



## A SHARED FUTURE

Fostering Communities of  
Inclusion in an Era of Inequality

# Speaking Truth to Power: Enhancing Community Engagement in the Assessment of Fair Housing Process

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This paper was presented as part of Panel 4 at the symposium, entitled “What would it take... For the HUD AFFH rule to meaningfully increase inclusion?”

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*[The Fair Housing Act] imposes ... an obligation to do more than simply refrain from discriminating ... 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.*

—Judge Stephen J. Breyer<sup>1</sup>

## **Introduction**

The recent presidential election, the advent of the Trump administration and the apparent ascendancy of hostile forces in Congress have temporarily unsettled the expectations of advocates and elected and appointed officials concerning the obligation of states, localities, and public housing authorities (“Recipients”) to affirmatively further fair housing (“AFFH”). Although HUD’s interpretation of a Recipient’s obligation to analyze race-based and other impediments is “firmly rooted in the statutory and regulatory framework and consistent with the case law,”<sup>2</sup> the Trump administration and a number of Republican lawmakers have suggested they may seek to repeal AFFH regulations promulgated by the Obama administration, suspend recipients’ obligations to comply, defund HUD’s enforcement, or prohibit HUD from disseminating data related to segregation and discrimination.<sup>3</sup>

After eight years of HUD’s heightened expectations that Recipients should identify and take steps to overcome fair housing impediments, and with each Recipient now “on the calendar” for producing a comprehensive Assessment of Fair Housing (“Assessment”) and action plans to overcome fair housing barriers in the next five years, stakeholders are looking for some clarity about how to proceed in the short and medium terms.

As another paper in this symposium articulates,<sup>4</sup> AFFH is the law of the land and Recipients can and will be held to its obligations regardless of inaction by the Trump administration or attempts by Congress to weaken enforcement tools. But this much is clear: Five decades after it was adopted as part of the Fair Housing Act of 1968, the AFFH provision

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<sup>1</sup> *NAACP v. Secretary of Housing and Urban Development* 817 F.2d 149. 1st Cir (1987).

<sup>2</sup> *U.S. ex rel. Anti-Discrimination Center v. Westchester County*, 495 F. Supp. 2d 375, 387 (S.D.N.Y. 2007).

<sup>3</sup> H.R. 482 and S. 103 are identical bills providing, in relevant part, that the Final Rule and other HUD notices providing for an AFFH Assessment Tool “shall have no force or effect,” and that “no Federal funds may be used to design, build, maintain, utilize, or provide access to a Federal database of geospatial information on community racial disparities or disparities in access to affordable housing.” See Local Zoning Decisions Act of 2017, H.R. 482 and S. 103, 115th Cong. (2017).

<sup>4</sup> Julian (2017).

has never been self-executing, and entities seeking to implement and enforce it have had to tangle with powerful political and private market forces that favor segregation.

HUD's July 2015 AFFH regulation (the "Final Rule") provides both carrots and sticks to ensure robust community participation. On the one hand, HUD will offer technical assistance on techniques to encourage participation by groups that otherwise might not participate.<sup>5</sup> On the other, it warns that a Recipient that fails adequately to involve stakeholders is at risk of having its Assessment rejected as "substantially incomplete,"<sup>6</sup> which could lead to reduction or elimination of federal funding.

Overall, then, the Final Rule sets high expectations for "community engagement" and requires certain minimum procedural steps involving outreach, communications, and consultation,<sup>7</sup> but prescribes little about how a Recipient should encourage participation by people most directly affected by fair housing impediments.

The Final Rule sets the table for robust conversations about hard topics—like discrimination and segregation—that most communities have tried hard to avoid for decades. But it leaves to local discretion how to get the right stakeholders to the table for those conversations. While there is some evidence that this "federal nudge" may help communities to break free of some historical restraints and adopt new policies that address longstanding needs,<sup>8</sup> that kind of success does not take place in a vacuum. Rather, as this paper suggests, the full promise of AFFH can be achieved only in communities where there are concerted efforts by community groups, academics, and foundations to build capacity for: meaningful community participation by people of color and their advocates in the Assessment process and designation of actions to counteract segregation; robust local data collection and analysis; mobilization of political constituencies to implement those actions and, if all else fails, to enforce the AFFH obligations through litigation, administrative complaints and grassroots advocacy. In communities where these constituents come together to mobilize a strong "ground game,"<sup>9</sup>

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<sup>5</sup> Preamble to Final Rule, 80 Fed. Reg. 42272, 42295.

