

ANTI-DISCRIMINATION CENTER, INC.

“ONE COMMUNITY, NO EXCLUSION”

September 16, 2013

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, S.W., Room 10276
Washington, DC 20410-0500

Re: Proposed “Affirmatively Furthering Fair Housing” rule [Docket No. FR-5173-P-01]

Dear HUD Office of General Counsel:

As you would expect, the Anti-Discrimination Center (ADC) is deeply interested in whether existing affirmatively furthering fair housing (AFFH) rules are strengthened or weakened. It was, of course, ADC’s development and prosecution of the landmark False Claims Act case against Westchester County (based on the county’s false and fraudulent representations that it had AFFH’d) that rescued the concept of AFFH from the bureaucratic oblivion to which HUD had relegated it for so many years.¹

In reviewing the proposed rule and HUD’s explanation for it, ADC is encouraged by HUD’s greater emphasis on the need to combat the scourge of residential segregation. This focus is appropriate given the fact that, despite the progress made since 1968, the only fair assessment of 2010 United States Census Bureau data is that this remains a country that is characterized by deep and widespread segregation (*see* mapping tool *available at* www.remappingdebate.org/dm).

On the other hand, ADC is profoundly disturbed by the fact that HUD: (a) continues to fetishize analysis over action; (b) ignores the well-documented historical record of entrenched resistance to AFFH; (c) fails to approach the rule-making process as an exercise in effective *law enforcement*; and (d) indulges in the discredited premise that “buy-in” to genuine AFFH will be simple and painless. Before turning to these and other concerns about the proposed rule, though, it is important to tackle head-on one frivolous critique that has emanated from the right-wing echo chamber: that the proposed rule represents “social engineering.”

¹ That ADC litigation — a case that HUD and the U.S. Attorney for the Southern District of New York steadfastly refused to help prosecute — was the catalyst for the historic consent decree that was entered into in August 2009. That consent decree had enormous desegregation potential, but, for four years, the federal government (by which we mean HUD; the court-appointed Monitor that was nominated by HUD and who serves at the pleasure of, HUD; and the U.S. Attorney for the Southern District of New York) has refused to enforce it, notwithstanding defendant Westchester’s brazen and continuous contempt. *See* www.antibiaslaw.com/wfc. That failure to enforce is particularly relevant here because it stems from the same faulty premises that underlie the structure of the proposed rule.

Objections to “impositions” on local or state control are nothing new, of course. South Carolina introduced the idea that a federal mandate could be “nullified” in 1832. Both the Confederacy itself and those who fiercely resisted the civil rights movement of the 1960s fought under the banner of “states’ rights.” That philosophy continues today, frequently expressed by opposition to “social engineering.”

If, however, one takes a moment to get beyond the poisonous rhetoric — rhetoric that is unmistakably designed to stir fear of the “other” — one immediately appreciates the fact the social engineering is the building block upon which *any* society is built. Wherever men and women no longer live in a state of nature, behaviors of all sorts have been and continue to be shaped by law and regulation. The question, therefore, is not *whether* there should be social engineering, but, rather, *to what ends* should social engineering be directed.

Most relevant to the proposed rule, residential segregation is itself a product of social engineering. Through much of the 20th century, that engineering had taken many forms: restrictive covenants; property owners, developers, and realtors who openly engaged in racial discrimination; federal discouragement of investment in integrated neighborhoods alongside massive investment in the development of all-white suburbs; discriminatory ordinances on the state and local level; state and local government that did nothing to stop acts of terrorism designed to intimidate African-Americans from moving into neighborhoods, and restrictive zoning that made affordable housing off-limits in many neighborhoods, most especially in wealthier suburbs that surround major metropolitan areas.

Engineered patterns of segregation do not automatically disappear in the absence (or relative absence) of the most brutal and overt manifestations of intentional discrimination. In the first place, that engineering continues to contribute to the fact that African-American households (as a group) have fewer means than whites to purchase property today. Over the decades, those who were permitted to own property in what were racially restrictive suburbs (whites) — often with federal financial assistance of one form or another — were given a spectacular advantage over those who were kept out (African-Americans, and, later, Latinos): the amassing of capital via property appreciation.

