

The New Affirmatively Furthering Fair Housing Strategies – How they Affect LIHTC



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Genesis 17: 20-21

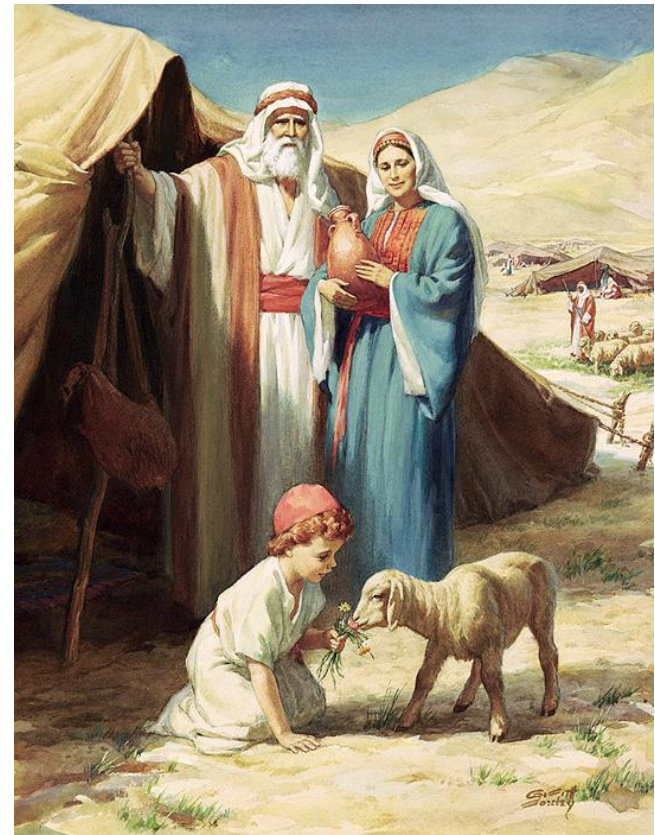
- "As for Ishmael, I have heard you; behold, I will bless him, and will make him fruitful and will multiply him exceedingly. He shall become the father of twelve princes, and I will make him a great nation. "But My covenant I will establish with Isaac, whom Sarah will bear to you at this season next year."...

Two “Great Nations” in Conflict

Ishmael Sent Away



Isaac Stays Home





Stereotypes and Rhetoric

- Fair Housing: Mobility to higher opportunity neighborhoods. Best way to address poor schools, unsafe streets, poor life outcomes
- CDCs: Preserve existing assets, many of which are in low-opportunity communities. Best way to revitalize and honor choice of residents to remain in traditional communities



Economic and Racial Segregation Go Hand-in-Hand

- It's an obvious point; seen most clearly with disparate impact and placement of affordable housing
- But, even middle class African Americans are more likely to live in poor neighborhoods than are poor whites
 - So it's not always just about class
 - Disparate impact & intentional discrimination



Segregation Puts a Target on the Backs of Communities of Color

- Poor Housing
- Failing Schools
- Disconnection from Employment
- Inadequate Transportation
- High Crime
- Poor Health Outcomes
- Diminished Social Capital
- Declining Home Equity



Segregation Permits Discriminators to be More Efficient

- Steering
- Blockbusting
- Redlining
- Predatory Lending
- Equity Stripping
- NIMBYism
- Where to disinvest
- Where to gentrify?
- Discriminatory zoning
- Discriminatory building standards
- Discriminatory refusal of municipal services
- Environmental racism



AFFH Statutory Authority

- FHA requires HUD to “administer [housing] programs...in a manner affirmatively to further the policies of [the Fair Housing Act],” including the general policy to “provide, within constitutional limits, for fair housing throughout the United States.”
 - 42 USC §3608(e)(5).



“No Certification, No Money”

- 42 U.S.C. §5304(b)(2): “Any grant under [the CDBG program] shall be made only if the grantee certifies to the satisfaction of the Secretary that ... the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 [42 U.S.C. 2000a et seq.] and the Fair Housing Act [42 U.S.C. 3601 et seq.], and the grantee will affirmatively further fair housing.”



Obligations Apply to All Funds

- “Although the grantee’s AFFH obligation arises in connection with the receipt of Federal funding, its AFFH obligation is not restricted to the design and operation of HUD-funded programs at the State or local level. **The AFFH obligation extends to all housing and housing-related activities in the grantee’s jurisdictional area whether publicly or privately funded.**”
 - *Fair Housing Planning Guide* (1995), at p.1-3.