<sup>6</sup> 24 C.F.R. §§ 5.162, 91.500.

<sup>7</sup> 24 C.F.R. §5.158.

<sup>8</sup> Blumgart (2017).

<sup>9</sup> Allen (2015).

historically disadvantaged constituencies are likely to secure concrete commitments to address fair housing impediments, and organizing models can be tested and brought to bear on communities whose Assessments are due later in the process.

### **The Centrality of Community Engagement**

Nearly fifty years ago, Senators Edward Brooke (R-MA) and Walter Mondale (D-MN) understood that, to be fully successful, the Fair Housing Act needed an AFFH provision invoking Congressional power under the Constitution’s Spending Clause in support of its twin goals of nondiscrimination and racial integration. Since then, Congress and HUD have added parallel AFFH provisions in the authorizing statutes for the Community Development Block Grant (“CDBG”), HOME Investment Partnership (“HOME”), and public housing programs.<sup>10</sup> As a condition of receiving that funding, federal law requires those entities to certify their compliance—and actually comply with<sup>11</sup>—a number of civil rights obligations, including the obligation to AFFH.

All of these programs—under which HUD distributed more than \$38 billion in FY 2015<sup>12</sup>—have, for years, required Recipients to adopt citizen or resident participation plans. But, unless local advocates have insisted, few of these plans have resulted in full-throated community engagement. As a consequence, most such planning processes have been “top-down,” with a handful of municipal experts serving up fully-formed plans for grassroots groups to review and digest during fairly short public comment periods.

Perhaps recognizing that Recipients’ funding under the above-referenced programs actually “belongs to poor people with housing problems,”<sup>13</sup> the Final Rule and its associated guidance seek to reverse the approach: “The goal of community engagement in the development of the [Assessment] is to create a product that is informed by and supported by

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<sup>10</sup> 42 U.S.C. §§ 5304(b)(2), 12705(b)(15), 24 C.F.R. §903.7(o).

<sup>11</sup> *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33, 73, 75 (D.Mass. 2002).

<sup>12</sup> HUD’s final appropriations for Fiscal Year 2015 provide for approximately \$4.5 billion in HUD block grant funding for State and local governments and \$33.5 billion in public housing and rental assistance funding to public housing authorities and similar agencies.

<sup>13</sup> Junge (1995).

the entire community and establishes a standard for inclusive decision making.” Going forward, HUD expects “meaningful community participation,” and expects local governments to “employ communications means designed to reach the broadest audience.” In other words, it is entirely fitting that the authentic voices of people intended to benefit from these programs be amplified in the Assessment process.

At the moment, the Final Rule’s provisions on community engagement are something of a blank canvas. Every community will start with a different palate, and no finished product will look like any other. But folks in the housing justice movement have been organizing for a long time, and there are sophisticated training materials and countless examples of successful campaigns—six of which are summarized below—to inform groups around the country seeking to insert themselves into similar conversations that are part of an Assessment process.

There are also substantial reasons—beyond fear of enforcement and loss of funding—for Recipients to embrace and promote deep community engagement. Without grassroots partners, no top-down approach will be effective against the obligation that each Recipient take “meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on [race, national origin, and other] protected characteristics.”<sup>14</sup> Nor, without honest conversations about discrimination and its antidotes, will any Recipient be able to “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.”<sup>15</sup>

### **Power Concedes Nothing Without a Demand: Local AFFH Advocacy**

Over the past decade—sometimes with governmental and philanthropic support and sometimes without—community-based organizations have developed AFFH advocacy strategies at the state or local level that may be worthy of emulation as we move into a period

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<sup>14</sup> 24 C.F.R. §5.152.

<sup>15</sup> *Ibid.*

in which HUD's affirmative efforts are less robust. Each of the matters listed below provides an example of how an advocacy or grassroots group made room for itself at the community table and instigated conversations about discrimination and segregation.

