

The Fair Housing Act's Requirement to Affirmatively Further Fair Housing

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Over the last century, residential segregation and isolation of African Americans have been intractable features of housing patterns in the United States and sadly, this segregation did not occur by accident. Rather, they are a product of a complex web of decisions made since the beginning of the 20th century. Racially restrictive covenants, federally mandated redlining policies, racial zoning, the location of public housing projects, discriminatory building codes, and *de jure* segregation in schools worked in concert with discriminatory private real estate actions to [rigidly segregate](#) our communities by race and national origin.

When the [Fair Housing Act](#) became law in 1968, high levels of residential segregation had already become entrenched. A primary purpose of the Act was to address the residential segregation which the Kerner Commission focused on its famous [1968 report](#), issued only one month before Dr. Martin Luther King's assassination and the passage of the Act. However, the Act's promise as a tool for deterring discrimination and dismantling segregation remains largely unfulfilled. Residential segregation has decreased only slightly since the Fair Housing Act and most African Americans continue to live in neighborhoods and communities that are more likely to have inferior schools and be located far away from quality employment opportunities.

Residential segregation is especially pernicious because of its adverse impact on African American communities. Segregated housing patterns not only separate white and African American neighborhoods, but help create and perpetuate the stubborn disparities in employment, education, income, wealth, and public transportation, as well as higher crime rates and poorer health conditions. More specifically, residential segregation: (1) separates African Americans from centers of employment opportunity, contributing to unequal employment outcomes for these communities; (2) has resulted in failing public schools with high dropout rates, low instructional quality, and poor test scores, contributing to African Americans' unequal educational attainment and reinforcing their disadvantage in today's labor market; and (3) undermines opportunities for African Americans to accumulate wealth through home ownership because their house values typically lag behind those of white neighborhoods and appreciate more slowly.

The Fair Housing Act not only includes a broad prohibition of discrimination in housing and mortgage lending and other residential real estate transactions, but also requires that the U.S. Department of Housing and Urban Development (HUD) and other federal agencies engaged in housing and urban development (as well as their grantees) administer housing programs in a manner that affirmatively furthers fair housing (AFFH). The courts have recognized that this provision of the Act requires HUD (and the recipients of federal housing assistance) to "do more than simply not discriminate itself; it 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." In defining this affirmative duty, the courts have emphasized the importance of both careful fair housing analysis and more diverse housing choices and outcomes. The underlying reason is that this provision ensures individuals and families (across the spectrum of race, ethnicity and disability) the opportunity to have full access to job opportunities, a choice in the selection of schools, and an ability to engage as equal members of their community.

As such, the duty to affirmatively further fair housing is a unique provision in civil rights law because it requires positive steps to promote fair housing and residential desegregation. HUD regulations pertaining to this duty require a certification by each applicant for federal housing assistance to ensure fair housing by: (1) conducting an analysis to identify impediments to fair housing choices (known as an AI) in the jurisdiction; (2) taking appropriate actions to overcome the effects of any impediments identified through that analysis; and (3) maintaining records reflecting the analysis and actions. In addition, HUD has adopted a [Fair Housing Planning Guide](#) that explains in more detail these responsibilities. The AFFH duty also applies to federal programs providing mortgage lending and housing financial assistance.

Unfortunately, since the passing of the Fair Housing Act more than 40 years ago, there has been virtually no enforcement of this provision by HUD until recently. A 2010 Government Accountability Office (GAO) [report](#) highlighted HUD's limited regulatory requirements and oversight concerning the duty to affirmatively further fair housing as the major reason for poor compliance by recipients of federal housing and urban development funds and recommended several steps for improving enforcement, including expeditiously completing a new, comprehensive regulation pertaining to the AFFH requirements. With respect to the financial assistance for housing, the AFFH enforcement records is worse. The major federal program providing such financial assistance is the low-income housing tax credit (LIHTC) program administered by the Department of the Treasury, but the Treasury has never acknowledged that the AFFH responsibility is applicable to this program.

This lack of enforcement has begun to change at HUD in the last two years. First, in 2009 the groundbreaking Westchester County, NY case - *U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc., v. Westchester County*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) - was decided. Noting that the "central goal of the obligation to affirmatively further fair housing [is] to end housing discrimination and segregation," this decision is the most comprehensive judicial decision pertaining to the AFFH duty. HUD signaled a new commitment to more vigorous enforcement when in 2009 it intervened in the Westchester County case and helped negotiate a far-ranging consent decree focused on the AFFH duty.

Second, HUD has been engaged in the drafting of a detailed regulation addressing this provision, and has demonstrated a new commitment to enforcement as demonstrated not only in the 2009 consent decree in Westchester County but also in conciliation agreements resolving administrative complaints alleging a failure to affirmatively further fair housing against the State of Texas and Marin County, CA.

Third, HUD has created two new housing programs - the [Sustainable Communities Initiative](#) and the [Choice Neighborhoods Initiative](#) - which promote the goals of AFFH.

This renewed commitment at HUD has been driven to a large extent by advocacy and actions of private, non-profit fair housing organizations and law firms. These actions include an increase in the filing of administrative complaints with HUD that allege failure to comply with the Fair Housing Act's AFFH requirements, and efforts of advocates to get the Department of the Treasury to adopt fair housing regulations, including AFFH requirements, in their administration of the LIHTC program.

The need for a national campaign to address these AFFH issues is clear. The [Lawyers' Committee for Civil Rights Under Law's](#) highest fair housing priority is to create and support programs and activities that promote AFFH. Through work with the Greater New Orleans Fair Housing Action Center, we recently released a new publication titled "[Strategies to Affirmatively Further Fair Housing: Proposals for the City of New Orleans Comprehensive Zoning Ordinance and Beyond.](#)" We are presently engaged in a project to identify best practices for meeting AFFH responsibilities and for better involving local communities in AFFH planning.

HOW FUNDERS CAN HELP

Funders can play a major role in assisting fair housing advocates in their efforts to put teeth into the AFFH provision of the Fair Housing Act. For example, the Ford Foundation recently awarded a grant to the Lawyer's Committee for support our work to fully integrate fair housing and community development practices through research, knowledge-sharing and policy advocacy. Over 1,200 jurisdictions are required to complete analyses of impediments and strategies to overcome impediments. The vast majority of these reports are incomplete and useless. The following types of assistance are needed to address this lack of compliance with the duty to AFFH and to promote residential desegregation:

1. Support ongoing efforts and new pilot programs of fair housing advocates designed to identify best practices for meeting the AFFH requirements.
2. Assist community groups and local leaders in building coalitions and participating in the AFFH process.
3. Support education campaigns for housing clients, landlords, housing authorities, affordable housing developers and local officials, including the creation of a website to collect all AIs and other informational material pertinent to AFFH in one central place.
4. Support fair housing advocates and organizations who can provide legal assistance (including assistance provided through the private bar, pro bono) in the drafting of administrative complaints to HUD concerning non-compliance with the AFFH requirements of the Fair Housing Act.
5. Support programs that provide technical assistance to jurisdictions and community groups analyzing local laws, administrative procedures, tax policies, zoning ordinances, and housing patterns in the identification of implicit or explicit impediments to fair housing.