



RENO & CAVANAUGH PLLC

October 15, 2018  
Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW, Room 10276  
Washington, DC 20410-0500

[Re. Docket No. FR-6123-A-01] Affirmatively Furthering Fair Housing: Streamlining and Enhancements (the “Streamlining Notice”)

To Whom It May Concern:

The Council of Large Public Housing Authorities (“CLPHA”) and Reno & Cavanaugh, PLLC (“Reno & Cavanaugh”) are pleased to submit comments on the Affirmatively Furthering Fair Housing (“AFFH”) Assessment of Fair Housing Tool for Public Housing Agencies (the “PHA Tool”).

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of more than seventy large public housing authorities (“PHAs”) own and manage nearly half of the nation’s public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs. They collectively serve over one million low income households.

Reno & Cavanaugh represents more than one hundred PHAs throughout the country and has been working with our clients on fair housing issues throughout the years. Reno & Cavanaugh was founded in 1977, and over the past three decades the firm has developed a national practice that encompasses the entire real estate, affordable housing and community development industry. Though our practice has expanded significantly over the years to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh’s original goal of providing quality legal services dedicated to improving housing and communities still remains at the center of everything we do.

Our previous comments (see attached) to HUD on the AFFH rule and the proposed PHA tool emphasized our concerns that: (1) the AFFH rule and the PHA Tool would impose costly and burdensome requirements on PHAs; and (2) the AFFH rule and the PHA Tool failed to offer adequate protections to PHAs that make good faith, reasonable efforts to satisfy the obligations HUD previously described in the respective Notices. In addition, as we and other commenters have noted, there were several unanswered questions about how PHAs could efficiently and effectively collect and interpret data to yield a meaningful fair housing analysis.

We are pleased to see that HUD has taken some steps to acknowledge and address these concerns in the Streamlining Notice. PHAs are committed to furthering fair housing and pursuing the goals of de-concentration of poverty and increased integration of housing opportunities. However, given the ongoing concerns shared by CLPHA, HUD, and others, we support the agency's decision to reassess the rule and make amendments that would minimize administrative burden, provide for greater local control and innovation, and more efficiently use HUD resources.

Below are our comments on the Streamlining Notice.

***1. An amended rule should clarify when a PHA has met or will meet its obligation to affirmatively further fair housing. HUD should create safe harbor standards that provide protection from potential litigation for PHAs that make good faith efforts in their analysis of fair housing impediments.***

In the Streamlining Notice, HUD asks how it should evaluate AFFH efforts, what distinguishes acceptable efforts from unacceptable efforts, and what levels of effort on specific actions could be deemed in compliance with the obligation to affirmatively further fair housing. We strongly support HUD's efforts to clarify these questions about when a PHA has met its obligation to affirmatively further fair housing and how to determine safe harbor standards.

In our prior comments, we called on HUD to create safe harbor standards for PHAs that make good faith, reasonable efforts to comply with the requirements laid out in the AFFH rule and under the proposed PHA tool. We were particularly concerned that the proposed PHA Tool's certification requirements could create new legal liability for PHAs. Most broadly, as discussed further below, the PHA Tool required PHAs to report about a diverse array of fair housing issues and contributing factors that stem from many sources over which PHAs have no control, including state and regional laws and funding patterns, as well as local politics and community sentiment. Unlike cities or other governmental agencies, PHAs are not units of general local government and do not have the jurisdictional authority to control state, regional, or local laws, or spending.

Section VI of the PHA Tool required a PHA to explain how the housing authority would address each of these fair housing issues and the AFFH certification required PHAs to agree to take meaningful action to further these goals. By signing the certification, PHAs could expose themselves to audit and false claims act liability for failure to further these goals, or subject PHAs to lawsuits from parties who have been injured by the fair housing impediments that the PHA described. This liability is created not by any actual failure of the PHA to perform under its Annual Contributions Contracts or other agreements with HUD, but simply by virtue of the fact that the proposed PHA Tool required PHAs to certify that they will take actions that they have no legal jurisdiction, resources, or operative means to undertake.

This creation of unnecessary liability existed at a more detailed level within the proposed PHA Tool itself. For example, the PHA Tool required that PHAs "discuss how you have been successful in achieving past goals, and/or how you have fallen short of achieving those goals (including

potentially harmful unintended consequences)”. This question effectively required PHAs to make a public admission of wrongdoing and identify the injured parties, which may promote litigation by those same injured parties. In any amended rule or future tools, we encourage HUD to refrain from any broader emphasis on failures. Instead, PHAs should be allowed to use their fair housing assessments to help guide their fair housing planning processes moving forward and focus on achieving their missions of providing decent, safe and sanitary affordable housing to the nation’s most underserved populations.

***2. HUD should provide PHAs with funding and additional resources to support any data collection and assessment activities required under an amended AFFH rule.***

We are encouraged that HUD will be carefully considering data collection and analysis requirements and protocols as the agency moves forward with the rulemaking process.

Under the prior AFFH rule and proposed PHA Tool, PHAs would be required to describe and analyze data that is well outside the scope of their normal operations and experience. For instance, the PHA Tool required housing authorities to describe disparities in access and opportunity, as well as analyze trends and patterns of segregation and integration, not just inside their service area, but across jurisdictions. This ignores the fact that housing authorities have no jurisdiction over local government or city agencies or other local actions and have no leverage to require production of this data or the rationale for the other jurisdictions’ decisions and practices around education, health, environmental factors, or housing. The PHA Tool required housing authorities to analyze factors that may have been decided decades ago (like siting decisions) and make conclusions about impediments to fair housing (like zoning and permitting) that are outside of their control. Many CLPHA members have expressed concern about the impact of these outside factors on their efforts to fulfill their obligations under the existing AFFH rule.

