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# Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing

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## ABSTRACT

In 2015, the U.S. Department of Housing and Urban Development (HUD) issued the Affirmatively Furthering Fair Housing (AFFH) Rule, arguably the most significant federal effort in a generation to address place-based disparities in access to opportunity and to advance fair housing. In 2018, HUD suspended the rule, it said in part because of the resources it was expending to implement it and in part because of the large share of municipal plans that HUD determined had failed to meet the rule's requirements. In this article, we present the first analysis of the fair housing plans that HUD did not accept, examining how municipalities failed to meet the rule's requirements, what those failures imply about advancing fair housing, and the extent to which HUD's enforcement strategy was working before the suspension. Our analysis shows that HUD engaged in detailed reviews of municipalities' Assessments of Fair Housing and provided constructive feedback. The most common issue with which municipalities struggled was setting realistic goals that would actually advance fair housing and creating measurable metrics and milestones to gauge progress. Several municipalities neglected to conduct thorough regional analyses or analyses of all relevant disparities in access to opportunity. Both shortcomings reflect broader challenges municipalities face in advancing fair housing, particularly in identifying strategies that address interconnected causes of disparities in access to opportunity and in building regional support to address those causes.

## ARTICLE HISTORY

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*"This is the story of the first 50 years of the Fair Housing Act: gradual progress and frequent setbacks. If the law's drafters could have been accused of anything, it was excessive optimism about how easily a segregated society could be unified. But even as the epochal events surrounding its passage fade from collective memory, the Fair Housing Act persists. It remains a bulwark for advocates of justice and equality, as they advance, inch by inch, toward a fairer, more integrated nation."*

*-Walter Mondale (2018, p. 27)*

Over the course of 2018, the U.S. Department of Housing and Urban Development (HUD) took multiple steps to suspend and amend the Affirmatively Furthering Fair Housing (AFFH) Rule—the most significant effort in a generation to address residential segregation and place-based disparities in access to opportunity.<sup>1</sup> HUD argued that the rule was “unworkable” because of “(1) The high failure rate from the initial round of submissions; and (2) the level of technical assistance HUD provided...” (83 Fed. Reg. 23,923 (May 23, 2018)). In this article, we present the first analysis of the plans that municipalities submitted pursuant to the rule and that HUD did not accept. We examine how municipalities failed to comply with the rule, what those failures imply about advancing fair

housing, and the extent to which HUD's enforcement strategy was working before it suspended the fair housing rule.

### **The AFFH Mandate**

Congress passed The Fair Housing Act in 1968 as a “comprehensive open housing law” designed to provide for “fair housing throughout the United States” (*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 [1968]; 42 U.S. Code § 3601—Declaration of policy). The Fair Housing Act prohibits discrimination in the sale or rental of housing, whether that discrimination occurs through practices that intentionally treat members of protected classes differently or through policies that have a disparate impact (42 U.S. Code § 3604; *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2015). The Fair Housing Act also requires that all executive agencies administer their housing and community development programs in ways that further fair housing (42 U.S. Code § 3608). The act further entrusts the Secretary of HUD with the responsibility to ensure that all HUD programs and activities are conducted “in a manner affirmatively to further” the Fair Housing Act (42 U.S. Code § 3608). In other words, the Fair Housing Act gives HUD the responsibility to “do more than simply refrain from discriminating” (*NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987)). Instead, HUD must ensure that its programs make meaningful progress to increase the supply of housing that is open and accessible to all, without discrimination based on race, disability, family status, or other protected characteristics (*NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987)).

George Romney, who became the Secretary of HUD in the year after Congress enacted the Fair Housing Act, sought to fulfill the act's promise of fair housing by denying HUD funding to wealthy municipalities that used a variety of exclusionary practices, such as overly restrictive land-use regulations or discriminatory provision of basic urban infrastructure. In his words, he sought to break up the “high-income white noose” around black communities (quoted in Hannah-Jones, 2012). President Richard Nixon, however, actively sought to undermine Romney's Open Communities efforts, contributing to Romney's eventual resignation (Bonastia, 2006).

Nixon instead promoted his concept of the New Federalism through the Housing and Community Development Act of 1974 (Pub. L. 93–383), which consolidated multiple federal funding streams into the Community Development Block Grant (CDBG) program with the aim of “providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income” (42 U.S. Code § 5301—Congressional Findings and Declaration of Purpose). The 1974 act required compliance with Title VI of the Civil Rights Act of 1964 (prohibiting discrimination in programs receiving federal assistance; see 42 U.S. Code § 5309—Nondiscrimination in Programs and Activities) but conspicuously did not include any reference to the Fair Housing Act.

Congress in 1983 amended the CDBG program to specify that HUD should award grants only if the grantee demonstrates they will affirmatively further fair housing (Pub. L. 98–181; 42 U.S. Code § 5304—Statement of Activities and Review, 1983; 42 U.S. Code § 5306—Allocation and Distribution of Funds, 1983), clarifying again that state and local recipients of HUD's largest source of community development funds had a central role to play in opening access to housing. In 1988 and again in 1995, HUD issued regulations stating that CDBG recipients would be considered in compliance with their obligation to further fair housing if recipients “conduct an analysis to identify impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions” (53 Fed. Reg. 34,416 [September 6, 1988]; see also 60 Fed. Reg. 1878 [January 5, 1995]; 24 C.F.R. §§ 91.225(a)(1) and 91.325(a)(1)). HUD, however, rarely reviewed these Analyses of Impediments and there were essentially no consequences for incomplete, inadequate, or nonexistent analyses.

These minimal requirements regarding the furtherance of fair housing in the decades after Congress enacted the Fair Housing Act illustrate the struggle to realize the act's promise of reducing persistent racial disparities in access to opportunity. In what some have referred to as

“our localism,” substantial power to exclude continues to rest with local governments (Briffault, 1990, p. 1). And political will for the federal government to curb those exclusionary powers is generally lacking (Frug, 2001).