Second, neighborhoods and jurisdictions that are ultra-white continue to impose an “inhibition effect” on African-Americans who would otherwise elect to live there if they did not perceive that they would not be welcome.²

Finally, there is a powerful piece of segregation-perpetuating engineering that remains in place throughout much of the country today: exclusionary zoning. Excessive limitations on density and the prohibition or discouragement of context-appropriate multiple dwellings make the development of affordable housing in many areas difficult or impossible. That lack of affordable housing bears more heavily on African-American and Latino households. Removing

² If anyone doubts that the message “don’t come here” is still being conveyed, the racial invective spewed in the wake of the Westchester consent decree — a decree that, among other things, was designed to provide housing for families with annual household income of as much as \$85,000 — should cure that misimpression.

such barriers, on the other hand, would free not-for-profit and for-profit developers to develop mixed-income housing (combining market-rate units with affordable units). Opponents of AFFH should make clear that they are not opposed to social engineering *per se*; they are opposed to the *re-engineering* that would remove artificial barriers to responsible development and facilitate fair housing choice; *they support the existing social engineering that acts to perpetuate segregation.*

1. Fetishizing analysis over action

The showpiece of the proposed rule is the old “analysis of impediments to fair housing choice” (“AI”) dressed up in the new clothes of “assessment of fair housing” (“AFH”), defined at proposed §5.152 [FR 43729].³ HUD advertises the AFH as a critical and meaningful improvement, but ADC isn’t buying.

Second, and equally important, the Holy Grail here is not supposed to be a *planning tool*, but *actual change on the ground*. The fundamental obligation on jurisdictions needs to be the *action* obligation. It is fine to have a *supplemental obligation* to engage in a planning process, but jurisdictions need to know that: (a) their *action* obligation cannot be limited by an inadequate AFH that has “deemed” approved via HUD inaction for 60 days (or “actually” approved in a rushed 60-day process that will undoubtedly resemble rubber-stamping more than anything else); and (b) they will be held accountable for whether they have eradicated barriers to fair housing choice.

If one only were to read the definition of AFFH contained in the first sentence of §5.152, one might believe that HUD was on the right track in terms of reciting requirements consistent with the intent and language of the Fair Housing Act to take “proactive steps” to “overcome segregated living patterns and support and promote integrated communities.”⁴

But when one turns to certification language (*see, e.g.*, §91.2254(a)(1) at FR 43738), the action requirement is stated in terms *subordinate* to the planning process (taking “meaningful actions to further the goals *identified in the AFH* conducted in accordance with the requirements of 24 CFR 5.154”). Surely HUD does not intend to convey to jurisdictions — especially jurisdictions resistant to AFFH — that they could limit their *action* obligation if they manage to get a barebones AFH through the HUD “review” process. **The action requirement should stand alone**, and HUD should clarify what ADC hopes is its actual intention: that the

³ All citations preceded by “FR” refer to a page in Vol. 78, No. 139, July 19, 2013 of the Federal Register that is part of the proposed rule on Affirmatively Furthering Fair Housing, intended to amend CFR Parts 5, 91, 92, et al.

⁴ We leave aside until later in this letter the overly broad language about “access to community assets,” language apparently reflecting the desire of some to see not only enhancement of *non-housing* resources in racially concentrated areas of poverty, but also the continued practice of perpetuating segregation by intensifying the concentration of affordable housing units in racially concentrated areas of poverty (RCAPs).

requirement to take all the steps necessary to overcome all the barriers of fair housing choice exists regardless of whether a jurisdiction has bothered to identify a barrier in an AFH. (Note that specific language for the certification is proposed, *infra*, at section 5, page 8).

Beyond the confusion of means and ends, if HUD does intend jurisdictions to be held responsible for actions and for results, the proposed rule is, at best, opaque.

2. Ignoring resistance to AFFH

HUD writes the proposed rule in a way to get an “A” for euphemism (“the fair housing elements of current housing and community development planning are not as effective as they can be”) and an “F” for recognizing the intensity of opposition to AFFH. Does anyone really believe that the failure of hundreds of jurisdictions throughout the country to AFFH is attributable to the lack of planning tools? You don’t need either a Ph.D. in American History (or even a crash course in how Westchester has violated a lawful federal court order with impunity for four years running) to know the obvious: jurisdictions don’t AFFH because *they don’t want to AFFH* or because they are in region where neighboring jurisdictions don’t want to AFFH.