### **Anti-Discrimination Center**

After comparing Westchester County's Analyses of Impediments (AIs)—the precursor to the Analysis of Fair Housing Assessment ("Assessment") mandated by the Final Rule—and other submissions to HUD with data on discrimination and segregation, in late 2005, the Anti-Discrimination Center ("ADC") concluded that the County's certifications of compliance with its AFFH and related civil rights obligations were not truthful. When ADC sought an explanation for the discrepancies, the deputy planning commissioner revealed that the County routinely approved funding for municipal members of its funding consortium without respect to whether those members had exclusionary zoning provisions or otherwise resisted proposals to develop affordable housing within their borders.

ADC eventually brought suit under the federal False Claims Act, alleging that the County's AFFH certifications were knowingly false because the County had taken no steps to identify or overcome race-based impediments and that the County had steered funding for the development of affordable housing principally to racially-segregated and low-income neighborhoods. ADC's ability—through an expert demographer—to conduct data analysis and mapping of segregation and affordable housing units was critical to establishing the County's liability for violating its AFFH obligations.

The U.S. District Court in Manhattan granted summary judgment for ADC, holding that no reasonable jury could conclude that the County had conducted an appropriate analysis of race-based impediments as part of its 2000 and 2004 AIs.<sup>16</sup> The matter settled in August 2009, and the County was required, among other things, to ensure the development of 750 units of affordable housing in predominantly white areas, and to conduct a new AI and zoning analysis of each municipal member of the funding consortium. The County's progress (and lack thereof) in fulfilling its obligations is chronicled at <http://www.antibiaslaw.com/westchester-case>. Contact: Craig Gurian, [craiggurian@antibiaslaw.com](mailto:craiggurian@antibiaslaw.com).

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<sup>16</sup> *U.S. ex rel. Anti-Discrimination Center v. Westchester County*, 668 F. Supp. 2d 548, 563 (S.D.N.Y. 2009).

## **Texas Low Income Housing Information Service and Texas Appleseed**

Following Hurricanes Dolly (July 2008) and Ike (September 2008), Congress appropriated several billion dollars in CDBG disaster recovery funding, roughly \$3.1 billion of which was allocated to the State of Texas.<sup>17</sup> Texas Low Income Housing Information Service (“TxLIHIS”) and Texas Appleseed are statewide advocacy organizations with long histories of fighting for housing equity and transparency in affordable housing programs administered by the State of Texas. In the mid-1990s, the groups got the state legislature to produce an annual report on low-income housing in Texas. For ten years prior to Hurricanes Dolly and Ike, that annual report provided detailed data on the current ethnic and racial composition for each multifamily housing development receiving any form of assistance from the State, along with the number of households in each development with children, with disabilities, and making use of housing choice vouchers.

Through analysis of this and other local data, the groups were able to establish that the recovery programs developed by the State of Texas would perpetuate racial segregation and limit housing choice. Among other things, their analysis showed that the state housing agency’s limitation on rebuilding single-family homes on existing sites would require homeowners of color to return to neighborhoods that were disproportionately high in crime, racially segregated, and characterized by low employment and educational opportunity. Similarly, the programs the State proposed for rebuilding affordable multifamily housing emphasized rebuilding in segregated neighborhoods and permitted higher-opportunity neighborhoods to avoid new construction of affordable housing through enforcement of Low-Income Housing Tax Credit rules that grant homeowners associations and local politicians veto power over such proposals. TxLIHIS and Appleseed were also able to document the State’s plan to distribute billions of dollars of disaster recovery funds to localities with discriminatory land use rules, deeply entrenched segregation, and documented hostility to racial integration.

On December 1, 2009, TxLIHIS and Appleseed filed an administrative complaint with HUD, alleging that the State’s disaster recovery programs involving housing and community development violated the Fair Housing Act and the State’s AFFH obligations, and asking HUD to

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<sup>17</sup> Texas General Land Office, “Recovery,” <http://www.glo.texas.gov/recovery/>.



suspend funding until the State came into compliance. During the next six months—during which TxLIHIS and Appleseed showed clear data mastery exceeding the capacity of the State—the parties negotiated a Conciliation Agreement, pursuant to which the State agreed to conduct a new AI and to commit hundreds of millions of dollars to rebuilding housing in a manner consistent with AFFH.<sup>18</sup> The Agreement also required each locality seeking federal funding to complete a Fair Housing Assessment Statement, identifying local fair housing impediments and making specific local commitments to actions intended to overcome those impediments.

