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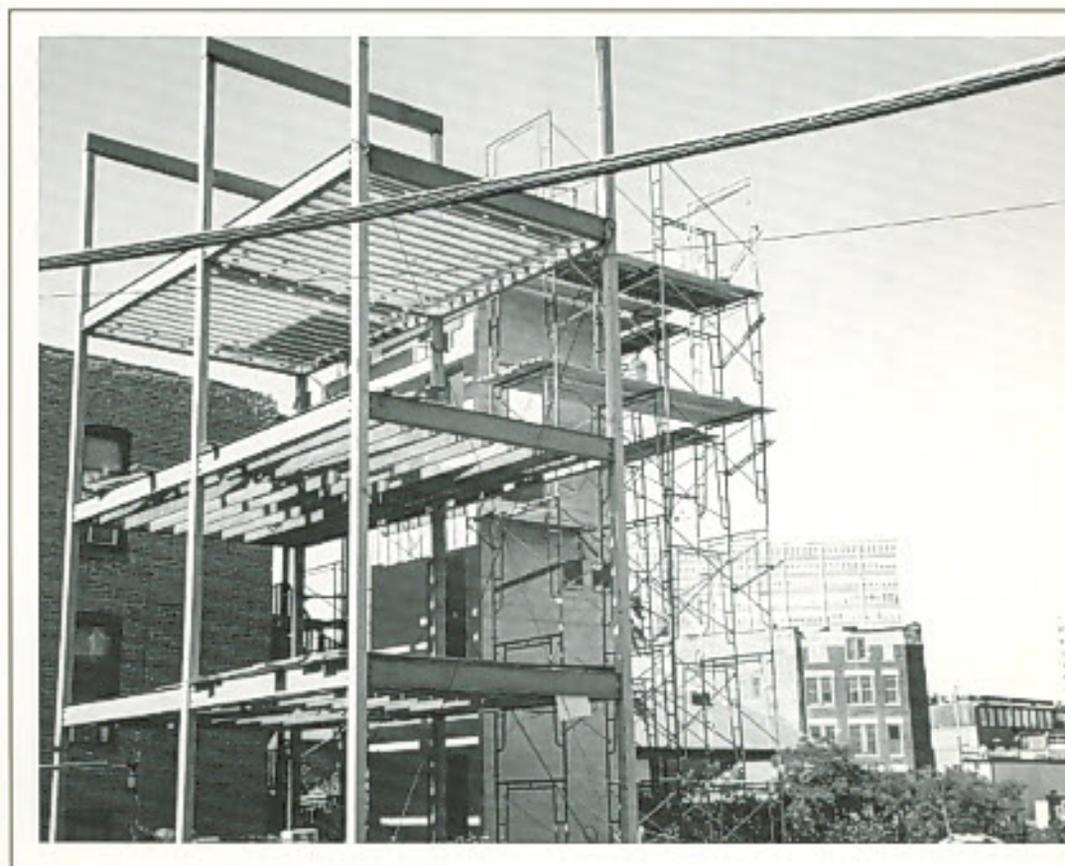
INSIDE

Administrative and
Judicial Enforcement
of Consolidated Plan
Obligations

How to Use the Fair
Housing Laws to Achieve
Your Community
Development Goals

Recipient Concerns with
the Use of Electronic
Benefit Transfer Systems
for the Delivery of State
and Federal Benefits

The Living-Wage
Ordinance: A First Step
in Reducing Poverty



Consolidated Plan and Community Development Block Grant Advocacy

How to Use the Fair Housing Laws to Achieve Your Community Development Goals

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For legal services attorneys working to influence their local jurisdiction's community and housing development policies through the Consolidated Plan (ConPlan) process, the struggle is often over getting enough resources directed to our clients, who fall, in ConPlan jargon, into the 0-30 percent median family income (MFI) group.^{1/} Almost always this group will show the greatest housing need in comparison to other groups. However, as discussed in the accompanying articles in this issue, the language in the U.S. Department of Housing and Urban Development (HUD) ConPlan regulations linking need to allocation of resources is weak, and HUD has a history of unwillingness to enforce its already weak regulations.^{2/} Historically many local jurisdictions have focused their housing production dollars on existing homeowners and first-time homebuyers because the housing needs of these groups are easier and less expensive to meet. Getting local jurisdictions to spend their housing dollars on the housing needs of low-income renters is often a battle.

