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The **Department of Housing and Urban Development (HUD)** Proposed Rule: **FR-6123-A-01 Affirmatively Furthering Fair Housing: Streamlining and Enhancements**

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NIXON PEABODY LLP
ATTORNEYS AT LAW

NIXONPEABODY.COM
@NIXONPEABODYLLP

Harry J. Kelly
Partner
T 202-585-8712
hkelly@nixonpeabody.com

799 9th Street NW
Suite 500
Washington, DC 20001-4501
202-585-8000

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Via E-Mail

Office of the General Counsel
Rule Docket Clerk
Department of Housing and Urban Development
451 Seventh Street, SW, Room 10276
Washington, DC 201410-0001

RE: RIN 2529-AA97

Docket No. FR-6123-A-01

Title: Affirmatively Furthering Fair Housing: Streamlining and Enhancements

Dear Sir or Madam:

This firm represents the National Multifamily Housing Council (“NMHC”), the National Apartment Association (“NAA”), and the National Leased Housing Association (“NLHA”) (jointly, NMHC, NAA and NLHA are referred to as the “Housing Commenters”) in connection with responding to the Federal Register notice issued by the Department of Housing and Urban Development (“HUD”) dated August 16, 2018, 83 Fed. Reg. 40713 (the “August Notice”), seeking comments on proposals to streamline and enhance HUD’s Affirmatively Furthering Fair Housing (“AFFH”) rule codified at various places in HUD’s regulations. At the time the AFFH regulations were proposed by HUD in 2013, the Housing Commenters warned that the AFFH regulation could actually create obstacles to meeting the needs of renters in the United States for additional affordable housing.¹ Unfortunately, due to the heavy burdens the AFFH rule places on local agencies and flawed implementation by HUD, many of those fears have come to pass. The Housing Commenters therefore welcome the opportunity to provide comments on the August Notice and to urge HUD to make necessary changes to the AFFH rule to reduce obstacles to the development of additional affordable housing and to promote creation of urgently needed multifamily housing around the country.

¹ See Comments of Housing Commenters, RIN 2501-AD33, Docket No. FR-5173-P-01, “Affirmatively Furthering Fair Housing” (September 17, 2013) (“2013 Comments”).

Background

NMHC/NAA represent the nation's leading firms participating in the multifamily rental housing industry. Our combined memberships engage in all aspects of the apartment industry, including ownership, development, management and finance. NMHC represents the principal officers of the apartment industry's largest and most prominent firms. The NAA is a trade association for owners and managers of rental housing. The NAA is comprised of 160 state and local affiliated apartment associations. The NAA encompasses over 78,000 members representing more than 9.3 million rental homes throughout the United States, Canada, and the United Kingdom. The NAA, which is the leading national advocate for quality rental housing, is also the largest trade organization dedicated solely to rental housing. NLHA is a vital and effective advocate for nearly 450 member organizations, including developers, owners, managers, public housing authorities, nonprofit sponsors and syndicators involved in government related rental housing.

As noted in the 2013 Comments, the Housing Commenters offered qualified support for HUD's proposed AFFH rule, recognizing that it could help to reduce some obstacles to development of affordable multifamily housing, such as removal of exclusionary zoning rules. At the same time, the Housing Commenters explained that the proposed AFFH regulations could actually make it more difficult to develop multifamily housing. Among other things, the Housing Commenters warned that the proposed AFFH rule could (1) impose additional burdens on public agencies, (2) encourage HUD to second-guess planning decisions made by those local agencies, (3) deluge planners with data and statistical information that actually frustrate needed planning improvements, and (4) allow new data and statistical resources to be misused in enforcement efforts against private housing providers, rather than to promote the production of multifamily housing.

The August Notice explained that many of these concerns came to pass. For example, according to HUD, most of the initial round of AFFH submissions were rejected by HUD for various technical reasons. HUD was forced to expend large amount of its own staff time to work with local agencies attempting to prepare AFFH submissions. Indeed, HUD's own implementation of the AFFH rule was faulty – it issued some, but not all, of the Assessment Tools needed by HUD grantees to implement the AFFH rule, and then suspended or withdrew those documents. As a result, HUD reported in the August Notice that “[t]here are currently no approved assessment tools that are available for program participants to use.” August Notice, 83 Fed. Reg. at 40714. Thus, since the AFFH rule was finalized in 2015, it has only added to the burden of public agencies and has done almost nothing to meet what should be one of its primary goals – expanding the availability of affordable housing. Indeed, as Secretary Carson himself recognized when the August Notice was announced, “[i]t's ironic that the current AFFH rule, which was designed to expand affordable housing choices, is actually suffocating investment in some of our most distressed neighborhoods that need our investment the most.” HUD, Press Release, HUD Seeks To Streamline and Enhance ‘Affirmatively Furthering Fair Housing’ Rule, available at https://www.hud.gov/PRESS/PRESS_RELEASES_MEDIA_ADVISORIES/HUD_NO_18_079

(August 13, 2018). The current AFFH rule is flawed and represents a wasted opportunity to provide multifamily housing that America urgently needs.