Contacts: John Henneberger, [john@texashousing.org](mailto:john@texashousing.org); Maddie Sloan, [msloan@texasappleseed.net](mailto:msloan@texasappleseed.net).

### **Greater New Orleans Fair Housing Action Center and Lawyers Committee for Civil Rights**

Greater New Orleans Fair Housing Action Center (“GNOFHAC”) is a private, full-service fair housing enforcement organization that found itself at the epicenter of fair housing issues after Hurricane Katrina hit the region in late August, 2005.<sup>19</sup> Building on its post-Katrina experience, at a January, 2011 conference held in a church basement,<sup>20</sup> GNOFHAC introduced the concept of a “People’s AI,” designed to engage community members in identifying, analyzing, and responding to segregation and other fair housing barriers that they experienced every day, but that had been omitted from the AI produced by the City of New Orleans. Published in December 2011 by GNOFHAC and the Lawyers’ Committee for Civil Rights Under Law, “People’s Analysis of Impediments (AI) to Fair Housing for New Orleans”<sup>21</sup> provides a roadmap for community groups to participate in fair housing planning efforts. Because of its insights into local conditions and its work on the “People’s AI,” GNOFHAC was selected as a

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<sup>18</sup> “Conciliation Agreement between Texas Low Income Housing Information Service, Texas Appleseed, and the State of Texas,” May 25, 2010, <http://www.relmanlaw.com/docs/Texas-AFFH-Final-Conciliation-Agreement-signed-by-HUD.pdf>.

<sup>19</sup> Greater New Orleans Fair Housing Action Center, “St. Bernard Parish,” <http://www.gnofairhousing.org/programs/enforcement/st-bernard-parish/>; “Conciliation Agreement between U.S. Dep’t of Hous. and Urban Dev., Greater New Orleans Fair Housing Action Center, and Jefferson Parish,” June 24, 2013, <http://www.relmanlaw.com/docs/GNOFHAC-2013.06.24-Executed-Conciliation-Agreement-Jefferson-Parish.pdf>.

<sup>20</sup> Greater New Orleans Fair Housing Action Center, “Fit for a King 2011,” Flickr album, Jan. 14, 2011, <https://www.flickr.com/photos/58782715@N08/sets/72157625898694712>.

<sup>21</sup> Greater New Orleans Fair Housing Action Center and Lawyers’ Committee for Civil Rights Under Law (2011).

contractor for the development of the Assessment for the City of New Orleans and the Housing Authority of New Orleans, which was the first Assessment pursuant to the Final Rule.<sup>22</sup> Contact: Cashauna Hill, [chill@gnofairhousing.org](mailto:chill@gnofairhousing.org).

### **Latino Action Fund, Fair Share Housing Center, and New Jersey State Conference, NAACP**

After Superstorm Sandy hit New Jersey in October, 2012, Congress appropriated nearly \$3 billion in CDBG funds to assist in recovery efforts. Three statewide advocacy groups—Latino Action Network, Fair Share Housing Center, and the New Jersey Conference of the NAACP—conducted community forums and undertook data collection and analysis to determine the extent to which the Christie administration’s disaster recovery programs were serving low-income families of color, particularly those living in multifamily rental housing.

After determining that the State’s initial action plan proposed to favor higher-income homeowners disproportionately to the harm they had suffered, and that the State was not meeting its requirements with respect to federal Limited English Proficiency (“LEP”) regulations meant to ensure that non-English speakers would have an equal opportunity to benefit from the recovery programs, the advocacy groups filed an administrative complaint with HUD in April, 2013, alleging violations of Title VI of the Civil Rights Act of 1964 (“Title VI”), the Fair Housing Act, and the AFFH obligation. Those groups provided HUD both insight and sophisticated data analysis with respect to program beneficiaries, and their close monitoring of state agencies identified several thousand applicants who had lost the opportunity to participate because of LEP violations as well as several thousand applications that were erroneously denied by a private contractor.