The 2015 AFFH Rule represents a rare moment in which a federal agency devoted substantial attention to encouraging state and local governments and public housing authorities (PHAs) to take more meaningful actions to advance racial equity and reduce disparities based on protected characteristics, including disability, family status, and national origin. In this article, we briefly review the history of the rule and analyze the current submissions pursuant to the rule to understand how some municipalities have failed to fulfill its requirements. That analysis illuminates the challenges municipalities face in completing their assessments and HUD’s challenges in enforcing this new rule.

## **The AFFH Rule**

### ***Analysis of Impediments***

Until 2015, the primary mechanism for enforcing the Fair Housing Act’s requirement that federal housing and community development funds affirmatively further fair housing was the Analysis of Impediments (AI) process. However, HUD rarely reviewed the AIs and there were essentially no consequences for inadequate or even nonexistent filings. After conducting a study in which it asked a sample of participating jurisdictions to produce AIs for review, HUD found that more than a third of jurisdictions failed to produce one at all (U.S. Department of Housing and Urban Development, 2009). Conducting a systematic review of completeness, the HUD study found that nearly one out of two of the AIs that HUD actually did review needed improvement or were of poor quality. Specifically, HUD noted that “a sizable proportion of the AIs reviewed did not contain key aspects recommended for inclusion by the Fair Housing Planning Guide,” and that some of the AIs “were completed in a cursory fashion only” (U.S. Department of Housing and Urban Development, 2009, p. 15).<sup>2</sup> The study also found that the quality and completeness of submissions actually declined from the 1990s through the 2000s.

A Government Accountability Office study of AIs conducted the following year similarly found that more than a third of analyses were out of date. The study also found that the analyses included few measurable objectives or time frames and were generally not signed by the grantee’s highest ranking local official, effectively making it impossible to establish clear accountability (Government Accountability Office, 2010).

The 2009 HUD study and the 2010 Government Accountability Office study reinforced the findings of the bipartisan National Commission on Fair Housing and Equal Opportunity (2008, p. 44), co-chaired by former HUD secretaries Jack Kemp and Henry Cisneros, which found that “[t]he current federal system for ensuring fair housing compliance by state and local recipients of housing assistance has failed.” The Commission determined that “HUD requires no evidence that anything is actually being done as a condition of funding and it does not take adverse action if jurisdictions are directly involved in discriminatory actions or fail to affirmatively further fair housing” (2008, p. 44).

Despite manifest municipal failures to further fair housing or even comply with basic civil rights laws, HUD rarely withheld funding from municipalities for civil rights reasons, with only two documented examples of this temporary withholding. In 2011, HUD sued Joliet, Illinois, and temporarily withheld funding until the city agreed that any resident displaced because of the proposed demolition of a subsidized housing complex would be able to remain in affordable housing in Joliet (all of the withheld HUD funding was ultimately restored after a settlement in 2013). After the Anti-Discrimination Center of Metro New York sued Westchester County under the False Claims Act in 2006 for falsely certifying the county’s compliance with fair housing regulations, the United States joined the lawsuit, ultimately coming to a settlement in 2009. HUD in 2011 began

withholding millions of dollars in funding from Westchester because the county failed to comply with the settlement agreement, and finally accepted Westchester's 11<sup>th</sup> submission of an AI in 2017 after the change in presidential administration.

### ***Assessments of Fair Housing***

After years of external consultation and internal discussions, HUD issued the final AFFH Rule in July 2015, clarifying what recipients of HUD funding must do to create their own plans to further fair housing. Intended as a step to expand access to opportunity for protected classes and to reduce disparities in access to place-based resources, the rule takes into account access to high-performing schools, transportation, and jobs, as well as exposure to environmental hazards. Given recent research on the role of place in shaping intergenerational socioeconomic mobility (Chetty & Hendren, 2018; Chetty, Hendren, Kline, & Saez, 2014; Sharkey, 2013), the rule has the potential to combat growing neighborhood disparities by addressing exclusionary zoning restrictions, inadequate affordable housing, and the legacy of residential segregation. Indeed, the stated purpose of the rule is in part to "address significant disparities in housing needs and in access to opportunity" (80 Fed. Reg. 42353, July 16, 2015).

Pursuant to the rule, HUD provides grant recipients with uniform data about segregation and disparities in access to opportunity, and HUD has created a publicly accessible website that generates customized maps and tables for each jurisdiction and its surrounding region.<sup>3</sup> The rule requires grantees to conduct an Assessment of Fair Housing (AFH), using a standardized assessment tool. HUD issued an Assessment of Fair Housing Tool for Local Governments (hereafter Assessment Tool) in 2015 and a revised version in 2017.<sup>4</sup> The AFFH Rule introduced several significant changes compared with the prior AI process: (a) requiring HUD to provide data to municipalities, (b) used with a standard Assessment Tool to conduct the analysis, (c) combined with robust public engagement, (d) leading to local creation of specific measurable goals and actions, (e) that are tied to future planning and assessments necessary to receive future HUD funding, (f) all of which is submitted to HUD for review.

The Assessment Tool contains questions designed to help grantees complete their AFH. It contains six main parts, which we detail here, as they are relevant to the analysis below. Parts I and II are the cover sheet and executive summary. Part III is a description of the community participation process that the recipient engaged in to include the public in its analysis of fair housing issues. The rule requires municipalities to gather community input, make public a draft plan, solicit community feedback, and address community comments and concerns. Part IV of the Assessment Tool assesses progress in addressing prior fair housing goals and discusses how that progress or lack of progress has influenced the selection of current goals. The most substantial part of the Assessment Tool is Part V, the Fair Housing Analysis section, in which municipalities analyze the HUD-provided data and additional local data. The Fair Housing Analysis has five main parts: (a) a demographic summary; (b) an analysis of segregation/integration, racially or ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs; (c) an analysis of access to opportunity for the residents of publicly supported housing; (d) an analysis of access for individuals with disabilities; and (e) an analysis of fair housing enforcement, outreach capacity, and resources.