To put it another way: the failure to AFFH doesn’t occur because local officials don’t know that their jurisdiction (or region) is characterized by residential segregation, or don’t know that restrictive zoning creates a barrier to fair housing choice, or don’t know that the disparate placing of affordable housing (lots in some jurisdictions or parts of jurisdictions; none or virtually none in other jurisdictions or in some parts of the same jurisdiction) perpetuates segregation.

These facts should have told HUD that it needed to approach the proposed rule very differently.⁵ While it may be politically expedient to extol the virtue of local choice and to assure jurisdictions that the “proposed rule does not mandate specific outcomes for the planning process” (*see, e.g.*, FR 43711), HUD cannot help but realize that most jurisdictions will choose *not* to prioritize (or even identify) effective actions to AFFH (like eliminating exclusionary zoning) that are politically uncomfortable at the local level.

As such, HUD needs to assure that a set of core critical actions (undoing exclusionary zoning, reducing the number of pre-1991 dwellings that are inaccessible to people with disabilities, confronting — when a consortium is involved — the resistance of member municipalities to affordable housing with desegregation potential; etc.) are either specifically mandated or (at the very least) used as illustrations of actions that HUD will treat as presumptively necessary for AFFH compliance.

⁵ And not include in the explanation of the rule the delusional or disingenuous statement that the rule “seeks to make program participants *more empowered* to foster the diversity and strength of communities and regions by improving integrated living patterns and overcoming historic patterns of segregation...” [FR 43711, emphasis added].

3. HUD's failure to view AFFH in a law enforcement model

Forget about fair housing for a moment and think about the enforcement of other kinds of law (both civil and criminal, both national and local). The first rule is that you don't negotiate away elements of the law. The second rule is that you need to establish the realistic prospect of a deterrent (a reasonable probability that violations will be detected and then punished swiftly and effectively). The third rule is that "softer" methods of achieving compliance (such as education) do not and cannot effectively work in isolation. Had HUD been thinking in law enforcement terms — oughtn't civil rights law enforcement have the same status as other forms of law enforcement? — it would have shaped its proposal very differently.

There is, for example, *zero* emphasis in the proposed rule on consequences for non-compliance. On the contrary, the only thing that HUD has to say about litigation is that one of its aspirations for the proposed rule is that "it will reduce the risk of litigation for program participants" [FR 43711].

HUD needs to specify that it has a range of sanctions available to it for failure to AFFH, including something it has still not done (or at least not persuaded the Justice Department to do): bring a False Claims Act claim against jurisdictions that make false or fraudulent representations. Doing so would hardly be unprecedented in the context of protecting the federal government from fraud: the Department of Health and Human Services, for example, has no problem bringing False Claims Act claims against those who defraud the federal government in connection with Medicaid.

Just as important, HUD needs to build in a real auditing function, not unlike the Internal Revenue Service. The effectiveness of the IRS has obviously varied greatly over time. But the underlying problem faced by that agency is one well worth thinking about. Some taxpayers will meet their obligations because it would never occur to them not to. Others are committed to evading their obligations unless and until caught.

But there is a vast third category: those taxpayers whose compliance is influenced by their perception of relative risk and reward. As such, the IRS engages in three basic types of enforcement: (i) focusing on areas of high yield, both for the specific impact and the general deterrence against a particular type of evasion or taxpayer profile; (ii) responding to information about non-compliance; and (iii) conducting random — or seemingly random — audits. All the categories foster general deterrence; the last is noteworthy precisely because of its lack of transparency. That is, deterrence is not enhanced by giving taxpayers a road map of what kinds of evasion are unlikely to be pursued, but rather by doing enough enforcement work across the board so that taxpayers in general sense that noncompliance does place them at risk.