The parties entered into a Conciliation Agreement<sup>23</sup> on May 30, 2014 that requires the State to target \$240 million in additional funds to the communities hardest hit by the storm, with an emphasis on serving low-income renters, who are much more likely than homeowners to be people of color. The agreement also mandates immediate steps to address language barriers that had prevented many Sandy victims from participating in the recovery programs. The agreement governs the State’s administration of nearly \$2.8 billion in HUD disaster

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<sup>22</sup> National Low Income Housing Coalition (2016); Housing Authority of New Orleans (2016).

<sup>23</sup> Fair Share Housing Center, Latino Action Network, and NAACP New Jersey State Conference (2015).

recovery funding, and requires the State to add supplemental funding of \$215 million to its principal program to build replacement units for households displaced by the storm. It also establishes an additional \$15 million for immediate help for renters who are still displaced from Sandy, which can be used for up to two years while replacement homes are being built, and \$10 million for mobile home owners. Contacts: Kevin Walsh, [kevinwalsh@fairsharehousing.org](mailto:kevinwalsh@fairsharehousing.org); Adam Gordon, [adamgordon@fairsharehousing.org](mailto:adamgordon@fairsharehousing.org).

### **Metropolitan Interfaith Council on Affordable Housing**

Until the mid-1990s, the Minneapolis-St. Paul (“Twin Cities”) metroplex had one of the country’s most sophisticated, pro-integration fair share affordable housing programs, under the supervision of the Metropolitan Council, a regional government entity that awarded money for transportation, parks, and regional infrastructure to suburbs that embraced affordable housing, and withheld it from those who did not. Concerned that state and local governments had abandoned their commitment to such programs, the Metropolitan Interfaith Council on Affordable Housing (“MICAH”) worked closely with the Institute on Metropolitan Opportunity at the University of Minnesota Law School to develop local data on the funding and location of affordable housing over a two-decade period, documenting the rapid re-segregation of neighborhoods and public schools in the Twin Cities and inner-ring suburbs.

When grassroots advocacy with the affected municipalities yielded no change in housing policy, and when the Metropolitan Council issued new fair share guidance that would accelerate affordable housing obligations in lower-opportunity neighborhoods and slow it in high-opportunity neighborhoods, MICAH and other groups filed an administrative complaint with HUD in May, 2015, alleging the Cities of Minneapolis and St. Paul had violated Title VI, the Fair Housing Act, and the obligation to AFFH. One of MICAH’s chief complaints was that the Regional AI on which the Twin Cities and eleven other jurisdictions based their entitlement to CDBG, HOME, and related funds did not address residential and school segregation, or the extent to which municipal housing and funding policies were perpetuating segregation. HUD brought the parties together for settlement talks, and they entered into a Conciliation

Agreement on May 25, 2016.<sup>24</sup> The Cities and eleven suburban entitlement jurisdictions agreed to revise the Regional AI by June, 2017, using the analytical tools associated with HUD's Final Rule. The revised analysis will identify fair housing barriers within each jurisdiction and across the region, with a special focus on patterns of integration and segregation, racially or ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs. MICAH and the other Complainants secured the right to participate on the Regional AI advisory committee, and to help conduct the community engagement process to ensure that key stakeholders participate in the process.<sup>25</sup> Press coverage of the agreement suggests that it will alter how affordable housing is approved and built in the region.<sup>26</sup> Contact: Sue Watlov Phillips, [sue@micah.org](mailto:sue@micah.org).

### **Metropolitan Milwaukee Fair Housing Council**

For nearly 50 years (and irrespective of income), the Milwaukee Metropolitan Statistical Area has been one of the most racially segregated regions in the country.<sup>27</sup> The Metropolitan Milwaukee Fair Housing Council (“MMFHC”) began tracking the efforts of Waukesha County and several dozen members of its CDBG and HOME funding consortium in late 2007, and quickly compiled local demographic data and information concerning municipal land use restrictions on the development of affordable, multifamily housing. More than three years of meetings with County officials yielded no commitments to revise the County’s AIs or to identify shortcomings in oversight of the fair housing performance of consortium members.