Based on this assessment of data in Part V, the Assessment Tool asks grant recipients in Part VI.1 to identify pressing local fair housing issues and then to pinpoint and prioritize the factors that contribute to those fair housing issues, particularly the denial of fair housing choice and the creation of disparities in access to opportunity. Finally, the Assessment Tool in Part VI.2 asks grant recipients to set goals designed to overcome those contributing factors, clarify how each goal addresses that contributing factor, and set out metrics, milestones, time frames, and parties responsible for achieving the goals. To implement these goals, the metrics, milestones, and strategies should be included in subsequent consolidated plans, annual action plans, and PHA plans.

In explaining the rule, HUD noted the significant problems with the former AI framework, especially that the AI “was not well integrated into the planning efforts for expenditure of funds made by HUD program participants” (80 Fed. Reg. 42,272, 42,275). HUD accordingly timed the due dates for the AFHs to precede the due dates for CDBG consolidated plans and PHA plans, which must include fair housing elements from the AFH (21 C.F.R. § 91.500(b)). The timing of the AFH submissions was determined by the five year cycle of the municipalities’ Consolidated Plan Submissions – a schedule that was in place before the issuing of the AFFH rule.

### ***HUD Review***

Under the AFFH Rule, HUD is expected to review AFHs within 60 days. Any AFH not reviewed within 60 days is deemed accepted. Acceptance of an AFH “does not mean that the program participant has complied with its obligation to affirmatively further fair housing” (24 § C.F.R. 5.162 (a)(2)). Instead, “HUD’s review of an AFH is to determine whether the program participant has met the requirements for providing its analysis, assessment, and goal setting...” (24 CFR § 5.162(a)). The regulation specifies that HUD will not accept an AFH if it finds that a portion of the AFH is inconsistent with fair housing or civil rights requirements or is substantially incomplete (24 CFR § 5.162(b)). A municipality without an accepted AFH should not be able to receive CDBG funding: “If a program participant does not have an accepted AFH, HUD will disapprove a consolidated plan or a PHA Plan...” (24 CFR § 5.162(d)). For any AFH that is not accepted, the rule requires HUD to provide in writing both the reasons for the nonacceptance and guidance as to how the AFH should be revised to be accepted (24 CFR § 5.162(b)(ii)).

Withholding block grant funding from HUD program participants would represent a significant financial burden for localities—and potentially an effective deterrent. In Fiscal Year 2017, HUD disbursed \$4.6 billion in block grants to more than 1,200 state and municipal governments.<sup>5</sup> The block grant programs all require state and local governments to conduct both annual and long-term strategic planning for their use of these funds, in what is known as the consolidated plan process. Similarly, HUD also requires public housing agencies to conduct annual and long-term planning and produce what is known as a PHA Plan. To receive block grant funds, program participants must submit to HUD a consolidated plan every 3–5 years and certify that they will comply with all statutory and regulatory requirements, including the AFFH provision.

### ***Enforcing the AFFH Rule***

The AFFH Rule is an example of meta-regulation, in which localities are required to develop their own plans for compliance and self-regulation (Steil & Kelly, 2019). Meta-regulations rely on localities sincerely adopting the federal instruction and working creatively to advance the purposes of that regulation. In this case, the AFFH Rule relies on localities undertaking rigorous analysis and creating meaningful goals to meet the fair housing requirements, and then honestly evaluating progress toward those goals.

The AFFH Rule is also a form of equality directive, in which there are limited avenues for either private or public enforcement through courts and responsibility falls to federal agencies using their administrative powers to set directives for state and local governments to advance racial equity (Johnson, 2012, 2017). Like other equality directives, in which federal agencies set objectives for state and local governments to advance, responsibility also falls to federal agencies to use their administrative powers strategically to ensure local compliance. One approach to strategically using federal administration powers is a process of “responsive regulation”—of escalating enforcement measures as regulators adapt to the actions of regulates and allowing for gradations in the levels of sanctions (Ayres & Braithwaite, 1995).

In other words, the AFFH Rule depends on most localities genuinely embracing the spirit of the rule and following its stipulations. When a locality fails to comply, enforcement falls to HUD. Effective enforcement requires either substantial penalties or intensive enforcement, potentially with escalating enforcement measures. In general, if penalties for noncompliance are low, then

enforcement efforts must be thorough and intensive to ensure that most issues of noncompliance are identified and remedied (Schill, 2007). If enforcement is not intensive, then penalties must be high to ensure that deterrence is effective (Schill, 2007). Under the AI regime, penalties were minimal and enforcement was nonexistent. In the case of AFFH, it is unclear yet whether penalties have increased, but the submissions and review until HUD suspended the rule made clear that the intensity of review was dramatically different than under the AI process. HUD's recent stance that such intensive review is not possible going forward, however, casts the whole enforcement regime into uncertainty.

### ***AFFH Rule Suspension***

On January 5, 2018, HUD announced it was suspending the rule until October of 2020. Up to that point, 49 Assessments of Fair Housing representing 103 municipalities and public housing agencies had been submitted (83 Fed. Reg. 683, January 5, 2018). Thirty-two AFHs had been initially accepted whereas 17 had been initially not accepted. HUD said that it was suspending the rule because of the large number of nonacceptances and because HUD believed it was overly burdensome for municipalities and for HUD staff reviewing the AFH submissions. HUD reported that based on the initial AFH reviews, "HUD believes that program participants need additional time and technical assistance to adjust to the new AFFH process and complete AFH submissions that can be accepted by HUD" (83 Fed. Reg. at 684).