For HUD, that would mean converting "high yield" from the IRS context to the AFFH context. For example, it is well known that African-Americans are willing to move to blocks and neighborhoods that have a wide variety of demographics. That willingness (not surprisingly) drops substantially in connection with all-white blocks and neighborhoods. Imagine selecting for AFFH-compliance scrutiny those jurisdictions that: (a) have a substantial number of

neighborhoods of high opportunity; (b) have an essentially all-white demographic profile; and (c) have significant barriers to fair housing choice (like exclusionary zoning).

Doing so would be high-yield in two complementary respects. First, these are the doors that need to be opened to remove real inhibitions against the exercise of true fair housing choice; second, it is essential that people making decisions on where to live (or to relocate) understand that there will be no safe harbor from FHA enforcement.

HUD would need to have a mechanism to take advantage of information provided by fair housing advocates and other interested parties and would need to be prepared to engage in random audits. No recipient should be able to believe that it is immune from scrutiny.

HUD does helpfully begin to introduce the concept — very familiar in the context of civil rights and other litigation — of shifting the burden of proof where appropriate to the actor whose conduct is sought to be regulated (and who has the greatest access to information about its own conduct). Thus, proposed §5.154(d)(4)(i) requires a jurisdiction to “justify the chosen prioritization” of fair housing issues [FR 43731].

But this kind of requirement to justify does not extend to the performance realm. HUD does have a recordkeeping requirement set forth in proposed §5.156(a)(3) which appropriately requires the maintenance of records “demonstrating the actions the program participant has taken to affirmatively further fair housing...and the actions the program participant has carried out to promote or support the goals identified in §5.154 during the preceding 5 years” [FR 43733-34]. What is HUD going to do with these records? Will HUD require jurisdictions to explain how they believe their action have AFFHd? Will HUD require jurisdictions to explain a failure to make progress on the ground? Will HUD penalize jurisdictions for such failures, and, if so, to what extent. The proposed rule itself does not make this clear.

In this connection, it is of great concern that HUD does not apparently propose to amend existing regulations 24 CFR §§570.912 and 570.913. These provisions provide for a wide range of sanctions, including referral to the Attorney General for the commencement of an appropriate civil action, but while they reference 24 CFR §570.601 (the anti-discrimination in federally-funded program provision) they do not reference 24 CFR ¶570.601, the AFFH provision. There is no justification of treating the AFFH provision as a second-class citizen and both 570.912 and 570.913 need to be amended to reference 570.601.

Finally, the nature of certification language (discussed, *infra*, section 5, page 8) is of crucial importance to any enforcement regime that: (a) can never have the resources to engage in real-time, substantive review of the actions (or failures to act) of all subject jurisdictions; and (b) is dealing with conditions and potential actions that a jurisdiction may not have reported. This last element is underappreciated: it’s not what a jurisdiction *says* that is necessarily most important; it is what the jurisdiction *doesn’t say*. And the latter is something that would only get put in context from complaints made by fair housing organizations or other third parties, or by HUD audits. The certification must encompass the entire AFFH obligation, and HUD must not shy away from using the full range of penalties when false claims are made.

4. The myth of buy-in

It would, of course, be wonderful if jurisdictions “bought into” the importance of AFFH. But wishing that to be the case doesn’t make it so.

HUD appears to recognize (although it again indulges in euphemism) that “the ultimate effect of the rule will depend upon the policy preferences of individual program participants, including whether [they are] favorably predisposed toward fair housing policies, the character of the local bureaucracy, and whether the limited incentives of the rule will affect the program participant’s active engagement in its fair housing obligations” [FR 43725-26].

Translation into English: if the individual program participant isn’t disposed to AFFH, the rule isn’t going to make it AFFH. Or, as HUD states: “the specific actions of a local government of PHA that would generate benefits for protected classes *are not prescribed, obligated, or enforced by the proposed rule* [FR 43726, emphasis added].

In the face of the “uncertainty” about what jurisdictions will do, however, HUD just goes ahead and promulgates a proposed rule that assumes that buy-in *will* occur and, therefore, the agency can rely on the carrot of improved data access instead of the stick of real enforcement.

At the same time, HUD apparently *is* aware that there is *significant* resistance to genuine buy-in. HUD responds not with a more law-enforcement based approach, but by preemptively trying to placate jurisdictions that it knows won’t be friendly to real AFFH (hence, no unpopular specific actions discussed and the repeated assurances that specific outcomes are not prescribed).