In September 2011, MMFHC filed an administrative complaint with HUD, alleging violations of Title VI, the Fair Housing Act, and AFFH. Prolonged settlement discussions ensued, and the parties finally entered into a Conciliation Agreement with an effective date of January 24, 2017.<sup>28</sup> Under the terms of the Agreement, the County will undertake a variety of activities with the aim of promoting integration and expanded fair housing choice. Among these, it will

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<sup>24</sup> “Voluntary Compliance Agreement between U.S. Dep’t of Hous. and Urban Dev., The City of St. Paul, and the Metropolitan Interfaith Council on Affordable Housing,” May 25, 2016, <https://portal.hud.gov/hudportal/documents/huddoc?id=16vcasigned.pdf>.

<sup>25</sup> As this chapter was going to press, the Minnesota Housing Partnership published a report cataloguing many of the efforts to bring grassroots groups into the AI or Assessment Process. Minnesota Housing Partnership (2017).

<sup>26</sup> Callaghan (2016).

<sup>27</sup> Eligon and Gebloff (2016).

<sup>28</sup> Metropolitan Milwaukee Fair Housing Council (2017).

collaborate with the City and County of Milwaukee to produce an Assessment of Fair Housing report, which will identify public and private impediments to fair housing choice. On an annual basis, the County will provide to HUD an action plan that will describe actions to overcome those impediments. The County will also require each municipality which receives CDBG or HOME funds to create an annual Fair Housing Impact Statements that identifies the specific actions the municipality will take to address fair housing impediments, and report on annual progress in eliminating those impediments. The municipalities will also be required to identify actions that promote affordable housing for families, and the County will develop a land inventory that will identify parcels suitable for development of affordable, multifamily housing. This appears to be the first resolution of an AFFH complaint during the Trump administration, and may be some evidence of the continued utility of HUD administrative complaints. Contact: Bill Tisdale, [wrtisdale@fairhousingwisconsin.com](mailto:wrtisdale@fairhousingwisconsin.com)

### **The Path Ahead**

As outlined above, many of the most successful grassroots AFFH efforts have combined some kind of enforcement action with sophisticated collection and analysis of local data and the capacity to mobilize allies to participate in fair housing planning and to demand that local elected and appointed officials adopt policies and actions to undo segregation and address other fair housing barriers. That is to say that enforcement without analysis and mobilization may be insufficient. But each effort described above has resulted in collective knowledge that is available to other advocates—in the form of written materials, settlement agreements, promising practices or simply contact information for the principal actors.

Even during the latter stages of the Obama administration, HUD began signaling that it would not be accepting new administrative complaints alleging only an AFFH violation, and would instead consider such complaints under its other civil rights authorities based on the Spending Clause, including Title VI, Section 109 of the Housing and Community Development Act of 1974, and—in the context of disability—Section 504 of the Rehabilitation Act of 1973.<sup>29</sup>

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<sup>29</sup> HUD (2013), 4-5.

In fact, the successful resolution of complaints in the Latino Action Fund, MICAH and MMFHC matters described above all explicitly referenced Title VI and Section 109.

So, while the Trump administration (and its Congressional allies) may be signaling hostility to AFFH concepts and complaints, it still has statutory and regulatory mandates to receive, investigate, conciliate, and adjudicate complaints alleging violations of all the Spending Clause statutes and the Fair Housing Act. In other words, an administrative enforcement route will remain available to enforce claims similar to those described above. And, as another paper in this symposium makes clear,<sup>30</sup> parties aggrieved by segregation and discrimination can seek direct judicial enforcement of Title VI, the Fair Housing Act, and the U.S. Constitution in federal courts and may, under some circumstances, use the False Claims Act to enforce AFFH obligations.

But as we look forward to what may be a period of HUD passivity (or hostility) toward AFFH principles, we must focus our attention on building the capacity of local groups to collect and analyze data about fair housing barriers; participate meaningfully in the Assessment process; and mobilize allies to ensure transparency in the Assessment process and commitment to actions that will undo segregation and expand fair housing choice. Because there will be insufficient resources to ensure that every community can secure the full promise of AFFH, advocates, academics, and funders should purposefully identify several “laboratories of democracy” in which to support grassroots organizations to achieve two objectives: (1) better fair housing outcomes for the individual community or region; and (2) model advocacy approaches that can be shared with other communities whose Assessments are further down the road. The criteria for selection should be discussed widely, but might prioritize cities of significant size and early Assessment deadlines, with pronounced patterns of segregation and sufficient advocacy infrastructure in place or available.<sup>31</sup>

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<sup>30</sup> Julian (2017).