On May 8, 2018, fair housing advocates sued in an effort to reverse the January suspension, and the Attorney General of New York State sought to intervene on behalf of the fair housing organizations. HUD then withdrew its suspension of the AFFH Rule (83 Fed. Reg. 23,928, May 23, 2018) but also withdrew the Assessment Tool (83 Fed. Reg. 23,922, May 23, 2018) and instructed municipalities to revert to the old AI process (83 Fed. Reg. 23,927, May 23, 2018). Again, HUD emphasized the nonacceptances as the reason for withdrawing the Assessment Tool, stating that the "proportion of submissions determined to be unacceptable indicates that the Tool was unduly burdensome and not working as an effective device to assist program participants with the creation of acceptable and meaningful AFHs" (83 Fed. Reg. 23922, 23923). HUD emphasized the cost of technical assistance to the municipalities that had submitted so far. HUD also noted its inability to effectively review the AFHs scheduled for submission in 2018, 2019, and early 2020, given that HUD's Office of Fair Housing and Equal Opportunity has lost 23% of its workforce since 2010 and HUD "has only approximately 28 full-time equivalent employees available nationally to support all AFH reviews" (Declaration of Krista Mills, 2018, p. 32). On August 16, HUD issued an Advance Notice of Proposed Rulemaking to streamline the AFFH Rule, arguing again that the assessment tools were ineffective based on the high rates of rejection (83 Fed. Reg. 40,713, Aug 16, 2018). The following day, the United States Court for the District of Columbia rejected the fair housing organizations' challenge to the rule suspension because it found that neither the fair housing organizations nor the State of New York had standing to bring suit in the case.

The court's conclusion that the plaintiffs lacked standing highlights the nature of the rule as a meta-regulation and an equality directive, reliant both on local compliance and on administrative enforcement by HUD. With limited private remedies, the success of the rule depends in large part on the enforcement system HUD implements. The fact that HUD rejected any of the first 49 AFHs submitted represents a dramatic change from decades of inaction under the old AI process. The submissions that were not accepted under the AFFH Rule lead one to ask what the reasons were for the nonacceptances and what feedback HUD gave; what changes, if any, municipalities made in response to the HUD comments; and whether the municipalities whose AFHs were not accepted differed in any significant ways from those whose AFHs were accepted. We review the available data to answer each of these questions in turn.

## Empirical Analysis

### Data and Methods

To answer these questions, we analyze in detail the 17 nonacceptance letters HUD issued before the rule suspension. We document the part of the submission that HUD identified as deficient in each nonacceptance letter and identify the frequency with which those parts occur in the nonacceptances. For four case study municipalities whose AFHs were not accepted, we also compare the initial AFH submission that HUD rejected and the subsequent revised submission to identify the scope of the changes.<sup>6</sup>

Data regarding the population, unemployment rate, median income, share of college-educated residents, demographic composition, median home values, median gross rent, vacancy rate, and housing tenure composition of the municipalities filing AFHs were obtained from the 2012–2016 American Community Survey. Data regarding CDBG funding were obtained from HUD and data regarding dissimilarity index values and publicly supported housing were obtained from HUD’s online AFFH tool. Measures of local political ideology come from the American Ideology Project estimates created by Chris Tausanovitch and Christopher Warshaw.

### Findings

#### Rejection/Acceptance by Field Office

Overall, HUD refused to accept 35% of the AFHs submitted. The first and primary level of review of the AFHs takes place at HUD field offices, and there could accordingly be variation in standards applied by different field offices. The number of AFHs reviewed thus far, however, is so low as to make any test of this variation infeasible. As Figure 1 shows, the Los Angeles, California, field office both reviewed more AFHs (eight) and rejected more (six) than did any other field office. There are no clear patterns distinguishable by region, except perhaps the larger number of submissions in the Los Angeles region than anywhere else.

#### Rejection Reasons

In the letters sent back to municipalities after rejecting their AFHs, HUD describes in detail what has made the AFH submission substantially incomplete or inconsistent with civil rights requirements.

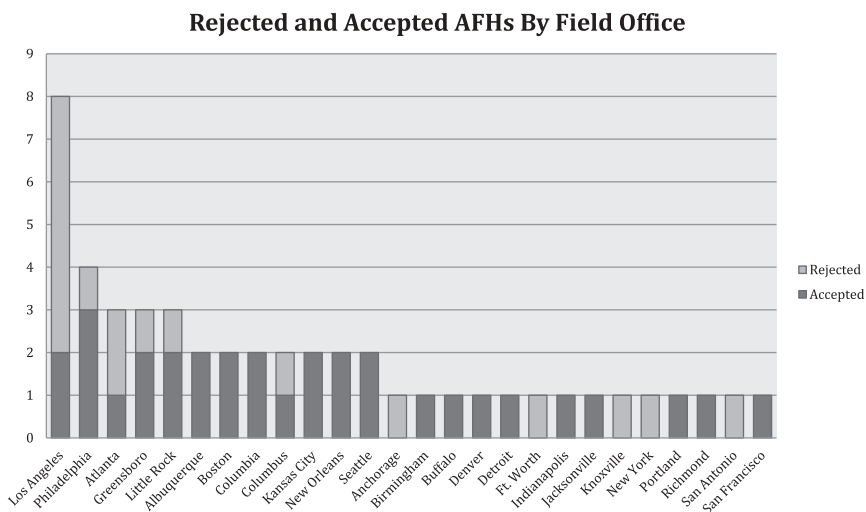


Figure 1. Accepted and nonaccepted Assessments of Fair Housing by reviewing field office.



HUD states the specific provisions of the AFFH Rule that were not complied with, identifies the prompt from the Assessment Tool being addressed, details the reason why the responses were incomplete or inconsistent with civil rights or fair housing laws, and then sets forth detailed guidance as to how the municipality can revise the AFH so that it can be accepted, along with further feedback or technical assistance to assist in revisions.

Table 1 presents the reasons for AFH nonacceptance, sorted by the prompt or part of the AFH that was incomplete.

Across the 17 AFHs, HUD noted 48 reasons for which the submissions were substantially incomplete or did not comply with civil rights laws. Those 48 reasons fell into 11 different parts of the Assessment Tool. The most common reason for nonacceptance was the fair housing goals section of the AFH. Every municipality whose AFH was not accepted struggled to set out meaningful goals with concrete metrics that were reasonably likely to address the factors that same municipality had identified as perpetuating segregation and disparities in access to opportunity. The second most common reason was the failure to identify or prioritize those factors altogether. The other most common reasons for nonacceptance were a failure to include a regional analysis in some or all of the AFH and a failure to analyze some aspect of disparities in access to opportunity.