Comments on AFFH Rule

The Housing Commenters are strong advocate for effective fair housing laws, and they are also strong advocates for policies that make it easier for housing providers to develop and preserve multifamily housing, especially in areas that have traditionally resisted it. For example, in a variety of studies, reports, and public statements, NMHC has explained that America is not meeting the urgent need for more multifamily housing generally and affordable multifamily housing in particular². Many factors contributing to the unmet demand for multifamily housing, including the aging of the baby boom generation, the expanding number of smaller households, and stagnating incomes that make renting a more attractive choice for many families and individuals. Vision 2030 at 8-10.

At the same time, NMHC research demonstrates that many barriers to developing multifamily housing persist at the state and local level. Zoning restrictions, severe environmental and permitting requirements, and lingering NIMBYism, among other factors, have made it difficult for housing providers to meet the Nation's multifamily housing demands. Vision 2030 at 12-14. These restrictions raise high entrance barriers to housing developers, who face long delays and, in some cases, millions of dollars of expense in order to obtain necessary permits and approvals – if they are available at all – before a single spade of dirt can be turned. In addition to frustrating the housing needs of millions of Americans, these obstacles make it more difficult for Americans to move to places where jobs are available, divert economic resources away from productive investments, and reduce overall economic growth.

Critical to improving the supply of multifamily housing is encouraging state and local governments to recognize the benefits that can come from development of multifamily housing. Properly revised and implemented, the AFFH rule can be an important component of meeting HUD's duty to provide additional multifamily housing resources to all American families, regardless of their status in a class of persons protected by the Fair Housing Act ("FHAct"). As Secretary Carson acknowledges, however, the current AFFH rule is only an obstacle to achieving those tasks.

Building on the comments they made in 2013 and the problems revealed since the AFFH rule was finalized in 2015, the Housing Commenters recommends the following steps to streamline and enhance the AFFH rule:

1. **HUD must make the AFFH rule clearer and reduce regulatory burdens on state and local agencies.** As HUD's experience to date has shown, the current

² See, for example, NMHC and National Apartment Assn., Vision 2030: Build 4.6 million New Apartments to Meet Demand and Control the Cost of Housing (June 2017) at 3-6 ("Vision 2030"); Testimony of James Schloemer, before House Comm. on Fin. Services at 2-4 (Sept. 5, 2018).

AFFH rule is overly complex and burdensome. Among other things, it incorporates extensive statistical databases that state and local agencies are required to employ to diagnose obstacles to fair housing in their jurisdictions using the Assessment Tools designed by HUD. As noted below, the Housing Commenters have concerns about the use of that data to improperly measure fair housing compliance of private housing providers or as enforcement tools. But if that data is to be provided to public agencies for AFFH purposes, the experience since 2015 indicates that the volume of raw data and the lengthy and burdensome analysis imposed by the Assessment Tools are too much for even large agencies, with professional planning staffs, to swallow. For smaller state and local entities and most public housing agencies, the AFFH planning process is simply overwhelming. As the Housing Commenters warned in its 2013 comments, providing voluminous data to public agencies without practical guidance about how to use it is only going to result in “paralysis by analysis,” without making any positive contribution to developing more multifamily housing. While it makes sense to provide a standardized database for all state and agencies to use, HUD should attempt to edit or curate the data to make it more useful for under-resourced agencies to use. Likewise, the Assessment Tools should be streamlined to focus on a limited set of critical questions related to barriers preventing housing development and preservation, which reflect the technical competence of state and local agencies charged with developing, operating and preserving housing resources.