<sup>31</sup> A review of such criteria might suggest the following jurisdictions (with Assessment due dates in parentheses) for consideration: Philadelphia (10/4/17; LA County (10/4/17); Dallas (1/4/18); Austin (1/4/19); New York City (4/6/19); Chicago (4/6/19); Milwaukee (4/6/19); St. Louis (4/6/19); Pittsburgh (4/6/19); Minneapolis/St. Paul (9/5/19); and Houston (10/5/19).

## The Primacy of Data

The uniform data sets that HUD will provide each Recipient, pursuant to the Final Rule, will often permit stakeholders to develop a high-level understanding of geographic disparities in access to community assets, areas of concentrated poverty, and areas of minority concentration. But, without more, such data will do little to help a Recipient or advocates understand how such conditions arose and what steps will be necessary to address them. The Final Rule requires Recipients to rely on “local data”<sup>32</sup> and “local knowledge”<sup>33</sup> as part of the Assessment process.<sup>34</sup> Because Recipients may lack the capacity or interest to fully collect and analyze such information, and because the Final Rule requires robust community participation, consultation, and coordination,<sup>35</sup> grassroots advocacy organizations can play a significant gap-filling role in the Assessment process by gathering and analyzing local data and local knowledge and preparing reports and recommendations based upon that material.

There are some strong models for building local capacity to conduct data analysis and mapping to support advocacy. For instance, TxLIHIS has documented how a number of Texas municipalities have perpetuated housing segregation, and its work has provided the basis for subsequent enforcement actions, media coverage, and legislative action.<sup>36</sup> Similarly, reports from Fair Share Housing Center have led to systemic reforms in post-Sandy recovery programs.<sup>37</sup> Other groups have relied on academic research centers for such capacity.<sup>38</sup> Either

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<sup>32</sup> The Final Rule defines “local data” to include “metrics, statistics, and other quantified information, subject to a determination of statistical validity by HUD, relevant to the program participant’s geographic areas of analysis, that can be found through a reasonable amount of search, are readily available at little or no cost, and are necessary for the completion of the [Assessment] using the Assessment Tool.” 24 C.F.R. §5.152.

<sup>33</sup> The Final Rule defines “local knowledge” to include “information to be provided by the program participant that relates to the participant’s geographic areas of analysis and that is relevant to the program participant’s [Assessment], is known or becomes known to the program participant, and is necessary for the completion of the [Assessment] using the Assessment Tool.” 24 C.F.R. §5.152.

<sup>34</sup> 24 C.F.R. §§5.154(c), (d)(2).

<sup>35</sup> 24 C.F.R. §5.158.

<sup>36</sup> See for example Livesley-O’Neill (2016).

<sup>37</sup> Fair Share Housing Center, Latino Action Network, and NAACP New Jersey State Conference (2015).

<sup>38</sup> Examples include the Institute for Metropolitan Opportunity (<https://www.law.umn.edu/institute-metropolitan-opportunity>), the Kirwan Institute for the Study of Race and Ethnicity (<http://kirwaninstitute.osu.edu/>), the Haas Institute for a Fair and Inclusive Society

way, as we move forward on AFFH matters, foundations, state and local governments, and HUD must redouble their efforts to fund capacity-building for local groups to promote the inclusion into the Assessment process of source information to contextualize local fair housing conditions.

