it analyzed whether there were race-based impediments to housing choice independent of the problem of low income, and as such, it did not comply with the requirement to AFFH.” *Id.* at *16.
- All of the express annual AFFH certifications are false as a matter of law, and so are more than 1000 implied AFFH certifications (claims for payment based on the express certifications). *Id.* at *16, *17

Summary Judgment Decision

- “[T]he County’s AIs ... utterly failed to comply with the regulatory requirement that the County perform and maintain a record of its analysis of the impediments to fair housing choice in terms of race. This failure is only compounded by the County’s failure to follow the guidance provided by HUD.” 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009), at *14

Summary Judgment Decision

- “As a matter of logic, providing more affordable housing for a low income racial minority will improve its housing stock but may do little to change any pattern of discrimination or segregation. Addressing that pattern would at a minimum necessitate an analysis of where the additional housing is placed. *Id.* at *15.

Summary Judgment Decision

- “[T]he grant funds at issue in this case were expressly conditioned on the AFFH certification requirement. The AFFH certification was not a mere boilerplate formality, but rather was a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations, requiring the County to conduct an AI, take appropriate actions in response, and to document its analysis and actions.” *Id.* at 20.

Settlement Terms

- County required to ensure development of 750 affordable housing units, within 7 years, in the whitest neighborhoods
 - 660 units must be built in municipalities with African-American population of less than 3% and Latino population of less than 7%
 - Additional integrative criteria at the census block group level

Settlement Terms

- HUD Appoints Monitor to Oversee Compliance with Settlement
- County Obligated to Conduct an Analysis of Impediments that Complies with FHA, Regulations and *Planning Guide*
- County Acknowledges its Authority to Sue Municipalities that Resist Affordable Units

Settlement Terms

- County Returns \$30 Million to HUD
 - \$21.6 Million to Fund Integrative Units
 - \$7.5 Million to Pay “Relator’s Share” for Ferreting Out False Claims
- County Must Supply an Additional \$30 Million for Integrative Units
- County Pays \$2.5 Million in Attorneys’ Fees and Costs

Media Coverage

Westchester County Agrees to Desegregate Housing in Mostly White Towns



Media Coverage

The New York Times

Fair Housing in the Suburbs

When one thinks about segregation, the suburbs of New York's Westchester County don't immediately come to mind. Unlike, of course, poverty's minority residential enclaves in cities, the county's suburbs are mostly white. But now, after a long and bitter fight, the county has agreed to pay \$30 million to fund a program to help integrate public housing in the county's mostly white suburbs. The settlement, which is the first of its kind in Westchester, will help pay for the construction of 1,000 new affordable units in the county's mostly white suburbs. The settlement also includes a requirement that the county pay for the construction of 1,000 new affordable units in the county's mostly white suburbs. The settlement also includes a requirement that the county pay for the construction of 1,000 new affordable units in the county's mostly white suburbs.

Reviving AFFH Enforcement

- Deputy Secretary Ron Sims: “This is consistent with the president’s desire to see a fully integrated society.... Until now, we tended to lay dormant. This is historic, because we are going to hold people’s feet to the fire.”

Reviving AFFH Enforcement

- HUD to Publish Proposed Rule on AFFH
- HUD to Revise *Planning Guide*?
- HUD to Provide Technical Assistance to Recipients?
- HUD to Increase Enforcement Staffing?

Scattering the Seeds of Westchester?

St. Bernard Parish (November 2009)

Breaking News >
St. Bernard Parish Council backs off on vote on apartments


By Chris Kirkham, The Times-Picayune
 November 03, 2009, 10:05PM

After pressure from federal housing officials and a pending lawsuit in federal court, the St. Bernard Parish Council on Tuesday officially rescinded an item on this month's special election ballot that would have given voters the chance to permanently ban large apartment complexes in the parish.

The move came on advice from the parish's lawyers, who last month told the council that they believed the potential lawsuit that would jeopardize federal financing for recovery projects and hurt the parish's appeals of its ongoing fair housing lawsuit.

The council proposed the voter referendum on future apartment complexes after three defeats in federal court this year, over its attempt to block construction of four 75-unit mixed-income apartment buildings in Chalmette, U.S. District Judge Ginger Searles sided with a local fair housing group and a Dallas real estate company on the four apartment complexes, and the parish eventually granted the building permits necessary for the developers, Provident Realty Advisors, to begin construction.

The council's plan for the apartment referendum would not have applied to the Provident developments, but was crafted to allow voters to ban any future apartment complexes of more than six units. After the council called for the election, the Greater New Orleans Fair Housing Action Center filed a motion last month arguing that parish officials were again in contempt of court.



I think the judge was wrong, St. Bernard Parish Councilman Wayne Landry said.

State of Texas (November 2009)

State plan for Ike money draws 2nd complaint

By Rhianon Haxxars
 The Daily News
 Published December 9, 2009

GALVESTON — The state's plan for spending \$1.7 billion in federal disaster recovery money has drawn a second legal complaint, this time from an advocacy group for public housing residents.

The Texas Low-Income Housing Information Service filed a complaint with the U.S. Department of Housing and Urban Development, claiming Texas was not taking steps to further fair housing with federal Community Development Block Grant funds it was to receive after hurricanes Dolly and Ike struck in 2008.

Specifically in Galveston, the housing authority proposes to rebuild 569 units of public housing on sites that are "highly vulnerable to future extreme weather conditions, and in neighborhoods that are hyper-segregated, rather than develop housing in neighborhoods with greater opportunities for residents," the complaint states.

