



RENO & CAVANAUGH PLLC

SUBMITTED VIA ELECTRONIC MAIL

August 3, 2020

The Honorable Benjamin S. Carson, Sr., M.D.
Secretary
U.S. Department of Housing and Urban Development
451 7th Street SW
Washington, DC 20410-0500

Re: HUD's New Affirmatively Furthering Fair Housing Rule

To Whom It May Concern:

The Council of Large Public Housing Authorities ("CLPHA") and Reno & Cavanaugh, PLLC ("Reno & Cavanaugh") vehemently oppose the U.S. Department of Housing and Urban Development's ("HUD's") Preserving Community and Neighborhood Choice Final Rule (the "New AFFH Rule") and condemn HUD's transparent and illegal efforts to turn back the clock and re-establish discriminatory and racist housing policy.

It is deeply disturbing that HUD considers the statutory mandate to affirmatively further fair housing "a waste of time for localities to comply with." Further, rather than enforce an act of Congress, which they are obligated to do, HUD and the Administration endeavor to demonstrate Congressional support for the New AFFH Rule simply by relying on statements by individual members of Congress that "every community should be free to zone its neighborhoods and compete for new residents according to its distinct values." As HUD is fully aware, phrases like "distinct values" have historically been used to justify segregation, discrimination, and overt suppression of the economic advancement of minority communities and communities of color. As HUD is also fully aware, public housing was often intentionally developed in segregated neighborhoods of high poverty and historically has been chronically underfunded because of these same "distinct values."

The obligation to affirmatively further fair housing ("AFFH") is an integral tool to address historic discrimination in housing that, unfortunately, continues today. HUD has the statutory authority and responsibility not only to administer the Fair Housing Act ("FHA") but to affirmatively further fair housing. More particularly, HUD is statutorily obligated to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further" fair housing and to "cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices." 42 U.S.C. § 3608. The New

AFFH Rule directly conflicts with these statutory obligations in an obvious and cynical political attempt to undermine Congressional intent and the renewed will of the American people to advance racial, social, and economic justice.

Clearly and unapologetically, the New AFFH Rule does nothing to affirmatively further fair housing or render technical assistance. On the contrary, it is a deliberate rejection and dereliction of HUD's statutory and moral obligations. We are shocked and dismayed by HUD's stark admission that the "abandon[ment of] its prior approach" to AFFH was produced at the direction of the President of the United States, who has recently stated that rescission of the AFFH Rule will allow "the people living their Suburban Lifestyle Dream" to live without being "bothered or financially hurt by having low income housing built in [their] neighborhood," that "housing prices will go up," and "crime will go down." We are left to conclude that HUD is actively attempting to eliminate decades of fair housing progress by legalizing discriminatory and racist housing policies through the New AFFH Rule.

In our view, the history of fair housing in this country requires withdrawal and rescission of the New AFFH Rule. CLPHA's members are committed to ending segregation, to ending housing discrimination, and to providing housing in areas of opportunity. This commitment to AFFH is not without challenges, especially given HUD's historic underfunding of not only Public Housing Authorities (PHAs) but affordable housing development generally. CLPHA and Reno & Cavanaugh have worked with current and previous HUD administrations in their efforts to develop reasonable and effective AFFH policies and regulations, often through notice-and-comment rulemaking. We have advocated for HUD to recognize these AFFH challenges and to reflect the substantive input of those grantees who must comply with HUD's AFFH implementation efforts, namely PHAs. While we have not always agreed with every detail of HUD's implementation of AFFH over the years, we utterly repudiate the surrender to institutional racism and inequality represented by the New AFFH Rule.

HUD must stand with PHAs and localities across the country to confront the legacy of discriminatory housing policies and take affirmative actions to ensure that lower income individuals and communities most in need of decent, safe, and affordable housing have equal and fair access to housing.

Further, we are alarmed that although the New AFFH Rule bears little resemblance substantively to all previously proposed changes to the AFFH rule, and that it retreats to a point even prior to the regulation in effect at the time of the 2015 rule, HUD did not engage in notice-and-comment rulemaking. According to HUD, "further notice and comment concerning AFFH ... would simply be a **legal formality** without adding substance to the debate" (emphasis added). By HUD's own admission, HUD is legally required to go through notice-and-comment rulemaking regarding the New AFFH Rule. HUD cannot simply forego a legal requirement because HUD believes compliance with the law would not "add substance to the debate."

Having confirmed that notice-and-comment rulemaking is legally required, HUD nevertheless argues in the New AFFH Rule that the Secretary of HUD has the authority not only to waive any regulation it administers, but specifically to waive the requirement to engage in notice-and-comment rulemaking in any "matter relating to ... public property, loans, grants, benefits, or

contracts.” This apparent revelation by HUD that it has unlimited authority to waive regulations without regard to statutory or procedural requirements is highly dubious, at best, and defies decades of regulatory precedent. We do not believe it will stand for very long.

In claiming unfettered regulatory power to undermine fair housing, the New AFFH Rule is a perfect storm of regressive social policy and a total disregard for the rule of law. Therefore, HUD must withdraw the New AFFH Rule.

Sincerely,



Sunia Zaterman
Executive Director
CLPHA



Stephen I. Holmquist
Member
Reno & Cavanaugh, PLLC