PLANNING/COMMUNICATIONS

7215 Oak Avenue River Forest, Illinois 60305 708/366-5200 Fax: 708/366-5280
Email: dl@planningcommunications.com URL: http://planningcommunications.com

June 4, 2009

Suggestions for Reforming Analyses of Impediments to Fair Housing Choice

All too often the Analysis of Impediments to Fair Housing Choice that every CDBG entitlement jurisdictions must periodically conduct is

- ❑ A cookie–cutter document devoid of any actual analysis
- ❑ Produced by an entity that has no interest in actually identifying impediments and achieving the goals of the Housing & Community Development Act to achieve racial and economic integration
- ❑ Produced by an entity with a conflict of interest
- ❑ Falsely certifying that the recipient is acting to affirmatively further fair housing
- ❑ Never submitted to HUD nor reviewed by HUD.

The new administration has a window of opportunity to reform the Community and Development Grant Program so that it is administered in accord with the purposes of the act.

It is clear that one of the key underlying purposes of the Housing and Community Development Act of 1974 is to foster racial and economic integration. This key goal of the act is reflected in the technical language "the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income." 42 U.S.C. §5301(c)(6) To this end, CDBG recipients are to act in accord with the nation's fair housing act and affirmatively further fair housing. Office of Fair Housing and Equal Opportunity, U. S. Department of Housing and Urban Development, *Fair Housing Planning Guide*, (Washington, DC. March 1996)

In interpreting the Housing & Community Development Act under which CDBG funds are disbursed, the courts have been very clear about the purpose of the Act. Taken as a whole the act has "the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups." *Otero v. New York City Housing Authority,* 484 F.2d 1122, 1134 (2d Cir. 1973) "With such a panoptic goal, HUD is obligated to use its grant programs "to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." *N.A.A.C.P. v. Secretary of HUD,* 817 F.2d 149, 155 (1st Cir. 1987) (Breyer, J.) "Congress saw the antidiscrimination policy [embodied in the Fair Housing Act] as the means to effect the

antisegregation–integration policy." *United States v. Starrett City Associates,* 840 F.2d 1096, 1100 (2d Cir. 1988)

Sadly, few recipient jurisdiction are taking actions to achieve these goals. The Analysis of Impediments to Fair Housing Choice has become a cookie–cutter collection of data devoid of actual analysis produced by a party that has a conflict of interest rather than an analytical tool to identify, analyze, and devise solutions to impediments to fair housing choice that may exist in a community.

Recipients know they can get away with this kind of behavior because nobody at HUD routinely reviews AIs and HUD does not cut off funds from communities that fail to act to affirmatively further fair housing choice. The reforms suggested here seek to remedy this situation.

Reforming the Analysis of Impediments

Ending conflicts of interest

It's an inherent conflict of interest for a recipient jurisdiction to conduct its own AI. That's like asking the recipient to police itself. A recipient jurisdiction has every motivation to avoid identifying impediments to fair housing choice and, if any should be found, suggesting genuine solutions. For example, can you picture a city finding in its self–conducted AI that its zoning provisions for group homes for people with disabilities violate the Fair Housing Amendments Act of 1988? Of course not. That would constitute an admission of guilt if the city were to be sued.

Similarly, hiring a consultant engaged in on–going work with the jurisdiction to conduct the AI also constitutes an inherent conflict of interest. What consultant that wants to *continue* to work for a jurisdiction is going to tell a city that its zoning for group homes violates federal law or that its policies and practices promote racial and economic segregation? They know full well they'll never get another contract from that jurisdiction. This is especially true for consultants conducting CDBG work for a jurisdiction. Would such a consultant conceivably find that its work constitutes an impediment to fair housing choice? Not in this lifetime.

There's a crying need to open up the competition for Requests for Proposals to conduct an AI, Consolidated Plan, or any CDBG–related contracts. Far too many go to the same firms that have turned AIs and other CDBG documents into cookie–cutter clones. Only large firms can afford the $5,000 annual fee to subscribe to services like Onvia's DemandStar.

Too often RFPs are released to just to favored consultants with just a 30–day window to respond. That can lead to cronyism and cloned proposals that fail to address the unique needs of each jurisdiction.

The following proposals can help end these practices.

Solution

HUD should mandate that AIs be conducted by an independent consultant.