I. Introduction

One strategy for getting more housing production resources targeted to our clients' housing needs is to use the fair housing laws as a legal handle. In many jurisdictions racial and ethnic minorities, people with disabilities, and families with children make up a disproportionate share of the 0--30 percent MFI group. This in turn brings the fair housing laws into play.

That local jurisdictions receiving federal housing and community development funds use the money in a way that "affirmatively furthers fair housing" has long been a legal requirement.^{3/} This means *p208* that jurisdictions must do more than not discriminate in the administration of programs funded by federal monies. Jurisdictions must use the funding in ways that counteract segregation and further integration. Programs cannot be administered in a way that ignores the housing needs of groups comprised disproportionately of members of the protected classes.

This requirement comes from multiple statutory sources including the federal civil rights laws and the authorizing statute for the Community Development Block Grant (CDBG)

program. This obligation, seldom enforced by HUD in the past, recently had new life breathed into it when HUD included in the ConPlan regulations a requirement that all jurisdictions prepare an Analysis of Impediments to Fair Housing Choice (AI) as a condition of continuing to receive CDBG and Home Investment Partnership Program block grant funds.

II. Fair Housing Obligations of Local Governments

Following is a brief discussion of the statutory bases for imposing this fair housing obligation on local jurisdictions.

A. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 applies to all recipients of any type of federal funding and requires that all federally funded programs be administered in a nondiscriminatory manner with regard to race and national origin.^{[4/](#)} Its implementing regulations state that "[e]ven in the absence of . . . prior discrimination, a recipient . . . should take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin."^{[5/](#)}

Although the statute is silent as to whether a showing of intent is required to prove a violation of the law, the above-quoted regulation clearly establishes an effects test, and the Supreme Court has explicitly upheld HUD's authority to adopt an effects test through the regulatory process.^{[6/](#)} Thus filing a Title VI administrative complaint with HUD may be the most viable and expedient remedy for advocates seeking to enforce their jurisdiction's obligation to direct housing development resources toward our clients' needs.

B. Title VIII of the Civil Rights Act of 1968

Title VIII of the Civil Rights Act of 1968 is also more popularly known as the Fair Housing Act.^{[7/](#)} The original Act prohibited discrimination in housing based on a person's race, color, national origin, religion, or gender. In 1988 the Act was amended to add disability and familial status as protected classes. Section 808 of Title VIII (codified as 42 U.S.C. Sec. 3608) mandates that all federally funded housing programs be administered "in a manner affirmatively to further" the policies of the Fair Housing Act. The courts have made clear that the obligation placed on jurisdictions by Section 3608 requires more than that a jurisdiction not discriminate. It requires that grantees of fund through HUD programs use those funds affirmatively to further fair housing.^{[8/](#)}

Courts that have considered the duties imposed by Title VIII hold that HUD must ensure that its grantees use federal housing funds in a way that increases the supply of integrated housing rather than furthers ghettoization in the inner-city neighborhoods of a metropolitan area. The duties imposed by Section 3608 of Title VIII require federally funded housing programs to act to reverse the effects of segregated housing. The First Circuit states:

[T]he law's supporters saw the ending of discrimination as a means towards truly opening the *p209* nation's housing stock to persons of every race and creed. This broader goal suggests an intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.^{9/}

The Supreme Court has never explicitly defined HUD's requirement to administer its programs in a manner affirmatively to further fair housing under Title VIII, and circuit courts of appeal are split on this issue.^{10/}

C. The Housing and Community Development Act of 1974

The Housing and Community Development Act of 1974 authorizes the CDBG program.^{11/} This Act bans discrimination in any program funded under the statute and requires all grantees to conduct their programs in conformity with Title VI and Title VIII and in a way that "will affirmatively further fair housing."^{12/} The statute states that its overall policy objective is to assist urban communities by "providing decent housing and a suitable living environment and expanding economic opportunity, principally for persons of low and moderate income."^{13/} The regulations elaborate that "providing a suitable living environment" includes activities that result in "reducing the isolation of income groups within a community or geographical area through the spatial deconcentration of housing opportunities for persons of lower income" and activities which result in "the revitalization of deteriorating or deteriorated neighborhoods. . . ."^{14/} Thus the statute makes clear that CDBG moneys must be used both to revitalize minority neighborhoods and to create housing opportunities for minority families outside concentrations of poverty and high-minority population.