This history is not a trivial issue. We are *not* starting with a blank slate. The “pretty please” method of seeking to persuade jurisdictions to AFFH has been the method of choice for HUD *and it already has a long record of failure*. If an agency seeks to have any hope of enforcing an AFFH rule, it must deal realistically with the fact that there is no evidence that jurisdictions have seen the light.

When you’re dealing with massive noncompliance, you need to: (a) recognize it; (b) understand that you must establish an extensive track record of holding jurisdictions to account through firm law enforcement methods before the larger “recipient community” realizes that window-dressing AFFH is no longer going to be tolerated;⁶ and (c) not be frightened of specifying what actions jurisdictions must ordinarily take.

⁶ Unfortunately, the federal government’s failure to hold Westchester in contempt for its ongoing failure to comply with the consent decree — the normal approach when a civil rights defendant won’t stop violating a civil rights court order — profoundly compromises any effort to persuade jurisdictions that HUD will use every enforcement tool at its command. Likewise, the federal government’s collaboration with Westchester in “counting” housing units that are anti-AFFH (like the units located on a census block already 51 percent Latino and African-American) as part of the County’s desegregation development obligation under the decree (in order to pretend that there has been “progress” and to avoid having to force zoning changes) tell jurisdictions throughout the country that the federal government is still in the window-dressing game.

5. Certification language

When ADC filed its complaint in the Westchester case, it included the allegation that Westchester's requests for payment were implicit (false) certifications that it had complied with its AFFH obligations. In granting ADC's cross-motion for summary judgment in significant part, the Court held that:

Given [the] explicit statutory and regulatory scheme, it is easy to find that federal law conditioned payment of the housing and community development funds on compliance with the duty to AFFH and that each time the County submitted a request for payment of those funds it made an impliedly false certification.

U.S. ex rel. Anti-Discrimination Center v. Westchester County, 668 F.Supp.2d 548, 566 (S.D.N.Y. 2009). In other words, it was not only a *prospective* formal certification that was at issue, but more than a thousand *retrospective* implied certifications that were at issue. Any jurisdiction other than one that is submitting a certification for the first time should be obliged to make a retrospective representation about AFFH compliance.

In addition, as noted earlier, the action requirement should stand alone. Finally, a jurisdiction should be required to make explicit the fact that it is making a certification with the intention that HUD rely on it without conducting an independent investigation.

As such, a certification should read as follows:

Each jurisdiction is required to submit a certification that it has and will affirmatively further fair housing, which means that: (a) it has and will take all meaningful steps possible to overcome barriers to fair housing choice that exist in or are contributed to by the jurisdiction; (b) it has not and will not take any action inconsistent with its obligation to affirmatively further fair housing; and (c) it has not and will not fail to act where such failure to act has been or would be inconsistent with its obligation to affirmatively further fair housing. The certification shall include a statement from the jurisdiction that it is representing that the certification is true, complete, and based on supporting evidence, and that it understands that HUD is entitled to rely upon such certification without conducting an independent investigation.

The last element (while it could be seen as part of "a") is important to spell out. The failure to change an exclusionary zoning ordinance can certainly be seen as not taking a meaningful step to overcome a barrier to fair housing choice, but it can also be seen as a failure to act that is inconsistent with its AFFH obligation. This add-on is perhaps even more important were HUD to stick with its current certification language, language which seems quite clearly to open the door to taking *some* but not *all* of the meaningful actions that are necessary.

HUD quite properly tries to close the door in part with the certification language that a jurisdiction “will take no action that is materially inconsistent with its obligation to affirmatively further fair housing” (although why it would seek to invite collateral disputes over whether an inconsistency is “material” is counterproductive), but it doesn’t deal as it should with failures to act. *Cf.* Westchester Consent Decree, ¶7(j) (emphasis added) (In the event that a municipality *does not take actions* needed to promote the objectives of this paragraph, *or undertakes actions* that hinder the objectives of this paragraph, the County shall use *all available means* as appropriate to address such *action or inaction*, including, but not limited to, pursuing legal action. The County shall initiate such legal action as appropriate to accomplish the purpose of this [consent decree] to AFFH”).