2. **HUD should encourage public agencies to focus their efforts on eliminating the most common obstacles to fair housing and development and preservation of multifamily housing.** NMHC research indicates that many of the barriers to fair housing – exclusionary zoning, excessive permitting and approval processes, and high fees and assessments, etc. – widely impact multifamily development and preservation across the Nation. While state and local agencies should be encouraged to identify unique barriers in their communities, many problems are so wide-spread that HUD should insist that all state and local agencies address them and assess what they can do to alleviate or eliminate them. At a minimum, public agencies should consider the impact of exclusionary zoning practices, excessive permitting and environmental review requirements, and fees imposed on private developers during the planning process on the ability to produce enough multifamily housing to meet the Nation’s needs.
3. **The AFFH rule should focus on practical tasks that state and local agencies can undertake to expand the availability of multifamily resources in general and affordable housing in particular.** A large part of the problem with the current AFFH rule is that it focuses on planning activities, rather than on practical steps necessary to develop more multifamily housing. While sound planning practices must be part of the AFFH process, in the end, HUD’s AFFH goals cannot be met without producing more multifamily housing in places

where it does not exist today. The obstacles to that housing are well-known, including exclusionary zoning rules, expensive and time-consuming permitting and environmental review practices and excessive fees for water, fire, police and education services. Rather than spending precious resources analyzing demographic trends, the AFFH process should focus on practical solutions to common problems that frustrate development and renovation of multifamily housing across the country.

4. **The AFFH process should be a carrot, not a stick.** HUD will never achieve its goal of affirmatively furthering fair housing without treating public agencies – and, for that matter, private housing developers – as its allies, not its enemies. As explained elsewhere, top-down directives and threats of suspending funding or initiating enforcement actions will not generate the cooperation HUD needs to carry out its mission. As it revises the AFFH rule, HUD needs to focus on steps that make the AFFH process successful for all involved. Certainly, the steps outlined here – developing better data resources and Assessment Tools that are more user-friendly – are essential first steps. But HUD also needs to make it clear that its goal is to work with public agencies and the private sector to promote development of multifamily housing, not to punish them with threats to sanction them or suspend grants and financial support. As noted, some barriers may be beyond the ability of specific agencies to correct, but all agencies should be encouraged to fix those problems they can and, where appropriate, to cooperate with other agencies in the area to address those barriers. Indeed, rather than threaten loss of Federal funding, HUD should encourage public agencies to use Federal resources including CDBG to promote its AFFH goals. The thrust of the AFFH program must be to develop incentives to help public agencies promote fair housing goals – beginning with steps aimed at increasing the supply of housing that is affordable – rather than to punish them if they do not.
5. **HUD needs to clearly restrict the availability of AFFH-related data to authorized public agencies.** As we expressed in our 2013 comments, the Housing Commenters remain concerned that aspects of the AFFH program – in particular, the detailed databases that HUD requires public agencies to use in their AFFH process – can be misused to impose additional enforcement obligations on private housing providers and developers. We are particularly concerned that data intended to allow public agencies to diagnose fair housing issues in their jurisdictions may be misused by litigants to support fair housing claims against private housing providers and developers. As noted above, without active cooperation between HUD, public agencies and the private sector, HUD's AFFH goals cannot be met. HUD should take steps to prevent this data from being misused against the private sector entities that should be its allies in promoting HUD's AFFH goals.
6. **The key to fair housing is more multifamily housing.** There cannot be a successful solution to America's fair housing issues without major public and private efforts to develop more multifamily housing. Simply put, HUD cannot


meet its fair housing goals without expanding the supply of multifamily housing in general and affordable housing in particular. By all measures, private housing providers and developers are the lowest-cost source for multifamily housing. Encouraging the private sector to develop more multifamily housing is the least expensive way for HUD to meet its overall goal of providing decent housing to all Americans while meeting its fair housing goals for persons in protected classes under the FHAct. As Secretary Carson recognizes, while it is important to streamline the AFFH process to remove excessive burdens it imposes on public agencies and to make it more user-friendly, HUD should focus its attention fully on using the AFFH process as part of its strategy to develop more multifamily housing.

Conclusions

There is an intimate and abiding connection between the goals of eliminating barriers to fair housing and eliminating barriers to multifamily housing generally. The current AFFH rule is flawed because it imposes excessive burdens on public agencies to comply with the AFFH rule, rather than encouraging those agencies to take steps to address the legal, economic and structural barriers to development and preservation of multifamily housing. While HUD is wise to consider steps to streamline the AFFH process and make the AFFH Rule work better, it should do so in a way that, as Secretary Carson urged, focuses on development of urgently needed multifamily housing throughout the country as the best way to promote its AFFH goals generally, and firmly engages public agencies and private housing providers and developers in this effort.

The Housing Commenters welcome the opportunity to provide comments as requested in the August 2018 Notice. Thank you for your consideration.

Very truly yours,


Harry J. Kelly
Partner

HJK