III. Analysis of Impediments to Fair Housing Choice

The new ConPlan regulations state that each entitlement jurisdiction, each state, and each consortium of urban county jurisdictions is required to submit a certification that it will affirmatively further fair housing, which means it will conduct an analysis to identify impediments to fair housing choice in the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through the analysis, and maintain records reflecting the analysis and actions in this regard.^{15/}

The preamble to the regulations states that all jurisdictions should have *p210* completed their AI by February 1996. The ConPlan regulations say nothing further about the requirement to conduct an AI, but HUD has published a Fair Housing Planning Guide, which offers a more detailed description of what HUD expects an AI to look like and the process which should be used to develop it. The guide defines the term "impediments to fair housing choice" to mean "[a]ny actions, omissions, or decisions taken because of race, color, religion, sex, disability, familial status, or national origin that restrict housing choices or the availability of housing choice, and any actions, omissions or decisions that have this effect."^{16/}

Thus, to be included in AI, impediments need not be intentional acts or omissions. AI should include "the full array of public and private policies, practices, and procedures affecting housing choice."[/17/](#)

All jurisdictions must have completed their first AI by now. If you are not familiar with your jurisdiction's AI, you should call the community development department of your county and/or city and request a copy of it. If it is well done and accurately identifies existing impediments, it can be a good tool for advocates participating in the development of the yearly action plan portion of the ConPlan. If it is not well done, you may want to begin organizing community advocates to push for a better AI the next time it is updated. HUD suggests that AIs be updated every three to five years.[/18/](#) All the citizen-participation requirements that apply to the ConPlan process apply to AI development and updating.[/19/](#) If your jurisdiction's AI was done without the benefit of cooperation among other jurisdictions in the metropolitan region, you should push for the update to be done with such cooperation. HUD strongly urges jurisdictions to undertake metrowide/regional fair housing planning.[/20/](#)

A. Accurate Demographic Picture of the Community

When reviewing your jurisdiction's AI, look for essential parts of any meaningful analysis of fair housing issues in the community. There should be a complete and unflinching analysis of the community's demographic information surrounding the issues of segregation by race and economic status, for the entire metropolitan area if possible. What percentage of people of color lives within the urban area of a metropolitan region? Within the city are neighborhoods segregated by race? Are poor people segregated within a community? What is the intersection between race and poverty in the community, that is, what are the poverty rates for blacks, Hispanics, and whites, and to what extent are minority neighborhoods in the jurisdiction also poor neighborhoods? All concentrations of minority population and poverty population in the relevant area should be clearly mapped out.

AIs should also discuss where jobs are currently located and where future job growth is expected to occur. Often this analysis will show a spatial mismatch between areas where poor people, particularly poor people of color, live, and areas of rapid economic development. This analysis is important because it demonstrates to the public at large why housing choice is crucial for poor people *p211* seeking increased economic opportunities as a path to economic self-sufficiency.

B. Listing of Impediments

Some impediments will or should show up in almost every AI.

1. Lack of Affordable Housing Outside Poor Neighborhoods

The lack of availability of affordable housing outside high-poverty neighborhoods is an impediment that will exist in many jurisdictions.[/21/](#) AIs should map out where public

housing units, subsidized housing units, and privately owned affordable units are located. If few affordable public or private housing units are available outside poor neighborhoods, the reasons for this should be discussed. Have federal and local housing development policies concentrated the development of affordable housing in already poor neighborhoods? Do local suburban zoning codes create barriers to development of affordable housing? Do the attitudes of some suburban residents toward affordable housing create barriers to its development? Have local jurisdictions taken action to combat the lack of federal money for the development of housing affordable to poor people by dedicating some of their general operating funds toward housing development, or using their bonding authority to raise low-cost funds to develop affordable housing? Have they sponsored the creation of a local housing trust fund as additional subsidies for affordable housing projects?

2. Mobility in the Housing Market

Another area of concern that should be addressed in AIs is the issue of mobility in the housing market. What is the vacancy rate in the rental and for-sale housing markets? Where do families with Section 8 certificates live? Do families with Section 8 certificates and other low-income families receive mobility counseling about housing opportunities for them outside high-poverty neighborhoods? Is there any clearinghouse of information concerning the affordable housing opportunities throughout a metropolitan area for families living in high-poverty neighborhoods to access easily? How many rental units meeting the Section 8 fair market rent requirements exist in moderate- and middle-income neighborhoods? Are suburban landlords willing to accept Section 8 certificate holders? Does the local public housing authority have a plan to recruit suburban landlords into the program?