Below we review each of the parts of the Assessment Tool on which an AFH was found deficient and provide examples to illustrate these shortcomings.

### Community Participation Process

HUD found deficiencies in the community participation processes of the AFH from Dauphin County, Pennsylvania. The AFH stated that “No Comments were received” from the public. But HUD noted this statement conflicted with other statements in the AFH that referred to public comments. HUD flagged this contradiction for Dauphin County and asked for clarification. HUD, quoting the AFH, also noted that, “Contacting a ‘key representative of the Residency Advisory Board’ may not meet [the] requirement” in the rule for a PHA to engage its whole Resident

**Table 1.** Reasons for nonacceptance.

Prompt	Name	Municipalities	No.
III.4	Community participation process: Summarize all comments obtained	Dauphin County, PA	1
IV.1	Assessment of past goals: Indicate goals set in recent planning documents and progress made	Lake County, OH	1
V.B	Fair housing analysis: Disparities in access to opportunity	Anchorage, AK (2); Clayton County, GA; Sandy Springs, GA; Lake County, OH	5
V.B	Fair housing analysis: Regional analysis	Pomona, CA; Clayton County, GA; Greenville, NC; Lake County, OH; Lewisville, TX	5
V.B	Fair housing analysis: Local data	Lewisville, TX	1
V.B	Fair housing analysis: Segregation/integration	Anchorage, AK; Apple Valley/Victorville, CA; Lake County, OH	3
V.C	Fair housing analysis: Publicly supported housing	Apple Valley/Victorville, CA; Lake County, OH; Dauphin County, PA	3
V.D	Fair housing analysis: Disability and access	Anchorage, AK; Lake County, OH	2
V.E	Fair housing analysis: Fair housing enforcement, outreach, and resources	Lake County, OH	1
VI.1	Fair housing goals and priorities: Prioritization of contributing factors	Jonesboro, AR; Apple Valley/Victorville, CA; Los Angeles County, CA; Pomona, CA; Temecula, CA; Clayton County, GA; Sandy Springs, GA; Lake County, OH; Nashville, TN	9
VI.2	Fair housing goals and priorities: Connect goals to contributing factors and identify metrics, milestones, and time frames	Anchorage, AK; Jonesboro, AR; Apple Valley/Victorville, CA; Long Beach, CA; Los Angeles County, CA; Moreno Valley, CA; Pomona, CA; Temecula, CA; Clayton County, GA; Sandy Springs, GA; Greenville, NC; New Rochelle, NY; Lake County, OH; Dauphin County, PA; Nashville, TN; Hidalgo County, TX; Lewisville, TX	17

Advisory Board meaningfully in the AFH process. Finally, HUD noted in the additional technical assistance section that the Latino population in the county had doubled between 2000 and 2010 and yet “[t]he AFH contains little evidence that representatives of the growing Hispanic community were included in the planning process.”

Overall, issues with community participation accounted for only one of the reasons for non-acceptance, yet the HUD review revealed close attention to the records of that participation and potential conflicts between public comments and municipal analyses. Improvements to community engagement were also mentioned in the additional feedback HUD provided to some of the other municipalities whose AFHs were not accepted.

### ***Assessment of Past Goals***

The Assessment Tool asks municipalities to discuss past goals and progress toward their achievement, and to consider lessons learned from success or lack thereof. However, HUD found that the Lake Metropolitan Housing Authority in Ohio failed to assess progress toward past goals by not conducting any evaluation of its past statements from AIs and progress toward achieving them.

### ***Fair Housing Analysis***

Within the analysis section, HUD identified seven different areas for improvement: lack of regional analysis, lack of analysis of disparities in access to opportunity, incomplete analysis of publicly supported housing, incomplete analysis of segregation and integration, incomplete analysis of disability and access, failure to incorporate relevant local data, and failure to document fair housing enforcement issues.

Five of the nonacceptance letters found that AFHs were substantially incomplete for failing to include the regional analysis required by the regulation (24 C.F.R. §§ 5.154(d)(2)(i–iv)). A regional analysis is required because fair housing issues cross jurisdictional boundaries and are an aspect of a regional housing market. Accordingly, HUD provides regional maps and tables to municipalities for their analyses. Yet five municipalities failed to include a regional analysis for one or more aspects of the AFH. For instance, Clayton County, Georgia, failed altogether to provide a regional analysis of issues of segregation and integration, disparities in access to opportunity, and disproportionate housing needs.

Five letters identified incomplete analyses of disparities in access to opportunity, often because of a failure to include one or more protected classes in those analyses. For instance, Sandy Springs, Georgia, failed to analyze protected classes based on national origin in its examination of disparities in access to opportunity, despite the fact that the HUD-provided data indicated substantial disparities in access to opportunity for those of Mexican origin in Sandy Springs. Similarly, the AFH from Jonesboro, Arkansas, focused on protected classes by race and ethnicity, but neglected to consider segregation and integration of persons in other protected classes such as those with limited English proficiency or according to national origin. The AFH for Anchorage, Alaska, talked about disparities in the concentration of population groups in high-poverty neighborhoods but did not discuss disparities in access to low-poverty neighborhoods and also did not effectively address disparities in access to environmentally healthy neighborhoods.

Three letters identified incomplete aspects of the publicly supported housing analysis. For instance, Dauphin County did not identify disparities in access to opportunity for residents of publicly supported housing, and the combined submission from Apple Valley and Victorville, California, did not identify patterns of segregation for residents of publicly supported housing. Lake County, Ohio, did not analyze differences in the composition of recipients of different types of subsidized housing, such as Housing Choice Voucher holders compared with public housing residents.

Attention to patterns of residential segregation and integration are central to the Assessment Tool and HUD provides several maps and tables with data on segregation by race and ethnicity,

national origin, English proficiency, family status, and disability. Some municipalities, such as Lake County did not analyze all of the maps and tables provided. And several, such as Anchorage, Alaska, and Lake County presented data on owner- and renter-occupied housing by race and ethnicity, but did not discuss the locations where owner- and renter-occupied housing were located and the levels of segregation and integration there.

