

LETTER TO PUBLIC OFFICIAL EXPLAINING AFFH MISCONCEPTIONS

The following letter is in response to an official who maintained that his county need not worry about HUD's AFFH because they were different from Westchester County (the landmark lawsuit that became the basis for AFFH) and that their attorneys had assured them they had read the contract and that HUD could not change their zoning laws.

The official also contended that they had completed a Consolidated Plan that HUD accepted, and therefore AFFH litigation and compliance was no problem.

The official is clearly under a series of misapprehensions that we find occur in many communities. This following letter explains the issues and may be useful in your community.

Because this is an on-going interaction, I have intentionally left out the names of the parties involved.

Hi _____,

Thank you for your response. I am not sure that you completely understand what happened in the Westchester County case, and the long-term implications of accepting certain HUD grants. Let me try to clear up a few important points.

I have consulted with nationwide expert on AFFH, and he explains it very well below. I ask you to please share this with your advisors and let me know their response. If any of your advisors would like to speak with him about this analysis, I would be happy to put you in touch with him. He met with Astorino very recently and his insight into what happened, and is still happening in Westchester. He says:

First, the Westchester case was brought in 2006. In the decade since, and as reflected in its 2015 rule, HUD's definition of what it takes to AFFH has dramatically changed. With it has changed the grantees' legal liability.

24 C.F.R. §5.152 - The grant recipients' actions must "address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws."

"Affirmatively furthering fair housing means taking proactive steps beyond simply combating discrimination to foster more inclusive communities and access to community assets for all persons protected by the Fair Housing Act. More specifically, it means taking steps proactively to address significant disparities in access to community assets, to overcome segregated living patterns and support and promote integrated communities, to end racially and ethnically

concentrated areas of poverty, and to foster and maintain compliance with civil rights and fair housing laws.

Second, note the vague definitions in HUD's explanation of AFFH. As Douglas County noted, "There is no clear definition of AFFH," and that is the real problem that concerns communities about the case. Not the original charge, but HUD's changes in the definitions since intervening in the case in 2009.

For instance, in the original settlement, Westchester agreed to build an additional 750 affordable homes. This they are completing ahead of schedule. HUD, however has upped their requirements.

- At first HUD accused the County of "Discrimination." When the court ruled against that charge...
- HUD came back with accusations of "exclusionary zoning practices." But two independent reports showed that zoning was based purely on safety and access to utilities, etc. and not on people. Any person of any race or ethnic background can live anywhere in the county as long as they could afford the home.
- HUD then said, the costly price of homes represented exclusionary zoning and demanded that low-income housing be built in upscale neighborhoods. EX. \$150K hi density condominiums next to \$800K homes in North Salem, NY.

The definitions keep changing. Socio-economic diversity and economic integration are now components of what it takes to AFFH. (This was never a part of the original Westchester case.)

Third, HUD does not change your zoning laws. They put you in a position where you are left no choice but to ignore or change them yourself.

- EX. HUD complained to one NY town official that the large one and two-acre lots in his community were exclusionary since low-income families could not afford them. The official replied, "Our zoning laws require wells to be at least 150' from septic systems that is why the lots must be larger." HUD responded, "We are not concerned about your zoning laws. You need smaller lots."

HUD does not look at local zoning. They only look at what they consider non-discriminatory and balanced lifestyles, definitions that are vague and flexible. Zoning is the local officials' problem. In other words, they tell you what to do and you do it.

Fourth, HUD's acceptance of an AFFH *"does not mean that HUD has determined that a jurisdiction has complied with its obligation to affirmatively further fair housing under the Fair Housing Act; has complied with other provisions of the Act; or has complied with other civil rights laws, regulations or guidance."* §5.162(a)(2)

In other words, a community can have their plan approved, receive the money, complete the plan, and still be liable to a HUD or third party initiated lawsuit.

Fifth, even if a community complies with all of HUD's definitions, the agency already said they see AFFH as a "platform for addressing discrimination in all areas." HUD defines their "Blueprint for Prosperity" as a way to improve "adult outcomes". Their newest HUD, DOT and Dep't of Ed initiative expands HUD's authority into assuring a diverse socioeconomic mix in elementary and secondary schools. Older anti-discrimination centers are now being converted to regional Equity Assistance Centers. Some of these programs are voluntary, but only until HUD decides they must be mandatory to meet their upgraded interpretations of Fair Housing Act.

Sixth, every applicant for CDBG, HOME, ESG and HOPWA grants must agree to compare their plan and data to that of the HUD defined or accepted region. HUD provides all of the jurisdictional and regional data. By aligning your plan and zoning to accommodate the AFFH plan, to that of the region, you are a de facto part of the region's planning process. In effect, AFFH begins the process of annexing your community into a larger region. Generally, regions are overseen by unelected councils giving local officials limited say and constituents reduced representation.

Seventh, a participant's AFFH obligation is not bounded by what it can do with the HUD funds it has received. The strategies and actions "will be accomplished primarily by making investments with federal and other resources...." §5.152; 78 Fed. Reg. 43716

This part of the rule has been around for years, but had lax enforcement. That has changed. Although the grantee's AFFH obligation arises in connection with the receipt of Federal funding, its AFFH obligation is not restricted to the design and operation of HUD-funded programs at the State or local level. The AFFH obligation extends to all housing and housing-related activities in the grantee's jurisdictional area whether publicly or privately funded.

Accepting any contract under these circumstances can only lead to massive increased liability, financial risk and loss of local autonomy.

There are many ways to replace expiring HUD money. It might serve well to reject HUD and begin exploring alternative methods to replace these high-risk moneys. As HUD stated in one of their AFFH explanatory documents, "there is no such thing as a free lunch."

Best regards,