Is public transportation serving those neighborhoods? Is affordable day care available? Are housing units that are accessible to people with disabilities available in an adequate number and located in all jurisdictions within a metropolitan area? To what extent do housing providers discriminate against people protected by the fair housing laws? Does the jurisdiction have a testing program to provide victims of discrimination with a way to enforce their rights? All of these issues affect mobility of protected class members within the relevant housing market.

3. Local Real Estate Industry Practices

The practices of the local real estate industry should be examined. Are realtors steering people away from or toward certain neighborhoods based on race or ethnicity? Are realtors willing to list properties in poor and minority neighborhoods? Does the real estate commission structure discourage realtors from working with lower-priced properties? Is there a testing program to determine if some realtors are practicing illegal discrimination?

4. Local Lending and Financial Institution Practices

The lending practices of local banks should also be examined. An analysis of local Home Mortgage Disclosure Act data should be included. Is there evidence that local banks are redlining? What is the denial rate of home mortgage loan applications for blacks, Hispanics, and whites? **p212** Is the black denial rate two to three times the white denial rate? Do local banks have branch offices located in minority neighborhoods?

5. Local Insurance Industry Practices

The practices of local insurance companies should also be examined. Do insurance companies use criteria that make it hard for property owners in inner-city neighborhoods to obtain appropriate homeowners' insurance coverage? Are insurance companies refusing to issue replacement-cost policies for homes based on their age or other criteria that cause a disparate impact on homeowners in minority neighborhoods? Is there any evidence of redlining being practiced by local insurance agents?

6. Enforcement Activities

Data should be gathered from all local agencies that take fair housing complaints from the public. How many complaints are received in a year? What types of discrimination are being alleged? What is the disposition of the complaints received? Is there a "substantially equivalent" enforcement agency locally? Is there any private enforcement of fair housing rights, such as a local testing program? Have there been any lawsuits locally alleging discrimination in the housing market? What is the outcome of such litigation? If there has been a judicial or administrative finding of discrimination, has the situation been corrected? [/22/](#)

C. Action Plan to Overcome Impediments

Once you have determined that all relevant fair housing impediments have been identified in AI, the next step is to ensure that your jurisdiction has developed an action plan with specific steps to overcome the impediments. For the action plan to include measurable goals against which performance can be evaluated is critical. HUD states: "The jurisdiction should define a clear set of objectives with measurable results it intends to achieve. The sole measure of success for [fair housing planning] is the achievement of results. These objectives should be directly related to the conclusions and recommendations contained in the AI." [/23/](#)

Every year, as part of its annual ConPlan performance report to HUD, a local jurisdiction must submit to HUD a summary of its AI and the jurisdiction's fair housing accomplishments in the past year. [/24/](#) If HUD determines that AI or actions taken to overcome impediments are not adequate, it will notify the jurisdiction and ask for further documentation. [/25/](#) If HUD determines, after giving the jurisdiction a chance to comment, that the affirmatively furthering fair housing certification is inaccurate, HUD rejects the certification. This in turn renders the ConPlan "substantially incomplete," giving HUD grounds to disapprove the ConPlan. [/26/](#) An approved ConPlan is required in order for the jurisdiction to receive any CDBG, Home **p213** Investment Partnership

Program block grant, McKinney Emergency Shelter Grant program, or Housing Opportunities for Persons with AIDS funds.[/27/](#)

Thus once a year, when the ConPlan performance report is submitted to HUD, advocates can challenge their jurisdiction's certification that it is affirmatively furthering fair housing if AI is inadequate or if the performance report reveals a lack of progress in overcoming identified impediments. Certainly such a challenge should be undertaken only after every attempt to meet and negotiate with the local community development staff and local officials fails.

IV. Applying the Fair Housing Laws and Results of the Analysis of Impediments to the Consolidated Plan Process

In order for AI and its action plan to be meaningful, your jurisdiction must merge its process to comply with fair housing requirements into the ConPlan process as soon as possible. The ConPlan is the document that lays out how your jurisdiction plans to use its housing development money in the coming year. Many of the action steps developed in response to AI will require allocations of funding in order to be implemented. Others may require changes in long-standing housing policies; these changes should be reflected in the ConPlan.

The following are questions to ask when reviewing your jurisdiction's ConPlan in light of the segregation and impediments to housing choice which should have been documented in AI.

Is your jurisdiction spending money on the needs of groups who are disproportionately minority (e.g., 0--30 percent) MFI families? Review the housing development programs being proposed by your jurisdiction. Poverty-level families' greatest need is often for affordable rental housing development programs. If your jurisdiction's programs lean heavily toward existing homeowners and first-time home buyers, the needs of the 0--30-percent MFI group are probably not being served. Because this group is disproportionately made up of minorities and members of other protected classes, in most jurisdictions you should argue that neglecting the needs of this group violates your jurisdiction's obligation affirmatively to further the goals of fair housing.