Refraining from Discrimination is Not Enough

- “...every court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating (and from purposely aiding discrimination by others)...This broader goal [of truly open housing] ... 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.”
 - *NAACP v. Sec’y of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987).



AFFH: Change is Coming

- HUD'S new rule was published on July 16, 2015
 - https://www.huduser.gov/portal/affht_pt.html#final-rule
- New Assessment of Fair Housing (“Assessment” or “AFH”) templates replacing old Analysis of Impediments
 - Jurisdiction template published December 2015
 - State template published for comment March 2016
 - Public Housing Agency template published March 2016
- New Guidebook to the AFH published December 2015
 - <https://www.hudexchange.info/resource/4866/affh-rule-guidebook/>
- New Data and Mapping Tool now available for jurisdictions
 - <https://www.hudexchange.info/resource/4867/affh-data-and-mapping-tool/>



Final Rule

- The Fair Housing Act “directs HUD’s program participants to take significant actions to overcome historic patterns of segregation, **achieve truly balanced and integrated living patterns**, promote fair housing choice, and foster inclusive communities that are free from discrimination.” 80 Fed. Reg. 42272 (July 16, 2015)



Tax Credits and Other non-HUD Funds are Included in the Assessment

- Program participants, including States, will be required in the Assessment to analyze data on the location and occupancy of affordable LIHTC units and to consider the impact of a QAP on fair housing issues in their jurisdiction.
- Use of other funds for housing, transportation, infrastructure may play a role and should be considered



Balanced Approach

- “A balanced approach would include, as appropriate, the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, effective housing mobility programs and/or concerted housing preservation and community revitalization efforts.” 80 Fed. Reg. 42279.



Publicly Supported Housing Analysis

- Publicly supported housing” is housing assisted with funding through federal, State, or local agencies or programs as well as housing that is financed or administered by or through any such agencies or programs.
 - Are there fair housing issues with the placement or occupancy of publicly supported housing?
- HUD provides data on:
 - Public Housing
 - Project-Based Section 8
 - Other HUD multifamily housing (includes both Section 202—Supportive Housing for the Elderly and Section 811—Supportive Housing for Persons with Disabilities)
 - **Low Income Housing Tax Credit (LIHTC) housing**
 - Housing Choice Vouchers (HCV)



Segregation

“Segregation” “means a condition, within the program participant’s geographic area of analysis.... in which there is a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a type of disability in a particular geographic area when compared to a broader geographic area.” 24 C.F.R. § 5.152



“Integration”

- “Integration” “means a condition, within the program participants geographic areas of analysis, as guided by the Assessment Tool, in which there is not a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a type of disability in a particular geographic area when compared to a broader geographic area.” 24 C.F.R. § 5.152



Publicly Supported Housing and Segregation

- Typical Assessment Prompts: Siting and location of publicly supported housing
 - Look at the patterns of occupancy by race, national origin and disability by program category (public housing, project-based Section 8, Other HUD Multifamily Assisted developments, HCV, and LIHTC) housing.
 - Examine the relationship between these patterns and the demographics of the general and income eligible populations
 - Describe patterns in the geographic location of publicly supported housing by program category in relation to previously discussed segregated areas and R/ECAPs.
 - Compare the demographic composition of occupants of publicly supported housing in R/ECAPS to the demographic composition of occupants of publicly supported housing outside of R/ECAPs
 - Is there a mobility counseling program (other than the PHA's), central registry, listing of rental housing available to HCV holders, or other program to ensure that residents, particularly those living in low-asset/high poverty neighborhoods become aware of public or private housing opportunities outside their neighborhood?



Definition of AFFH (§ 5.152)

- “Affirmatively furthering fair housing means **taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation** and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.”
 - Specifically means taking actions that “address significant disparities in housing needs and in access to opportunity, **replacing segregated living patterns with truly integrated and balanced living patterns**, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.”