Furthermore, obtaining and analyzing that volume of data is significantly burdensome for housing authorities already operating with limited funding and administrative resources. What is more, PHAs were also likely to incur costs for the increased use of expensive, private consultants to analyze and apply HUD-provided data, conduct additional activities to achieve the goals set out in the AFH, and assess the impact of PHA’s activities on fair housing determinants. Prior HUD estimates showed that the assessment would require 200 hours of staff time. Few PHAs have the in-house staff qualified to make these assessments or dedicate the necessary amount of time to complete the tool.

In our prior comments, we remarked that the PHA Tool’s data requirements were particularly burdensome for the many PHAs whose legal service areas are not equivalent to the local Metropolitan Statistical Area (“MSA”) or city or county boundaries. As HUD deliberates amendments to the AFFH rule, we urge the agency to consider that many housing authorities operate in jurisdictions that are not equivalent to MSAs and which also are not identical to city or county borders. Instead, these jurisdictions, or service areas, are typically defined by state statute and are based on a variety of factors in addition to political boundaries.

As HUD acknowledged in its Federal Register comments announcing the proposed PHA Tool, data collection for these PHAs' service areas is often very difficult. If necessary data is unavailable and/or cannot be provided by HUD, we would instead encourage HUD to explicitly defer to PHAs' selections of the most relevant datasets for their needs. This selection should then be included in the safe harbor protections described below.

In addition to questions of data collection, the proposed PHA Tool also did not clarify the level of analysis needed for housing authorities that operate across jurisdictions. The service areas for some housing authorities extend to multiple cities, counties, and municipalities, particularly in rural areas. Moving forward, we believe that it is particularly inappropriate to require PHAs that serve multiple political jurisdictions to complete data collection and analysis for every political jurisdiction that they serve. Again, we encourage HUD to create a safe harbor standard for PHAs that use good faith in determining the most relevant one (or two or three) data sets or political boundaries for use in completing their fair housing analysis.

***3. An amended AFFH rule, and any subsequent tools, should not disregard HUD and PHAs' commitments to preserving safe, decent, affordable housing for existing communities.***

The final AFFH rule recognized that strategies for affirmatively furthering fair housing may include removing barriers to access in high opportunity areas, as well as investing in revitalization for existing neighborhoods. However, the lack of preservation-related questions and guidance in the proposed PHA Tool suggests, we believe incorrectly, that development in non-segregated areas is always a more appropriate goal than preservation of existing housing that is not within an "area of opportunity."

The PHA Tool had no questions that directly assessed the preference of residents to remain in their own neighborhoods. Further, the PHA Tool had no direct questions that would help a PHA document that preservation and rehabilitation of these existing communities is the most appropriate way for the PHA to affirmatively further fair housing while also respecting the rights and preferences of residents to remain in their homes and communities. In contrast, Section V of the PHA Tool and the corresponding instructions had many questions describing segregation, racially or ethnically concentrated poverty, and disproportionate housing needs. The preponderance of questions related to movement of tenants away from impacted areas, rather than questions related to preservation of existing communities, suggested that HUD believes that preservation is only a secondarily acceptable strategy for meeting fair housing obligations.

This conflicts with the Administration's stated preservation goals where a PHA seeks to rehabilitate an existing asset and residents want to remain in their homes. For example, the Administration has continued to support of the Rental Assistance Demonstration ("RAD") Program, under which a PHA may pursue either preservation or new construction projects based on the community's housing needs. In the case of rehabilitation, RAD rules regarding fair housing permit the PHA to preserve the development and give the residents a right to return to their development and neighborhood following construction. Additional requirements apply to new construction. We would encourage HUD to adopt a similar model generally and recognize efforts,

in particular, to preserve and rehabilitate existing communities as equally affirmatively furthering fair housing actions. Further, we ask HUD to consider that in cases where new construction would be less expensive than rehabilitation, such redevelopments efforts that give families a choice to remain in their neighborhoods be accorded similar deference.

As HUD is aware, public housing was often developed decades ago in segregated neighborhoods that now often involve deliberately underfunded and concentrated low-income housing, resulting in distressed housing stock. Like HUD, CLPHA's members are committed to ending segregation and to providing housing in areas of opportunity. At the same time, however, PHAs cannot (and do not wish to) simply abandon these already-underserved communities and deprive them of desperately needed federal subsidies and infrastructure. This is not the goal of the Fair Housing Act. Preservation should be treated as an equally appropriate and valid means of affirmatively furthering fair housing. We encourage HUD to modify the rule to be more inclusive of preservation strategies, acknowledging that moving residents to areas of opportunity need not take precedence over providing existing, underserved communities with decent, safe, and sanitary affordable housing and improving overall neighborhood quality. This is especially crucial in gentrifying neighborhoods that may rapidly become "areas of opportunity." We also suggest that an amended rule explicitly acknowledge that preservation is an especially appropriate fair housing tool for PHAs given their longstanding investment in these communities that have been abandoned by so many other organizations and agencies.

Thank you for the opportunity to comment. If you have any questions, please do not hesitate to contact us.

Sincerely,



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