Is your jurisdiction spending money in neighborhoods with high-minority populations? Review your jurisdiction's grantee performance report for the past several years. How much money is being spent in census tracts with high-minority populations? Many jurisdictions spend a lot of community and housing development money on home improvement programs for existing homeowners. These programs sometimes end up benefiting mostly moderate-income homeowners who live outside areas of high-minority concentrations. Or perhaps your jurisdiction is spending too much money on "trophy projects" such as financing for commercial development in the downtown business district. If the needs of poor minority neighborhoods are being neglected you may want to argue that this is a violation of the jurisdiction's fair housing obligations.

Is your jurisdiction spending money to create affordable housing opportunities both inside and outside areas with high minority and poverty concentrations? In reviewing the grantee performance report, check to see if any housing units affordable to poverty-level families were created outside areas of high-poverty concentration. For years HUD-financed housing affordable to poor people was built exclusively in neighborhoods of high minority population and poverty concentration, thereby using public money to perpetuate patterns of segregation. The courts and Congress have made clear that housing opportunities must be created for poor families in white neighborhoods as well as minority neighborhoods so that the expenditure of public funds is being used to promote integration.

Is your jurisdiction engaging in exclusionary zoning practices? This is a relevant inquiry when reviewing a ConPlan that includes suburban areas. In many urban metropolitan areas the pattern of **p214** development is that of an older city surrounded by a ring of more recently developed suburbs. The overwhelming number of housing that is affordable to poverty-level families exists within the city, with virtually no affordable housing opportunities for poor people in the outlying suburban jurisdictions. The suburban jurisdictions typically practice exclusionary zoning, which prevents affordable housing for poor people from being built within their borders. This almost always creates a high degree of racial segregation within the metropolitan area as well as an alarming degree of concentration of poverty within the city, especially inner-city neighborhoods. Incumbent upon the jurisdiction under the fair housing laws is to address the barriers to affordable housing in its jurisdiction. The following factors help evaluate the degree to which exclusionary zoning is being practiced in your area.

Is a meaningful amount of land zoned for multifamily development? Lack of land zoned for multifamily development means that any proposal to develop multifamily housing will have to go through a public rezoning hearing. This in turn will bring the not-in-my-backyard factor into play and make it very difficult to get approval for the rezoning.

Is multifamily development a permitted residential use of right? It is not uncommon for single-family housing to be the only permitted residential use of right in suburban zoning codes. Thus all proposals for multifamily development will be required to go through a public hearing to obtain a special-use permit, which brings the concerns outlined above into play.

Are infrastructure requirements unduly burdensome? Typical suburban requirements such as granite curbing, width of road requirements, and material requirements can raise the cost of developing any type of housing and essentially kill any chance of developing affordable housing for low-income people.

Are zoning code requirements reasonable? Suburban zoning code requirements frequently include minimum square-footage requirements for apartments that are too large and conflict with maximum square-footage requirements for HUD-assisted development. Other common requirements that eliminate affordability are landscaping

requirements, lot-area requirements, and special-amenity requirements such as balconies, patios, or covered parking for all apartments.

Are tax-abatement agreements negotiated with developers where appropriate? In order for the development of affordable housing for low-income people to occur, an abatement of suburban taxes or a payment in lieu of taxes agreement is almost always necessary. Urban jurisdictions grant such abatements or agreements as a matter of course, while suburban jurisdictions generally resist.

Has the jurisdiction entered into a cooperative agreement with the local urban public housing authority? A public housing authority based in the urban center of a region may well be required by state law to enter into a cooperative agreement with neighboring jurisdictions if it wishes to own, develop, or manage property within that jurisdiction. Historically suburban jurisdictions have not been willing to cooperate with urban housing authorities in getting public housing units built within their borders.

V. Conclusion

The fair housing laws discussed above can give housing advocates a legal handle in efforts to ensure that a meaningful share of federal housing and community development money be directed toward our clients' needs. The findings of a well-done AI should also serve as a potent tool in convincing local officials to act in our clients' interest since for them to ignore the findings of their own study would be difficult. By helping create housing opportunities for our clients outside very poor areas we can offer them a chance at superior job and educational opportunities that can lead to economic self-sufficiency.
p215

Footnotes¶

/1/The U.S. Department of Housing and Urban Development (HUD) makes available to each city or jurisdiction participating in the Consolidated Planning process statistics that establish the median family income for that jurisdiction. The need analysis required by the planning regulations must separately identify the needs of different income groups; the lowest income group that must be analyzed is the group within the 0-30 percent of median family income for the area.