A different aspect of certification appears not to be addressed by the proposed rule. The existing definition of “certification” is set forth in 24 C.F.R. §91.5:

A written assertion, based on supporting evidence, that must be kept available for inspection by HUD, by the Inspector General of HUD, and by the public. The assertion shall be deemed to be accurate unless HUD determines otherwise, after inspecting the evidence and providing due notice and opportunity for comment.

The “deemed to be accurate” language is confusing; what HUD is actually saying is that it is entitled to rely on the certification for program participation purposes. A clearer version of the section would read as follows:

A written assertion, based on supporting evidence, that must be kept available for inspection by HUD, by the Inspector General of HUD, and by the public. HUD shall be entitled to rely on the accuracy of the assertion, but nothing in this section shall preclude a finding by HUD at any time that the certification was in fact false, incomplete, not based on supporting evidence, or otherwise noncompliant with HUD requirements.

The language of 91.5 (whether the existing version or the one that ADC proposes) makes even more clear the importance of *not* limiting the substance of the certification to what a jurisdiction may have included in an AFH. A certification system based on the real AFFH obligation — eliminating segregation and other barriers to fair housing choice — can be a powerful tool (much more powerful than the cursory review that HUD might give to some AFHs within 60 days)⁷ if HUD is prepared to treat the truth or falsity of representations to the federal government as a serious matter.

⁷ Others will surely comment on how HUD’s AFH review system is doomed to fail. We’ll only add that, if a review system were to be retained in the final rule, the Poverty & Race Research Action Council has a very useful suggestion to introduce the category of “unreviewed.”

6. AFFH as a “national objective” and “priority need”

If AFFH is going to be taken seriously and genuinely integrated into how jurisdictions plan, allocate, and act, then there is no reason that AFFH should not be justified in the relevant regulations as a “national objective” and “priority need.”

7. Community assets and the unwillingness to stop perpetuating segregation

In the course of depositions of Westchester officials (and the defense’s experts), one theme was repeated over and over: you build affordable housing where eligible families currently live because “that’s where the need is.” It’s easy to see that this formula: (a) by definition perpetuates segregation and encourages the continuation of concentrated poverty; and (b) ignores the fact that many families would be happy to move to a high opportunity community, even if (as is frequently the case in Westchester) the high opportunity community is two, or five, or 10 miles away.

From an AFFH point of view, the clear problem is the inadequate provision of affordable housing units with maximum desegregation potential, which, as a practical matter, means affordable housing units in ultra-white areas. Rehabilitating housing in racially concentrated areas of poverty (RCAPs) is consistent with a focus on developing new units in areas of exclusion. So is infusing RCAPs with non-housing community assets. But the decades-long status quo of treating mobility as an afterthought has to stop if serious AFFH headway is to be made.

AFFH is principally about overcoming barriers. So it must be principally about thinking regionally and breaking down doors so that those households who *chose* to cross boundaries of race, ethnicity, socioeconomic class, and geography can do so. Some commenters have pointed to the equivalence given in the preamble and in proposed §5.150 to the residential integration goal and the community improvement goal. ADC would go further and say that this equivalence is not just bad policy but is inconsistent with the intent of the Fair Housing Act and could not be sustained in the face of judicial review.

We would also say that the suggestion of changing §5.150’s “or” to “and” (so as to read “strategies and actions may include strategically enhancing neighborhood assets...and promoting greater mobility...”) is *insufficient*. **The “or” should be changed to “and shall include” so that the revised language would read: “strategies and actions may include strategically enhancing neighborhood assets...and shall include promoting greater mobility...”** Pro-integration strategies cannot be left to be optional.

8. The trap of RCAP-focused thinking

The continued existence of racially concentrated areas of poverty is a function of a now 45-year-long failure to enforce the Fair Housing Act to achieve its fundamental goals. Ironically, HUD’s focus on RCAP’s is part of the problem.