The Assessment Tool asks municipalities to consider issues of disability and access, specifically, housing accessibility, the integration of supportive services and housing into the community, disparities in access to opportunity, and disproportionate housing needs. Lake County did not describe the extent to which persons with different disabilities apply for and are able to access publicly supported housing or the extent to which persons with disabilities are able to access government facilities, public infrastructure, proficient schools, or local jobs.

HUD highlighted the lack of use of local data or local knowledge in the AFH from Lewisville, Texas. HUD noted that Lewisville held required public hearings and included transcripts from those hearings in the AFH, but did not include in the text of the AFH information provided by the public that was relevant to fair housing. HUD officials read the transcripts and identified relevant information from them that should have shaped the city's analysis: "For example, one commenter described substandard housing, geographic concentration, and translation needs relating to the Chin community, who are members of a protected class group." But, HUD noted, "[t]his information is not reflected in the AFH's summary of public comments, description of outreach to LEP [Limited English Proficiency] populations, segregation analysis, disproportionate housing needs analysis, or related goals." The HUD commentary reveals a careful and complete review of the AFH and attention to the needs of residents that may not be visible in the HUD-provided data.

Among the multiple reasons HUD described for not accepting the Lake County AFH, HUD noted that the Lake Metropolitan Housing Authority had not specified whether there were any fair housing charges filed against it, as required by the rule.

### ***Fair Housing Goals and Priorities***

The prioritization of contributing factors was seen as one way for municipalities to set goals for the 5-year time frame that would have the greatest impact. Within the fair housing goals and priorities section, nine municipalities did not prioritize at all or did not justify their prioritization of the contributing factors that they identified. For instance, Jonesboro did not initially prioritize the contributing factors it identified or relate its goals to those contributing factors.

The most common prompt identified as incomplete was fair housing goals. Municipalities frequently presented goals that lacked a clear description of how each goal was designed to overcome the identified contributing factors and related fair housing issues, or proposed goals that lacked clear, measurable metrics, milestones, and time frames for determining what fair housing results would be achieved. Every one of the nonaccepted AFHs had some problem with its goals section.<sup>7</sup>

For example, the City of Moreno Valley, California, set out a goal to "improve the quality of life for residents living in high and extreme poverty neighborhoods." In the publicly available draft AFH, the metrics and milestones state only that the city will "implement current and future Neighborhood Development Programs in the six [high-poverty] neighborhoods," incorporate those programs "into an Anti-Poverty Strategy," and explore new funding tools for neighborhood revitalization. HUD pointed out that "the goal lacks metrics and milestones sufficient for evaluating progress or determining what fair housing results will be achieved," and it does not clarify what revitalization strategies the city will focus on, or how those strategies will reduce disparities in access to opportunity.

Similarly, Jonesboro's original AFH submission had a number of vague goals, such as the goal to "analyze existing socio-economic conditions and trends, with a particular focus on those that affect affordable housing, housing choice among minorities, protected class members and special populations." The only metrics, milestones, or time frames presented were to "work with state, residents,

housing professionals to analyze these socio-economic conditions and trends.” This goal, however, was essentially the whole point of the AFH process and so should have been done by the time the AFH was submitted. And it is not clear what the city is actually committing to do, if anything, nor how that will address the factors that contribute to disparities in access to opportunity or to residential segregation.

These two examples illustrate the types of goals HUD highlighted as substantially incomplete and illuminate the detailed feedback and technical assistance that HUD provided. In the following section, for four municipalities, we compare the goals in the original submission that was rejected and the revised submission that was accepted.

### ***Comparing Technical Assistance and Before and After Documents***

Comparing the goals in the AFHs that HUD rejected with the goals in the AFHs that were subsequently successfully resubmitted after revision allows us to examine how, if at all, the HUD process changed the goals that municipalities proposed. For four municipalities—Temecula, California; Lewisville, Texas; Lake County; and Los Angeles County—we have complete documentation of their nonacceptance letters, details of their technical assistance, and their original and revised AFHs.

HUD provided a variety of forms of technical assistance to municipalities, and here we focus on the technical assistance in the letters HUD provided to those municipalities whose AFHs were not accepted. In their original nonacceptance letters, HUD first outlines the reasons for noncompliance and then provides specific guidance for revision. HUD also often provides additional recommendations for improving future submissions. The guidance requested revisions to achieve compliance through changes to sections that were incomplete (Lewisville); sections that were missing entirely (Lake County); goals that did not fully comply with disability rights (Los Angeles County); and the lack of prioritization of contributing factors addressed by fair housing goals (Temecula, Los Angeles County).

For example, in their letter to Lewisville, HUD notes that Lewisville’s “AFH is substantially incomplete because it lacks the regional analysis required by the AFFH rule.” The letter then provides specific guidance about how to resolve the issues, urging Lewisville to review HUD-provided data and local data, and then prioritize the contributing factors, as well as align them with goals.

In addition to outlining reasons for noncompliance, HUD also often provided an additional technical assistance section in the nonacceptance letters that suggested specific strategies for municipalities to revise their AFHs. For example, in their letter to Lake County, HUD outlines why fair housing goals require metrics and milestones, recommending a “SMART” system for establishing goals: Specific, Measurable, Action-Oriented, Realistic and Time Bound (Lake County AFH).

Making the recommendation more concrete, the letter points toward Lake County’s goal #6, which sought to “create affordable housing in areas of opportunity in the county.” Here HUD identifies both the rationale for why the goal is inadequate and specific recommendations for improving it, writing that the goal section in the AFH neither:

outlines specific form(s) of support, nor identifies specific areas of opportunity, particularly as they relate to segregated and integrated areas. Without these milestones and their corresponding metrics, there is a limited basis for evaluating whether or not this strategy is an effective means to achieving this laudable goal... examples of useful metrics...include decrease(ing) the percentage (provide specific figure) of residents facing housing cost burdens in identified locations over a specific time period...[or] increase(ing) the number of affordable housing units in identified areas of opportunity for households earning below area median income over a specific time period.

