

HUD's New Rule Repeals Substantive Federal Review of Affirmatively Furthering Fair Housing

In 2018, the U.S. Department of Housing and Urban Development (“HUD”), suspended HUD’s 2015 Rule regarding Affirmatively Furthering Fair Housing (“AFFH”). HUD has now repealed the 2015 AFFH Rule altogether and replaced it with a new Rule. HUD’s new Rule redefines AFFH and reduces the level of AFFH effort required by recipients of a number of HUD programs. While this is a major change with respect to HUD funded programs, California public agencies and funding recipients remain subject to the State of California’s requirements with respect to Affirmatively Furthering Fair Housing. Affirmatively Furthering Fair Housing.

In addition to declaring housing discrimination illegal, the Fair Housing Act of 1968 (the “FHA”) requires that HUD and HUD funding recipients “affirmatively further fair housing.” In 2015, HUD adopted an AFFH Rule, which defined AFFH as a mandate for public housing agencies (“PHAs”) and public agency funding recipients of HUD Community Planning and Development funds (“Funding Recipients”).

The 2015 AFFH rule required PHAs and Funding Recipients to “do more than simply not discriminate,” and required submission of an Assessment of Fair Housing (“AFH”) for HUD review. Funding Recipients and PHAs were required to assess the state of fair housing in their local jurisdiction, develop local goals, metrics, and milestones to foster fair housing, and implement locally created strategies to reach their local goals. Preserving Community and Neighborhood Choice.

On July 23rd, 2020, HUD released a new final Rule, the “Preserving Community and Neighborhood Choice” Rule, repealing the 2015 AFFH Rule

(which had already been suspended since 2018). HUD removed the detailed planning, monitoring, and reporting requirements imposed by the 2015 AFFH Rule, relying on the argument that “affirmatively furthering fair housing” is not defined in the FHA and thus HUD has broad discretion to reasonably interpret the phrase and fulfil its obligations. HUD labeled the 2015 AFFH Rule “too aggressive,” and declared that fair housing goals were “longterm goals to be achieved through the narrow means of eliminating overt housing discrimination.” Now to comply with the FHA’s “affirmatively furthering fair housing” requirement, HUD merely requires that the Funding Recipients certify that they are taking any action rationally related to promoting one or more of the following: affordable housing; safe housing; decent housing; housing free of unlawful discrimination; and/or accessible housing as required under civil rights laws. AFFH Still Required in California.

While Funding Recipients will no longer have to submit an AFH to receive HUD funding, California law still requires public agencies to affirmatively further fair housing, a duty which “extends to all of a public agency’s activities and programs relating to housing and community development.” Though the phrase “affirmatively furthering fair housing” is not defined in the FHA, Section 8899.50 of the California Government Code defines the phrase and declares that the interpretation is to be consistent with the Federal 2015 AFFH Rule, even if that original Rule is suspended or revoked. This means that California entities must look to the 2015 AFFH Rule and accompanying guidance as the standard for activities that require affirmatively furthering fair housing. Beginning with housing elements due in 2021,

The California Department of Housing and Community Development (“HCD”) will review Housing Elements in accordance with Government Code Section 65583. HCD will require an AFH “consistent with the core elements” of the AFH required under the former Federal 2015 AFFH Rule. The AFH submitted to HCD is to include following components:

- A summary of fair housing issues and an assessment of the jurisdiction’s fair housing enforcement and fair housing outreach capacity.
- Analysis of data, knowledge, and contributing factors to integration and segregation patterns and trends, racially or ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs, including displacement risk.
- Identification of the jurisdiction’s fair housing priorities and goals, giving highest priority to those identified factors that limit or deny fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance, and identifying the metrics and milestones for determining what fair housing results will be achieved.
- Strategies and actions to implement those priorities and goals, which may include enhancing mobility strategies and development of new affordable housing in areas of opportunity, place-based strategies to encourage community revitalization, preservation of existing affordable housing, and protecting existing residents from displacement.

An [April 23, 2020 Memorandum from HCD](#) provides guidance on preparation of an AFH for Housing Elements as well as further links to the 2015 AFFH Rule and Guidance.

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