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## Piecemeal Move To Gut Fair Housing

When HUD Secretary Ben Carson campaigned for the presidency in 2016, he called the Obama administration's overhaul of the department's fair housing mission a social engineering crusade.

After assuming the HUD post, Carson discovered how complex a web HUD officials wove to accomplish that mission -- a complete reinterpretation of the 1968 Fair Housing Act and its subsequent legislative alterations to stiffen enforcement of the law and close off all loopholes.

The resulting Affirmatively Furthering Fair Housing rule, bolstered by new supporting regulations designed to continue strict enforcement of the new FHA interpretation should someone challenge the AFFH rule, was hurriedly established in July 2015 so its mechanisms could be well in place before the end of the Obama administration.

AFFH would not only strictly enforce violations of the Fair Housing Act's original provisions that addressed denial of housing based on race, color, ethnicity, faith, sex, disability and children, it would also actively enforce desegregation of the nation's largely white suburbs.

More affluent minorities have diversified many predominantly white neighborhoods in hundreds of cities but segregation of poor minority families remains entrenched in large Northeast and Rust Belt cities like New York and Detroit.

By initially using FHA enforcement in its original form, HUD targeted affluent Westchester County, NY as its ultimate AFFH model by accusing the county in 2009 of failure to spend its Community Development Block Grant awards to build low-income housing -- CDBG is the last revenue sharing program initiated in the Nixon administration that more than 1,200 communities depend on to supplement their operating budgets.

HUD gave Westchester an ultimatum: Either voluntarily change local zoning laws to accommodate construction of 750 low-income apartment buildings in 31 wealthy single-family home communities or face the loss of zoning options and CDBG subsidies.

The apartments would be occupied by black families on a 7% quota basis and Hispanic families on a 10% basis to reflect the county's racial and ethnic breakdown. Westchester is required to go outside the county to recruit minority tenants, mainly the adjoining New York City region.

Westchester officials chose to acquiesce and its decision established the model for the future AFFH regulation.

The new Obama administration took office in 2009 with its initial fair housing overhaul strategy spelled out in a report to Congress that was largely ignored. That gave a coterie of HUD officials an opportunity to structure a new FHA enforcement plan unhindered, a plan that mustered much of HUD's operating energy which ultimately took its toll on the department's oversight of housing programs and other functions.

HUD developed a strategy that would ultimately include a three-prong approach to enforce racial and ethnic parity in all zip codes encompassed in zones around the 1,200 local governments, all states, and more than 4,000 public housing authorities and community development agencies receiving federal subsidies.

To ensure a largely uninterrupted strategy to enforce the new FHA provisions, HUD developed and issued in 2012 a comprehensive addition to the list of protected classes in the original law. The FHA now covers lesbians, gays, bisexuals and transgenders as protected classes.

HUD developed its "Disparate Impact" rule the following year at the urging of then Attorney General Loretta Lynch. The Justice Department said the presence of unlawful practices including zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods, without any sufficient justification, make it difficult to enforce the 1968 FHA.

Disparate impact can be used by applying statistics and other evidence to show decisions, policies, and practices have discriminatory effects without proving they are the result of discriminatory intentions.

HUD for years applied FHA enforcement to bar housing practices that have a discriminatory effect even if there was no intent to discriminate. Several court decisions supported HUD's position but there were variations in each decision. HUD decided to issue a uniform rule concluding that disparate impact could be the deciding factor in any FHA enforcement action.

The Texas Department of Housing & Community Affairs immediately sued to stop disparate impact, but the U.S. Supreme Court affirmed its validity two years later after the Justice Department maneuvered -- coordinated by then Assistant Attorney General Thomas Perez -- to put the concept in the most favorable legal setting.

During the wait, HUD polished its AFFH regulation, ready to put it into effect after the high court ruled. AFFH would complete its trilogy of rules to lock in FHA enforcement -- new protected classes, disparate impact and AFFH.

Meanwhile, HUD designed a new safeguard to ensure desegregation of affluent neighborhoods by developing the Small Area Fair Market Rent rule.

SAFMR requires public housing authorities to alter their Section 8 housing voucher distribution

strategy to allow select families to hold enhanced vouchers, permitting them to relocate to affluent high-rent neighborhoods that provide better schools, less crime and more job opportunities. PHAs would cut the allowances of remaining vouchers to balance the books.

SAFMRs were Carson's initial challenge, Carson halted implementation of the SAFMR rule in August 2017. Housing advocates sued and a federal district court in December barred Carson's effort. HUD decided not to challenge but forge ahead by suspending the AFFH rule in January.

Facing a lawsuit by housing advocates, Carson backed away from the AFFH decision in May and decided to halt a requirement that PHAs develop studies showing impediments to fair housing and craft plans to remedy those impediments. Only a handful of PHAs had concluded their impediment studies at the time. Carson's move on the studies effectively shut down AFFH enforcement, at least for the time being.

At the same time, Carson decided to challenge the Disparate Impact rule, contending the U.S. Supreme Court "did not directly rule upon it" in 2015. Now HUD seeks public comment to determine whether the regulation is consistent with the federal court's ruling in *Texas v. Inclusive Communities*.

HUD sources say each of Carson's moves effectively sets back AFFH enforcement even if they ultimately fail in court. The delaying tactic is designed to help dismantle the enforcement structure developed in the waning days of the Obama administration and realign FHA enforcement procedures now in use by an assortment of autonomous fair housing organizations subsidized by HUD that initiate enforcement actions and collect a portion of financial settlements as a reward for initiating action.

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