The Texas Low-Income Housing Information Service calls for the federal housing department to reject the state's plan to spend the money — and bar the state from receiving future federal dollars — until Texas updates its federally mandated analysis of fair housing impediments. The analysis was last updated in 2003, long before hurricanes Katrina, Rita, Dolly and Ike changed the landscape for low-income families, the complaint states.

City of Joliet, Illinois (January 2010)

HUD ALLEGES: Joliet cutting black housing

Comments
 January 21, 2010
 By BOB DICKER bobd@jnet.com

JOLIET — Federal authorities are accusing Joliet of trying to reduce subsidized housing available to black residents.

The U.S. Department of Housing and Urban Development pointed to the city's attempts to condemn Evergreen Terrace and the Housing Authority of Joliet's restriction of the Focus Gardens housing project.

HUD's charges came in a letter reacting to the city's five-year, fair housing plan and threatens to take away roughly \$14 million in federal funds used for low-income residential development.

Some city officials, however, say they find HUD's criticism odd. Public Gardens, they note, was torn down with HUD approval and has been replaced with subsidized single-family houses and duplexes occupied primarily by black residents.

Evergreen Terrace fight

The HUD notice "came as a complete mystery to us because we had such a good working relationship with HUD over the years, and we always seek their approval for the actions that we take," City Councilman Timothy Brophy said Friday.

The city and HUD, however, have been at odds over the condemnation of Evergreen Terrace, a 200-apartment development that is privately owned but government subsidized.

City officials say Evergreen Terrace has been plagued for years by bad management, code violations and crime. But HUD in a Dec. 23 notice said the city has continued to pursue condemnation "even though Evergreen Terrace has undergone substantial rehabilitation."

"The city has not only failed to demolish Evergreen Terrace, but some city officials have expressed their extreme animus towards its residents," the HUD letter states.

HUD accuses an unnamed city commissioner of comparing Evergreen Terrace residents to a "pack of wolves" and an unnamed city official as referring to them as "all those niggers."

Brophy said city officials have questioned each other about the quotes. "We don't know where that came from," he said.

Policy Recommendations

- Private Right of Action to Enforce AFFH: amend definition of "discriminatory housing practice" provided in 42 U.S.C. §3602 to include "a failure to comply with the obligations of section 3608(e)(5)."
- Require concurrence of local fair housing enforcement groups on sufficiency of AI

Policy Recommendations

- HUD to fund an independent nonprofit agency with responsibilities to:
 - Collect all AIs
 - Post them on the Internet
 - Identify exemplary AIs and promoting them as models for other communities.
 - Provide technical assistances to fair housing and community groups to enhance their capacity to review and analyze AIs and to participate in the process of identifying fair housing impediments and appropriate actions to overcome them



Lessons for Recipients of Housing and Community Development Funds

- “[T]he central goal of the obligation to AFFH [is] to end housing discrimination and segregation.”
- Taking AFFH seriously can alert a recipient to ways in which private sector activity is harming the recipient—e.g., *City of Baltimore v. Wells Fargo*



Lessons for Recipients of Housing and Community Development Funds

- AFFH certifications are material preconditions to the receipt of HUD funds
- Courts likely to see claims for payment as implicit AFFH certifications
- Recipients ignore HUD’s *Fair Housing Planning Guide* and AFFH regulations at their peril



Lessons for Recipients of Housing and Community Development Funds

- A recipient must identify *all* impediments experienced by *all* protected classes, and must keep records of this analysis
 - Whether created by public or private sector, impediments must be analyzed
 - Impediments may include actions or policies that discriminate on the basis of protected class, whether by way of intentional discrimination or disparate treatment
 - A recipient is not excused from such an analysis by identifying the “greatest” or “most challenging” impediment; it must analyze everything it finds



Lessons for Recipients of Housing and Community Development Funds

- Permitting concentration of affordable housing development in minority neighborhoods likely perpetuates segregation and is a violation of the recipient’s AFFH obligation
- A recipient must take appropriate actions to overcome the impediments identified, and keep records of those actions
- It is impossible to meet this requirement in the absence of an adequate identification and analysis of underlying impediments



Lessons for Recipients of Housing and Community Development Funds

- Recipients are responsible for the AFFH compliance of their sub-recipients
 - You can’t fund jurisdictions whose policies and practices are AFFH non-compliant
- There will be more vigorous AFFH enforcement in the coming years:
 - Administrative complaints to HUD
 - HUD “front end” and compliance reviews
 - Litigation by civil rights groups
 - Litigation by developers and property owners



What is a Recipient to Do?

- Be proactive about AFFH and partner with knowledgeable public and private fair housing agencies
- Recipients who have not done or updated an AI since 2006 should conduct a new one ASAP, and engage with *all* interested parties
- Make sure the AI is an honest review of local government policies that may diminish fair housing choice in the jurisdiction



What is a Recipient to Do?

- Be vigilant about changes in housing and credit markets
- Since regional housing markets do not stop at your jurisdiction's border, investigate other communities' AFFH practices and coordinate with them appropriately
- TARP and economic stimulus money—to the extent it is in “programs and activities relating to housing and urban development”—brings AFFH obligations



Resources

- HUD *Fair Housing Planning Guide*:
<http://fhasecure.gov/offices/ftheo/images/fhpg.pdf>
- Information about Westchester litigation:
www.antibiaslaw.com/wfc
- City of Naperville (Ill.) Analysis of Impediments:
www.planningcommunications.com/ai/naperville_ai_2007.pdf