/2/See Ed Gramlich, Consolidated Plan and Community Development Block Grant Advocacy, and Michael Rawson, Administrative and Judicial Enforcement of the HUD Consolidated Plan Obligations, in this issue.

/3/Housing and Community Development Act of 1974, 42 U.S.C. Sec. 5304(b)(2). The National Affordable Housing Act of 1990, 42 U.S.C. Secs. 12721 et seq., requires communities to certify that the Consolidated Plan will affirmatively further fair housing and to submit a fair housing analysis, 24 C.F.R. Sec. 91.225(a)(1). Title VIII of the Civil Rights Act of 1968, 42 U.S.C. Secs. 3604 et seq., as amended in 1988, at Sec. 3608(e)(5), specifically requires that the HUD Secretary insure that all programs act "affirmatively to

further fair housing." Civil Rights Act of 1964, tit. 6, 42 U.S.C. Secs. 2000(d) et seq.; see 24 C.F.R. Sec. 1.4(b)(6)(ii).

/4/42 U.S.C. Secs. 2000(d) et seq.

/5/24 C.F.R. Sec. 1.4(b)(6)(ii) (emphasis added).

/6/Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582, 584 (1983).

/7/42 U.S.C. Secs. 3604 et seq.

/8/Otero v. New York City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973) (Clearinghouse No. 8233).

/9/NAACP, Boston Chapter v. Secretary of HUD, 817 F.2d 149, 155 (1st Cir. 1987).

/10/See Anderson v. City of Alpharetta, 737 F.2d 1530 (11th Cir. 1984), for the narrow view that HUD's duty is to refrain from discriminating or supporting the discriminatory actions of others in contrast to NAACP, Boston Chapter, 817 F.2d at 149, holding that HUD must additionally consider whether its decisions will have a discriminatory effect and take action to fulfill the goal of open, integrated residential housing.

/11/42 U.S.C. Secs. 5301 et seq.

/12/Id. Sec. 5304(b)(2).

/13/Id. Sec. 5301(c).

/14/24 C.F.R. Sec. 91.1(a)(ii).

/15/24 C.F.R. Sec. 91.225(a)(1), 91.325(a)(1), 91.425(a)(1). Advocates working in rural nonentitlement jurisdictions should note that states have a dual obligation with regard to fair housing planning: They must prepare a statewide Analysis of Impediments to Fair Housing Choice, as well as ensure that nonentitlement jurisdictions receiving funding through the state are meeting their obligation affirmatively to further fair housing. The state may require nonentitlement jurisdictions to prepare a full-blown Analysis of Impediments to Fair Housing Choice or they may require the jurisdiction to take specific actions that promote fair housing choice. See 24 C.F.R. Sec. 570.487(b)(4); U.S. DEPT OF HOUS. & URBAN DEV., OFFICE OF FAIR HOUS. & ECON. OPPORTUNITY, FAIR HOUS. CLEARINGHOUSE, FAIR HOUSING PLANNING GUIDE 3-5 (1996) [hereinafter FAIR HOUSING PLANNING GUIDE].

/16/FAIR HOUSING PLANNING GUIDE 2-16 (emphasis added).

/17/Id. at 2-8.

/18/Id. at 2-6.

/19/Id. at 2-5.

/20/Id. at 2-11. See also 24 C.F.R. Sec. 91.100 (a)(4).

/21/24 C.F.R. SEC. 91.225(a)(1) requires as a part of the Consolidated Plan proper an analysis of whether public policies of the jurisdiction create barriers to the development or preservation of affordable housing in the jurisdiction and a statement of what actions the jurisdiction will take to overcome any such barriers.

/22/See Rawson, *supra* note 2.

/23/FAIR HOUSING PLANNING GUIDE 2-21 (emphasis added).

/24/24 C.F.R. Sec. 91.520(a); FAIR HOUSING PLANNING GUIDE 2-24.

/25/FAIR HOUSING PLANNING GUIDE 2-24.

/26/24 C.F.R. Sec. 91.500 (b)(3); FAIR HOUSING PLANNING GUIDE 2-24.

/27/FAIR HOUSING PLANNING GUIDE 2-24.