That focus has led HUD to underappreciate the way residential segregation works. The agency can barely speak about ultra-white areas, preferring the euphemism (in this case, one that has some truth to it) “neighborhoods of opportunity.” But whether HUD (or some who hold themselves out as civil rights advocates) are prepared to say so, segregation operates by having disproportionately white, African-American, Latino, and Asian areas. It is an interactive process. Disproportionality need not rise to the level of 40 percent in the case of RCAPs to be cause for AFFH concern given the current demographics of the United States. Ultra-white neighborhoods *are* a cause for concern.

To put it another way, neighborhoods, jurisdictions, and regions can be segregated-white, segregated-African-American, segregated-Latino, and segregated-Asian. This perspective not only leads to a changed view of where AFFH enforcement is needed (disproportionately high placement of subsidized housing units in minority areas; disproportionately low placement of subsidized housing units in white areas), it also changes the way one thinks about data.

HUD (and some leading demographers, too) prefer to focus on the progress that has been made since 1968 (or, in some metropolitan areas, since 1980). But ADC suggests that a sober look at the dissimilarity and isolation indices shows unmistakably that serious and still entrenched segregation is all around us.

We ourselves have deployed a method of analysis that makes quite clear how much of the individual building blocks of an area “look like” the area as a whole. We first identify the racial and ethnic composition of an entire area. Then we look at individual census blocks and see how many of them are within 20 percent of a group’s area-wide percentage.

In Westchester for example, the White population (according to 2010 Census Bureau data) is 57.38 percent. Allowing for the deviation described in the previous paragraph would mean that any Census block group that had a non- Hispanic, single-race White population of anywhere from 45.90 percent to 68.86 percent would be considered similar in that population to the County as a whole.

Only 13.57 percent of Census block groups had Hispanic population similar to Westchester as a whole.

Only 9.86 percent of Census blocks groups had African-American population similar to Westchester as a whole.

Only 8.14 percent of Census block groups had both Hispanic and White population similar to Westchester as a whole.

Only 4.71 percent of Census block groups had both African-American and White population similar to Westchester as a whole.

Only 1.43 percent of Census block groups had African-American, Hispanic, and White population similar to Westchester as a whole.

Only 0.57 percent of Census block groups had African-American, Hispanic,

Asian, and White population similar to Westchester as a whole.

Westchester's segregation, of course, stands out more clearly than would the segregation of some other jurisdictions, but the method would be illuminating in a wide variety of jurisdictions and we commend it for use by HUD and others. We also commend for use the mapping referenced earlier (www.remappingdebate.org/dm), mapping that looks at where the African-American and Latino population is lowest and highest. Cf. Consent Decree, §22(f) (requiring construction of housing on census blocks with the lowest concentrations of African-Americans and Latinos).⁸

9. A few lessons from Westchester that should be learned for the final rule

One can expect a great majority of individual jurisdictions and consortia to assert that they don't have resources to act and don't have legal authority to act. They will ignore zoning barriers or diminish the importance of desegregation. That's why the consent decree focuses (as written, not as enforced) so strongly on desegregation and on combatting municipal resistance.

Any person or entity (including a governmental entity) that acquires an interest in property with desegregation potential, but who is stymied by zoning restrictions has a disparate impact cause of action under the Fair Housing Act. Any consortium lead should be required to identify housing sites with maximum desegregation potential to be developed, and then to cause such sites to be developed, with local cooperation if possible, by means of litigation under the Fair Housing Act and such other state or local remedies that are applicable, if necessary.

In connection with this obligation, the consortium lead should be required to identify what state and local legal tools are in fact available for the purposes set forth in the preceding paragraph.

In addition, two parts of Consent Decree, ¶31 should be incorporated into AFFH requirements. First, each jurisdiction must make the "elimination of discrimination, including the present effects of past discrimination, and the elimination of de facto residential segregation" goals of all of the jurisdiction's housing policies and programs (and, subsequently, be held accountable in conformity with those goals). Second, it is important for each jurisdiction to acknowledge that "the location of affordable housing is central to fulfilling the commitment to AFFH because it determines whether such housing will reduce or perpetuate residential segregation."

Respectfully submitted,

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Executive Director

⁸ Westchester, with the collaboration of the federal government, has wrenched this requirement from its natural and intended meaning to focus construction on areas with no population at all, not areas of low concentration of African-Americans and Latinos *in relation to others*.