

# The Housing We Need in the Neighborhoods We Want

New developments in the fair housing laws for people who are transgender, victims of domestic violence, people with disabilities, source of income protections, and for people who wish to move.

# Agenda

- New developments in the fair housing laws
  - Protections for people who are transgender
  - Protections for the victims of domestic violence
  - Helping people with disabilities obtain and keep the housing of their choice
  - Protections for families with children
- Promoting integration and providing access to neighborhoods

# Protections for People who are Transgender

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# Gender Identity or Expression

- Protected under state law, Con. Gen. Stat. §46a-51(21).
- HUD has issued a rule that there shall be equal access to housing in HUD programs regardless of sexual orientation or gender identity
  - <http://portal.hud.gov/hudportal/documents/huddoc?id=12lgbtfinalrule.pdf>
- Examples of gender identity or expression discrimination
- Examples of equal access to HUD housing

# Definition of Gender Identity or Expression

- A person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, part of a person's core identity or not being asserted for an improper purpose.

# Protections for Survivors of Domestic Violence

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# Protections for Survivors of Domestic Violence

- No specific protection in state or federal law
- Women experience domestic violence in higher proportion to the rest of the population
- Complaints can be brought using different theories – direct evidence of unequal treatment, disparate impact

# Protections for Survivors of Domestic Violence

- Examples of what could be discrimination
  - Eviction as the result of too many police visits
  - Damage assessment for damage caused by an abuser
  - Denial of housing because of bad landlord reference resulting from domestic violence
- HUD memo:  
<http://portal.hud.gov/hudportal/documents/huddoc?id=11-domestic-violence-memo.pdf>

# Protections for Survivors of Domestic Violence

- Violence Against Women Act (VAWA)
  - Protects victims of domestic violence, dating violence, sexual assault, and stalking.
  - Protects public housing residents as well as voucher holders, and Section 8 project-based voucher holders from eviction as the result of domestic violence.
  - Prohibits the denial of federal housing assistance to the victims of domestic violence for reasons resulting from domestic violence.

# Protections for People with Disabilities

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# Protections for People with Disabilities

- Illegal to refuse to rent or sell to someone because they are disabled
- Illegal to have different terms and conditions for people who are disabled
- Illegal to steer based on disability

# Protections for People with Disabilities

- Illegal to make the person prove they have the ability to live independently
  - Cannot ask for a doctor's letter stating the person has the ability to live independently
  - Cannot ask to see the person's medical records
  - Cannot ask someone to move out because the housing provider thinks the person is "too disabled" to live in the housing
  - Person who lives in the unit decides if it is appropriate for them

# Protections for People with Disabilities

- Reasonable accommodations
  - Change in rule, policy, or practice
  - In general does not cost money
- Request is a statement that describes the limitation and the change in the rule policy or practice.
- Housing provider cannot refuse just because the request is not in writing.
- Housing provider cannot ask for copies of medical records or to talk to a doctor.

# Protections for People with Disabilities

- Reasonable modifications
  - Modifications mean money—putting in a ramp, installing a roll-in shower, etc.
- Owners or operators of housing receiving federal operating support must make modifications at their own expense.
- All other owners must permit the tenant or occupant to make modifications.

# Protections for Families with Children

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# Definition of Families with Children

- Household that includes a parent or guardian or someone standing in the place of a parent or guardian and children under the age of 18;
- A household that includes a pregnant woman;
- A household in the process of obtaining custody of a child under the age of 19.

# Family Status Discrimination

- Illegal to refuse to rent or sell to a family with children;
- Cannot have different rules for families with children than for everyone else;
- Cannot steer families with children;
- Can refuse to rent to families with children if the building is for people who are disabled or elderly.

# Family Status Discrimination

- Occupancy limits, e.g. two people per bedroom
  - Rule may have a disparate impact on families with children
  - In general, landlords can limit the number of people living by determining the square footage of the unit
  - Boys and girls of any age can share a bedroom

# Promoting Integration and Access to Neighborhoods

Affirmatively Furthering Fair Housing

# **Affirmatively Furthering Fair Housing: What it means to your community**

by Timothy M. Smyth  
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# Existing AFFH Obligations

# AFFH Statutory Mandate

- Fair Housing Act 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) (emphasis added).