Fair Housing Planning Obligations

- Recipients must “tak[e] meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination.” 24 CFR § 5.150
- Participants must identify the existence and extent of: (1) integration and segregation patterns, (2) racially or ethnically concentrated areas of poverty; (3) significant disparities in access to community assets, and (4) disproportionate housing needs. §5.154(d)(2)



The Focus

- The rule identifies categories of analysis that contain fair housing issues that program participants will assess:
 - Patterns of integration and segregation
 - Racially or ethnically concentrated areas of poverty
 - Disparities in access to opportunity
 - Disproportionate housing needs
 - Publicly supported housing analysis
 - Disability and access analysis
 - Fair housing resources



Honest Conversations About Race and Segregation

- AFH process requires Program Participants to initiate and follow through on jurisdiction-specific community conversations about race, segregation and access to opportunity areas.
- Community participation process should bring Ishmael and Isaac back together



“Both-And” Solutions

- Erika Poethig & Reed Jordan, “Cities Where a Big Chunk of Affordable Housing Could Soon Disappear,” *available at <https://nextcity.org/daily/entry/affordable-housing-could-soon-disappear-in-many-us-cities>*
 - New approach to preservation: “With constrained resources, local leaders often must prioritize which units receive significant preservation attention. **For generating economic mobility, we should focus on units within high-opportunity neighborhoods, because they are likely the primary source of affordable housing in these neighborhoods.** These units face the most pressure to convert to market-rate units, because owners can capture higher rents or sell at a high price. And yet, we know from research that low-poverty neighborhoods are more likely to support families’ efforts at upward mobility.



When in Doubt, Ask a Genius

- John Henneberger: (2014 MacArthur winner), “False Choices in Fair Housing Policy,” 24 *Poverty & Race*, No. 5, at pp. 3-4:
 - “If we are serious about overcoming segregation, we need to reject the false choice of community revitalization vs. resident mobility that would maintain the status quo. We need to get on with a policy that deals with the realities our neighborhoods confront. Let’s expand subsidized housing choices, reinvest in public facilities and services while supporting existing homeowners in racially segregated high-poverty neighborhoods and figure out how to maintain affordable housing opportunities in gentrifying neighborhoods.”



Principles of Reconciliation

- Retool the conversation about preservation: Rather than a “save every unit” approach, use AFH process to identify the units and communities in which a concerted revitalization strategy can mobilize public and private sector resources to improve life outcomes in existing neighborhoods characterized by segregation and poverty



Principles of Reconciliation

- Conduct honest conversations about choice:
The Fair Housing Act focuses on housing choice, so any policy solution needs to preserve options for remaining in traditional neighborhoods and increase options for mobility. NIMBYs cannot hide behind choice rhetoric, nor should fair housing advocates disrespect the choice to remain



Principles of Reconciliation

- Examine when gentrification/displacement is a form of discrimination: As new urbanism and the focus on walkable communities increases, we need to identify opportunities to create policy and funding bulwarks to ensure that communities of color are not displaced from their traditional communities.



Principles of Reconciliation

- Infuse the conversation about every housing program with the question “how does this undermine segregation and expand housing choice?”: In the wake of the *ICP* decision and the HUD Final Rule on AFFH, cities and States are on notice that they must ask hard questions about all of their housing programs and activities



Conclusion

- Genesis 25:9: “Then [Abraham’s] sons Isaac and Ishmael buried him in the cave of Machpelah....”
- It took decades but, having descended from the same parent, Isaac and Ishmael reconciled
- Perhaps the 2015 AFFH “reset” will provide the occasion for reconciling housing advocates, if only to begin burying old disputes.



Resources

- **Relman, Dane & Colfax AFFH Page:**
<http://www.relmanlaw.com/affh/index.php>
- **Smyth, Allen & Schnaith, “The Fair Housing Act: the Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients,”** *23 Journal of Affordable Housing* 231 (Feb. 2015).



Resources

- Schwemm, “Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s ‘Affirmatively Further’ Mandate,” 100 KY. L.J. 125, 137–44 (2011–2012)
- Michael Allen’s AFFH Presentation for FHCO:
<https://vimeo.com/user25658681/review/100159910/2ec832ee0e>
- HUD AFFH page:
http://www.huduser.gov/portal/affht_pt.html#affh



Resources

- Allen, *No Certification, No Money: The Revival of Civil Rights Obligations in HUD Funding Programs*, in *Planning Commissioners Journal*: <http://www.relmanlaw.com/docs/WestchesterArticle.pdf>
- Allen and Gurian, *Making Real the Desegregating Promise of the Fair Housing Act: “Affirmatively Furthering Fair Housing” Comes of Age*, in *Clearinghouse Review*: http://www.relmanlaw.com/docs/Clearinghouse_Article_on_Westchester.pdf