### ***Revised AFHs***

Did municipalities substantively revise their AFHs in response to HUD’s feedback? As described above, one of the original goals in Lake County’s AFH sought to “create affordable housing in areas

of opportunity in the county.” In Lake County’s revised plan, the new goal addressing affordable housing is more specific and measurable. It targets landlord participation in the Housing Choice Voucher Program, with yearly goals including outreach and recruitment of landlords in higher opportunity neighborhoods. These goals also had yearly metrics for achievement. They did not, however, have quantifiable metrics for improving outcomes, such as a specific number of new Housing Choice Voucher holders in high-opportunity areas.

More substantial changes are visible in Temecula’s revised AFH. Most of these revisions involved making fair housing objectives more measurable. Temecula also revised its goals to focus more on activities that could actually be achieved by the city, as opposed to aspirations outside the city’s control. As an example of how Temecula’s goals improved, its original goal #1, to increase the affordable housing stock in the city through an affordable Housing Overlay ordinance, did not list many details for achieving that objective, such as the number of units to be constructed. Temecula’s revised goal, on the other hand, included a target number of affordable housing units (2,007), a size site (at least 100 acres), and specificity on multifamily uses allowed by right.

Other municipalities made changes that were more subtle, but perhaps no less important for implementation of AFFH goals. Los Angeles County’s original AFH, for example, lists every one of its goals as high priority. HUD noted that such a prioritization scheme did not “weigh the relative impact of these factors on fair housing choice”. In response, Los Angeles County ranked its various goals according to high, medium, or low priority. The county also adjusted its goals to ensure that they complied with Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, and the Fair Housing Act.

Lewisville added new sections throughout its plan on the regional impacts of its programs—elements that were missing in its original AFHs and requested by HUD in their revision letter.

### ***Municipal Differences***

We also examined the characteristics of the cities whose AFHs were accepted compared with those whose AFHs were not accepted to identify any notable differences. [Table 2](#) presents descriptive statistics for municipalities by AFH acceptance or nonacceptance.

Across the 49 AFH submissions, the characteristics of municipalities whose submissions were accepted and those whose submissions were rejected were relatively similar. Those that were rejected were on average somewhat larger and had somewhat lower levels of CDBG funding per capita, but the variation is not statistically significant using a standard t-test. The only difference that was significant between the two sets of municipalities was the share of residents who were non-Hispanic white, with municipalities whose AFHs were not accepted having a somewhat lower share of the population that was white than those municipalities whose AFHs were accepted.

### **Discussion and Conclusion**

Several themes stand out from this analysis of HUD’s nonacceptance letters. First, HUD has thus far engaged in a careful and thorough review of the AFHs. These initial nonacceptances represent a strength of the new AFFH Rule and HUD’s implementation of it. The AFFH Rule has more explicit guidance for municipalities than did the previous AI regulations, and HUD has thus far actually enforced those standards, requiring municipalities to improve incomplete AFHs. The nonacceptance letters were detailed and constructive, and they provided participants with the opportunity to respond to HUD feedback and to strengthen their AFHs to meet their fair housing obligations.

Second, many municipalities struggled to set out goals that could meaningfully advance fair housing and found it difficult to define achievable metrics and milestones. The previous AI process had minimal expectations for the quality or specificity of goals, and, regardless, municipalities were never held accountable for progress toward accomplishing those objectives. The new AFFH Rule

**Table 2.** Descriptive statistics of municipalities with accepted and nonaccepted Assessments of Fair Housing.

Municipal characteristics	Accepted (n = 32)	Rejected (n = 17)
<b>Controls</b>		
Population	293,830	830,691
County	0.28	0.29
<b>Capacity</b>		
CDBG funding	3,442,738	3,286,834
<b>Political context</b>		
Conservatism	-0.18	-0.08
<b>Socioeconomic context</b>		
Unemployment rate	8.6	9.5
Median household income	49,231	51,556
% College graduates	35	29
<b>Heterogeneity and segregation</b>		
% White non-Hispanic*	58	44
% Black non-Hispanic	16	17
% Latino	18	30
Black-white dissimilarity	46	43
Latino-white dissimilarity	37	42
<b>High cost</b>		
Median home value	226,275	246,945
Median gross rent	962	1,027
Vacancy rate	11	9
Share renters	46	46

Note. CDBG = Community Development Block Grant.

\*  $p < .05$ , \*\*  $p < .01$ , \*\*\*  $p < .001$ .

and its corresponding Assessment Tool require municipalities to clarify how the goal will actually address a factor that contributes significantly to local segregation or disparities in access to opportunity. The Assessment Tool also requires municipalities to set out measurable objectives for actually achieving goals. This task is a challenging one that requires municipal creativity and innovation, especially in the early stages of rule implementation, during which the process is new to all and there are limited examples of what constitutes a robust AFH. Some cities benefitted from significant technical assistance, from HUD-funded providers such as Abt Associates or Enterprise Community Partners, or from foundation-funded assistance provided by the Lawyers Committee for Civil Rights, the Urban Institute, PolicyLink, and others. Some cities also engaged in more robust community participation processes, such as the productive engagement between the Greater New Orleans Fair Housing Action Center and the City of New Orleans or between the Alliance of Californians for Community Engagement, the Housing Rights Center, and the City of Los Angeles. Both this robust community engagement and technical assistance helped some municipalities craft creative goals that could meaningfully advance fair housing. Some other local governments without the benefit of this engagement and assistance struggled to identify such goals.

In some cases, municipalities seemed to hope that proposing many goals would substitute for proposing high-quality goals. HUD accordingly encouraged several municipalities to pare down the number of goals and to start by prioritizing the factors localities identified as contributing most to local disparities in access to opportunity. With those factors identified, municipalities could focus their energies on setting and realizing realistic goals achievable within the five years before the next AFH submission. For instance, in the letter informing the Apple Valley and Victorville HOME consortium of the need for revisions, HUD suggested, "consider paring back the long list of goals to

focus efforts on achievable goals within this five-year planning cycle. Also consider what can be accomplished that might have the greatest impact on the fair housing issues...identified.”