# “No Certification, No Money”

- “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.**”
  - 42 U.S.C. § 5304(b)(2) (emphasis added).

# 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 (1<sup>st</sup> Cir. 1987).

# Reports Required by HUD from “Entitlement Jurisdictions”

- Consolidated Plan
- Annual Action Plan
- Consolidated Annual Performance and Evaluation Report (CAPER)
- Analysis of Impediments to Fair Housing Choice (AI)

# 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) and 24 CFR § 91.225(a).

# Obligations Apply to All Funds

- “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.”
  - *Fair Housing Planning Guide* (1995), at p.1-3.

## *Westchester* Litigation: A Cautionary Tale

- 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”

## Court Decision—2009

- “[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*, 668 F. Supp. 2d 548, 564 (S.D.N.Y. Feb. 24, 2009).
- “[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 562.

# 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.”

# Lessons for Recipients of Housing and Community Development Funds

- AFFH certifications are material preconditions to the receipt of HUD funds
- 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:
  - Whether created by public or private sector, impediments must be analyzed;
  - 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 is a commonly identified failure to AFFH;
- A recipient must take appropriate actions to overcome the impediments identified, and keep records of those actions.

# Lessons for Recipients of Housing and Community Development Funds

- Recipients are responsible for the AFFH compliance of their sub-recipients
- There will be more vigorous AFFH enforcement in the coming years.

# What is a Recipient to Do?

- Be proactive about AFFH and partner with knowledgeable consultants with fair housing expertise;
- 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.

# HUD's Proposed AFFH Rule

# Proposed Rule

(78 Fed. Reg. 43710-743) (July 19, 2013)

- Clarifies and expands the AFFH obligations of HUD “Program Participants”
- HUD website on Proposed Rule:  
[http://www.huduser.org/portal/affht\\_pt.html](http://www.huduser.org/portal/affht_pt.html)

## Definition of AFFH (§5.152)

- “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.”

## Definition of AFFH (§5.152)

- “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.”

## AFH Must Address Zoning and Land- Use Impediments to Fair Housing

- A Program Participant's strategies should "overcome segregated living patterns and support and promote integrated communities." § 5.152
- Participants must "examine ... zoning and other land-use practices ..., and to take appropriate actions in response." 78 Fed. Reg. 43716.

## Unlike AI, AFH Submitted to HUD

- Participants must submit AFHs to HUD well in advance of annual Application for Federal Funds (in Consolidated Plan or Annual Action Plan)
- HUD can reject noncompliant AFHs, and impose a range of sanctions for noncompliance, up to and including withholding federal funds.

# Mandatory Areas of Inquiry

- Participants must use HUD data to identify the existence and extent of:  
(1) segregation, (2) racially or ethnically concentrated areas of poverty;  
(3) disparities in access to community assets, (4) disproportionate housing needs and (5) illegal discrimination. § 5.154(d)(2)

# Honest Conversations About Race and Segregation

- AFH process requires Program Participants to initiate and follow through on jurisdiction-specific community conversations about race, segregation and access to opportunity areas.

# All Enforcement Options Remain

- The proposed Rule leaves in place HUD's enforcement powers with respect to the AFH and compliance with participants' AFFH obligations. *See, e.g.,* 24 C.F.R. §§ 91.500(b) (HUD approval action); 570.304 (making of grants); 570.485(c) (making of grants); 570.601 and 570.602 (civil rights certification requirements); 570.904 (equal opportunity and fair housing review criteria); 570.910-570.913 (corrective and remedial actions).

## New AFFH Rule Governs All Funds, Not Just Federal Funds

- Proposed Rule emphasizes that a Participant's AFFH obligation is not bounded to 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.

# Conclusion/Resources

- For more information, please visit us at:  
<http://www.relmanlaw.com/affh/>