



January 18, 2019

Issue 19-03

Heard at HUD

HUD Settles On Fair Housing Gambit

Disparate impact was a central strategy in the Obama administration's plan to close off all loopholes in the enforcement of the 1968 Fair Housing Act.

HUD went so far as to rigidly reinterpret the law to fit the concept of disparate impact into its new enforcement rule, Affirmatively Furthering Fair Housing.

When the U.S. Supreme Court in June 2015 upheld the application of disparate impact in housing and other legal enforcement activities, HUD moved quickly -- within three weeks -- to apply its new AFFH rule that had been nearly six years in the making.

The high court set down strict guidelines on how disparate impact could be applied but HUD at that time considered that discrimination is frequently subtle and systemic and it forged ahead with AFFH implementation.

AFFH, HUD's third component in its trinity of new fair housing enforcement strategies -- new protected classes, disparate impact, and FHA reinterpretation -- was designed to assess the racial and ethnic disparities in the nation's largely white suburban neighborhoods and correct them through quota desegregation of each zip code in more than 2,000 communities.

The Obama administration was able to corner several communities under AFFH by recommending they change their zoning codes to allow higher density, low-income housing in suburban neighborhoods -- such as Westchester County, NY, Baltimore County, MD, Rockford, IL, Marin County, CA, etc.-- or face loss of their federal subsidies for failure to do so.

The incoming Trump administration vowed to scrap the AFFH, with new HUD Secretary Ben Carson calling it social engineering. Carson immediately halted the threat of loss of federal subsidies implicit in AFFH.

But facing a firestorm of criticism, Carson backed away and decided to dismantle the rule piecemeal.

Disparate impact has become the administration's chief focus in its campaign to roll back AFFH. Without disparate impact to show how a prior action could conceivably, however remote, be construed as discrimination, allegations of bias would be difficult to prove.

The Justice Department has now stepped in to bolster HUD's initiative. An internal memo to

department civil rights officials calls for a new look at Obama administration guidance focusing on disparate impact, the concept that an activity or policy can be discriminatory if it disproportionately affects minorities even if it is not intentionally discriminatory.

By challenging disparate impact, the Justice Department reinforces HUD's contention that AFFH is a Fair Housing Act interpretation overreach. AFFH is the last element in Carson's schedule to largely dismantle what is considered an Obama administration legacy policy.

Early in Carson's tenure, he scrapped the new Small Area Fair Market Rent rule which the Obama administration initiated in 2016 to give Section 8 voucher holders access to more high opportunity neighborhoods. A federal court ruling four months later reversed Carson's move.

Carson then scrapped the AFFH but reinstated it five months later following several court challenges. Instead, Carson vowed to rewrite AFFH while eliminating its chief enforcement mechanism, the Fair Housing Assessment Tool which communities use to measure fair housing issues such as racially and ethnically concentrated areas of poverty, patterns of integration and segregation, disparities in access to opportunity and disproportionate housing needs.

Without the assessment tool, AFFH is largely ineffective. Carson's reinterpretation of AFFH is expected sometime this year. But without the ability to fully apply disparate impact, any application of AFFH, in original form or otherwise, is moot. 1/18/19