### **Enhancing Stakeholder Involvement and Mobilizing Political Support**

In my experience, many grassroots advocacy groups are not fully informed about their localities' AI or Assessment processes, and so are not prepared to engage fully in shaping the outcomes of those processes. GNOFHAC's "People's AI" can serve as a desk reference for other grassroots groups. Other national groups have developed materials to demystify similar fair housing and funding distribution processes.<sup>39</sup>

If we expect grassroots groups to get fully engaged in local Assessment processes, national advocacy groups must prioritize materials and training programs that will help to build local capacity so that the first round of Assessments submitted—which are likely to be seen as models for later efforts—become part of the feedback loop. HUD has funded a number of national technical assistance consultants to support Recipients in completing the Assessment process but, despite recommendations going back a decade or more,<sup>40</sup> has made no comparable investment in the capacity of local stakeholder groups. The Ford Foundation and Open Society Foundation have provided multi-year funding support for Fair Share Housing Center, TxLIHIS and selected other state and local groups to engage in the AI or Assessment processes.<sup>41</sup> But in order to go to scale—even with respect to the "laboratories" mentioned above—the investment in such an effort must be substantially larger. The templates offered by GNOFHAC, Center for Community Change, and Technical Assistance Collaborative provide a

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(<http://haasinstitute.berkeley.edu/>), and the Furman Center for Real Estate and Urban Policy (<http://furmancenter.org/>).

<sup>39</sup> Gramlich (1998); Technical Assistance Collaborative, Inc. (1999).

<sup>40</sup> Allen (2008), 4 (calling upon HUD to fund an organization to enhance the capacity of local organizations to review and analyze AIs and to "participate in the process of identifying fair housing impediments and appropriate actions to overcome them").

<sup>41</sup> Ford Foundation, "Grants Database," <https://www.fordfoundation.org/work/our-grants/grants-database/grants-all?page=9>; Open Society Foundations, "U.S. Programs—Texas Low Income Housing Information Service," <https://www.opensocietyfoundations.org/about/programs/us-programs/grantees/texas-low-income-housing-information-service>.



solid start, but priority must be given to the development of a comprehensive guidebook and resource materials on the Assessment process, hands-on training for the most capable grassroots groups and coalitions in the target communities, and funding for ongoing technical assistance to help guide such groups through the process and to provide advice on how enforcement mechanisms, media coverage and community organizing strategies can be combined to secure better AFFH compliance.

### **Securing Protections at the State and Local Level**

Finally, as progress on the national level may become more complicated, advocates must consider how legislation on the local and state levels can advance AFFH and other equity principles. For the past decade, ADC has helped to lead campaigns to broaden civil rights protections and to establish standards of proof that more effectively ensure positive civil rights outcomes. The passage of the Local Civil Rights Restoration Act expanded substantive protections against retaliation, extended protections to domestic partners, and increased penalties for violations. Just as importantly, the Restoration Act established canons of statutory construction that require New York City’s Human Rights Law to be “construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or [state laws] ... have been so construed.”<sup>42</sup>

Similarly, on February 15, 2017, California Assemblymember Miguel Santiago introduced Assembly Bill 686 (“AB 686”) to establish that all government agencies have an AFFH obligation as a matter of state law.<sup>43</sup> Unlike the federal AFFH obligation, AB 686 would provide for a private cause of action to enforce the state AFFH provision. The content of that obligation would mirror the Final Rule in that all state and local agencies, regional transportation agencies and councils of government would be required to “tak[e] meaningful actions, in addition to combating discrimination, that overcome patterns of segregation, promote fair housing choice, and foster inclusive communities free from barriers that restrict access to opportunity-based characteristics protected by this part; and that transform racially and ethnically concentrated

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<sup>42</sup> Gurian (2005), 103, quoting from N.Y.C. Local Law no. 85 of 2005 (October 3, 2005).

<sup>43</sup> For background materials on the proposed legislation, see Public Advocates (2017).

areas of poverty into areas of opportunity, while protecting existing residents from displacement.”

We need to help model such local advocacy for groups in the targeted communities, so that AFFH principles do not erode during a time of national inattention or hostility.

### **Conclusion**

In his opinion in *NAACP v. HUD*, then-Judge Breyer identified a useful metric that should be applied in every upcoming Assessment: whether the supply of “genuinely open housing” is increasing. I suggest that if the answer is not “yes,” then a community has not satisfied its AFFH obligations and must redouble its efforts. But Breyer’s metric ought also to apply to advocates, academics, and foundations. Until we sufficiently support local capacity to influence the Assessment process, we have not achieved the promise of AFFH. And we must redouble our efforts.

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