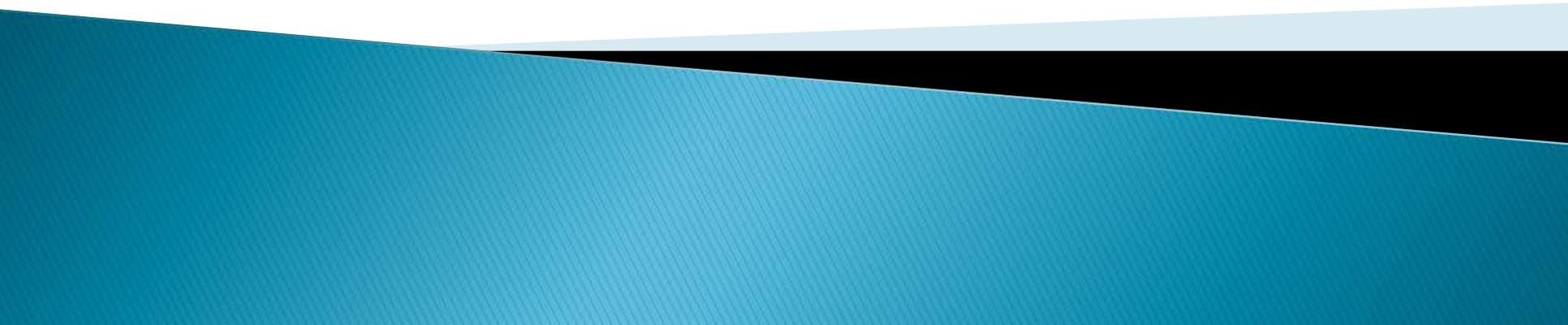


“Affirmatively Furthering Fair Housing”

“De-Concentration Inside Out: Creating Diverse, Inclusive Communities”

Compiled by David T. Quezada

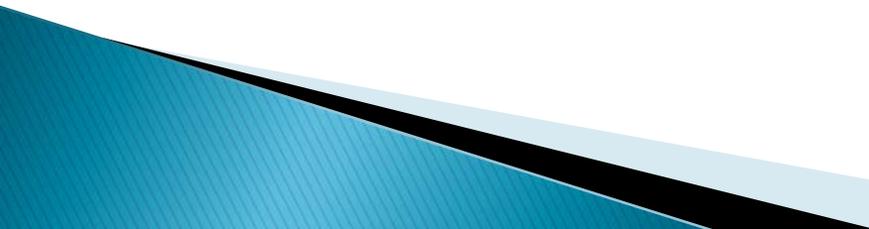
4TH ANNUAL SAN JOAQUIN VALLEY AFFORDABLE HOUSING SUMMIT
NOV 3, 2015



Fair Housing Act

- ▶ Section 808(e) (5) of the Act directs that the Secretary of Housing and Urban Development “shall administer the programs and activities relating to housing and urban development in a manner affirmatively to further fair housing

Affirmatively Furthering

- ▶ Obligation comes from the requirement in the Fair Housing Act that the Secretary of HUD act affirmatively in further fair housing
 - ▶ Actions come through housing and urban development activities
 - ▶ Purpose is not just to address discrimination and provide remedies for discrimination but also requires actions that would stop future discrimination and remove segregation and other effects of past discrimination
- 

What is Covered?

- ▶ HUD requires that each program that it funds certify that it will affirmatively further fair housing (AND) comply with a variety of civil rights laws
- ▶ All actions within that program are covered:
- ▶ Public Housing programs are covered (PHAs and Section 8) (24 CFR § 903.7(o)(1))
 - Multifamily housing like Section 8 project-based are covered
 - CDBG programs that cover states, entitlement jurisdictions and some small towns when they get grants (24CFR570.487(b)/570.601(a)(2)/570.303 & 24CFR91.225(a)(1))
 - The jurisdiction, taken as a whole, must affirmatively further fair housing, NOT just with HUD funds
 - So if there are private acts of discrimination within one of those jurisdiction, the jurisdiction is required to identify those actions and take actions to counter them.

Key Issues

- ▶ What are the barriers to Affirmatively Furthering Fair Housing?
 - Not just the lack of affordable housing, BUT:
 - **Where it is located ?**– so it does not perpetuate segregation
 - **How it is marketed?** – to those least likely to apply
 - **Have the zoning and/or funding decisions made . . . Exclude or limit housing opportunities?**
 - For people of color?
 - For families with children?
 - For people with disabilities?
 - **Are there any Regional considerations involved?**

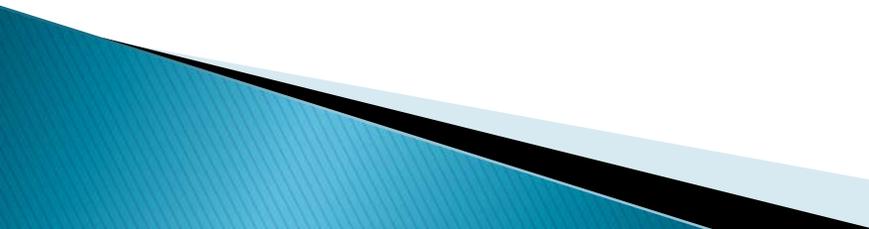
Westchester County

- ▶ County had data indicating communities within the county were segregated
- ▶ Knew or should have known that almost $\frac{3}{4}$ of affordable housing was being built in segregated neighborhoods
- ▶ Had conducted AIs but never found that segregated housing patterns were an impediment to choice
- ▶ Lot's on nimby-ism and lack of development of affordable housing in White communities
- ▶ Complaint filed by Anti-Discrimination Center of New York alleging violation of the False Claims act

Settlement Terms

- ▶ County must return \$30 million to HUD
 - ▶ County Must Supply an Additional \$30 Million for Integrative Units
 - ▶ County Pays \$2.5 Million in Attorney Fees/costs
 - ▶ County required to ensure development of 750 affordable housing units, within 7 years, in the whitest neighborhoods...
- 

What Can HUD Do to Enforce AFFH?

- Conduct compliance/monitoring reviews
 - Consider whether the jurisdiction is falsely claiming that it is complying with civil rights laws or the affirmatively furthering obligation by:
 - Reviewing the current AI or in the future the AFH Tool
 - Reviewing ConPlans/AAPs/PHA Plans
 - Conduct investigations of complaints
 - Stay alert to issues in the press or private lawsuits.
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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).

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)

Courts Rely 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.

Courts Rely 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.

Lessons for Recipients of Housing and Community Development HUD Funds

- ▶ “[T]he central goal of the obligation to AFFH [is] to end housing discrimination and segregation.”
- ▶ Funded Recipients are responsible for ensuring compliance by their sub-recipients with AFFH!
- ▶ There will be more vigorous AFFH enforcement in the coming years:
 - Administrative complaints to HUD
 - HUD front-end and monitoring reviews for compliance
 - **Litigation by civil rights groups**
 - Litigation by developers and property owners . . .