Third, municipalities often struggled to analyze fair housing issues regionally. This is a profound challenge for fair housing more broadly in that individuals and families are always part of regional housing and labor markets but often face significant obstacles to accessing affordable housing, high-quality schools, and living-wage jobs because of fragmented metropolitan governance structures and judicial rulings that end responsibility for many fair housing issues at municipal borders (Briffault, 1990; Frug, 2001; Steil, 2011; Ellen & Steil, 2019). Some municipalities, perhaps unsurprisingly, failed to conduct thorough regional analyses of important fair housing issues to understand their municipal role in relation to the region. The AFFH Rule allows collaborative submissions, however, and the 49 AFHs submitted in 2016 and 2017 represented 103 different local government entities and PHAs, suggesting that the rule has inspired new interagency and regional collaboration. For instance, the Kansas City AFH included five different cities in two different states and included both regional analyses and goals as well as separate municipal goals. The Hidalgo County, Texas, AFH represented a collaboration among 17 different local governments and PHAs. These regional collaborations represent encouraging signs even as some other municipalities did not take the regional analysis sufficiently into account.

What do these nonacceptances tell us about enforcement under the AFFH Rule? Over the first year and a half of enforcement, HUD has engaged in intensive and thorough enforcement to ensure that the majority of issues of noncompliance are identified, and has employed a collaborative strategy to remedy them. The majority of the AFHs that were initially not accepted were promptly revised and accepted, suggesting that this approach has been working.

This process of rejecting and revising AFHs is an example of “responsive regulation”—of escalating enforcement measures—built into the AFFH Rule (Ayres & Braithwaite, 1995). Indeed, HUD has actually relied on three levels of response. HUD accepted 18 of the 49 AFHs on initial submission. HUD accepted a further 14 of the 49 AFHs only after the program participants submitted revisions in response to feedback from HUD, without the need to formally not accept the AFH. Finally, as discussed here, HUD refused to accept 17 of the 49 AFHs and required resubmissions. This is an example of an enforcement pyramid beginning with warnings and advice and escalating to improvement notices, or, in this case, formal nonacceptances. HUD has not yet turned to the more punitive sanction authorized by the AFFH Rule, the provision prohibiting acceptance of a Consolidated Plan (and therefore disbursement of CDBG funding) without an accepted AFH.

HUD is now arguing that the intensive enforcement it has been engaging in is too costly and is using that intensive enforcement as a reason to rewrite the rule. The findings here suggest, however, that HUD’s intensive review process has already had successes through detailed reviews of AFHs resulting in improved plans.

The next real test for the efficacy of this process is whether these municipalities incorporate goals and strategies from their AFHs into their consolidated plans and PHA plans. The equality directive encoded in the AFFH Rule has shown promise thus far in inspiring state and local governments to advance racial equity (Johnson, 2012, 2017). Nevertheless, HUD’s announcement of an effort to “streamline” the Rule cast a shadow of uncertainty over its future.

## Notes

- 1 On January 5, 2018, HUD suspended the AFFH Rule until October 31, 2020. HUD suggested that program participants needed additional time and technical assistance to adjust to the new requirements. On May 8, the National Fair Housing Alliance, the Texas Low Income Housing Information Service, and Texas Appleseed sued, in an effort to stop the suspension. They alleged that the January AFFH Rule suspension violated the affirmatively furthering provision of the Fair Housing Act and violated the Administrative Procedure Act because it was enacted without notice and the opportunity for comment and because it was arbitrary and capricious. HUD responded by withdrawing the AFFH Assessment Tool, it said in part because of the large

share of plans that HUD determined had failed to meet the requirements of the 2015 AFFH Rule. In August, HUD filed an Advance Notice of Proposed Rulemaking requesting public comment on its plans to rewrite many of the AFFH Rule's key provisions.

- 2 HUD published a Fair Housing Planning Guide in 1996 and encouraged municipalities to use it in preparing their Als. The guide recommended that program participants survey fair housing issues in the area, identify impediments to fair housing, and recommend an action plan or other implementation steps. The guidance, however, was not codified in a binding regulation.
- 3 The data is available at: <https://egis.hud.gov/affht/>. The measures are presented in the "Affirmatively Furthering Fair Housing Data Documentation" released by HUD on December 16, 2015 and available at: [https://www.huduser.gov/portal/sites/default/files/docs/AFFH\\_Data\\_Documentation\\_12\\_31\\_2015.docx](https://www.huduser.gov/portal/sites/default/files/docs/AFFH_Data_Documentation_12_31_2015.docx).
- 4 HUD had said it would provide different Assessment Tools for different types of program participants, e.g., PHAs, states, etc., but only the local government tool was issued, before being withdrawn in 2018.
- 5 The CDBG program makes up more than two thirds of that funding. It provides flexible resources for state and local governments to pursue their community development goals, benefitting low and moderate income individuals through improving infrastructure and public facilities, fostering economic development, renovating affordable housing, acquiring land for new housing development, or other goals. HUD also administers HOME Investment Partnerships, which provides grants to fund the construction, purchase, or renovation of affordable housing; Emergency Solutions Grants, which fund emergency shelter and services for individuals who are homeless or at risk of homelessness; Housing Opportunities for Persons with AIDS, which provides grants for supportive services and housing assistance for households living with HIV/AIDS; and grants to PHAs, pursuant to the U.S. Housing Act.
- 6 We selected these municipalities because they were ones for which we were able to obtain the original submission, the HUD comments, and the revised submission to compare the changes.
- 7 Los Angeles County and the Housing Authority of Los Angeles County had a somewhat unique problem with their goals, which was that HUD found that the county's goals of enhancing accessible housing and supportive services for persons with disabilities were written in ways that did not include all federal accessibility requirements and standards, including compliance with Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act.

## Disclosure Statement

No potential conflict of interest was reported by the authors.

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