The basic principle is that an AI should be a completely independent investigation and should avoid even the appearance of a conflict of interest. No recipient community should be allowed to

conduct its own AI. Any entity engaged in CDBG work for a recipient community should be ineligible to conduct that community's AI. The underlying principle is to exclude any entity that would have substantial motivation to pull its punches. Both a recipient community and its on–going consultants have too much motivation to avoid finding impediments to fair housing choice.

This is not to suggest that a consultant that conducts an AI should be prohibited from later being hired by the jurisdiction for other consulting projects. We've seen no evidence of poor AIs being produced by independent consultants in order to get future work from a recipient community.

HUD should establish a web site on which all RFPs for AIs, Consolidated Plans, and other CDBG–related contracts should be posted at least two months before proposals are due.

Establishing a HUD website for RFPs will open up the process, offer transparency, and encourage the sort of competition that leads to better results. HUD, though, must mandate that these RFPs be posted on the site. And HUD must require at least a 60–day lead time before proposals are due. That will give respondents adequate time to prepare proposals responsive to each community's needs and avoid the cookie–cutter approach so many of them take to AIs.

Making the AI have consequences

Has any community ever lost its CDBG funding due to its AI? Is anybody at HUD charged with reviewing AIs and monitoring implementation of their recommendations?

The AI is currently nothing more than an academic exercise because HUD has not been enforcing the Housing & Community Development Act. Even when a community identifies impediments to fair housing choice, they do little to mitigate them. They know that HUD does not routinely read AIs and certainly does nothing to monitor implementation.

Solution

HUD should require each recipient jurisdiction to submit its AI for review and HUD should monitor progress toward removing impediments to fair housing choice. Progress standards should be set and funds denied or reduced to communities that fail to affirmatively further fair housing choice by removing impediments to fair housing choice.

Standards would have to be realistic. The key measure of progress toward achieving the Act's goal of racial integration involves first identifying what the composition of the jurisdiction would be in a housing market free of racial discrimination. This kind of analysis can be conducted for any jurisdiction for which census data exists. When the actual proportions of minorities are significantly less than the proportions that would exist in a housing market of racial discrimination, it is very likely that factors other than income, social class, or personal choice are influencing who lives in the community. Researchers have concluded "that race and ethnicity (not just social class) remain major factors in steering minority families away from some communities and toward others." D. Coleman, M. Leachman, P. Nyden, and B. Peterman, *Black, White and Shades of Brown: Fair Housing and Economic Opportunity in the Chicago Region* (Chicago: Leadership Council for Metropolitan Open Communities, February 1998). This type of analysis was pioneered by Harvard economist John Kain.

When the actual proportions of minorities are significantly less than the proportions that would exist in a housing market free of racial discrimination, it is very likely that factors other than income, social class, or personal choice are influencing who lives in the community. Researchers have deduced "that race and ethnicity (not just social class) remain major factors in steering minority families away from some communities and toward others." *Ibid.*

All too often AIs apply the "Dissimilarity Index" to quantify the extent of racial segregation in a community's housing. Unfortunately, this index can be very misleading. It does *not* offer an accurate depiction of the what the racial composition of a community would be absent racial discrimination because it identifies the percentage of households that would have to move to achieve an even racial distribution throughout a jurisdiction. The Dissimilarity Index is simply not appropriate for an AI due to income differences among racial and ethnic groups as well as the cost of housing which can vary significantly from city to city.

The Kain approach suggested here takes into account differences in household income and the cost of housing. It involves comparing the actual racial and ethnic composition of a community with the racial and ethnic composition in a housing market free of racial discrimination, where only income determines who lives there.

HUD should immediately start conducting this analysis based on the 1990 and 2000 census and be prepared to conduct this analysis when the results of the 2010 census are available. The 1990 and 2000 census analyses are needed to identify trends within each jurisdiction. The analysis should be conducted by metropolitan area or region.

Example of another standard: When an AI finds that a community's zoning for group homes for people with disabilities is an impediment to fair housing choice, the community should be given up to two years to amend its zoning to bring it into compliance with the nation's Fair Housing Act. While interpretations of what constitutes compliance varies, HUD should be able to identify a reasoned, documented maximum regulation. This, of course, means a planning and zoning analysis, not a review of court decisions.

All standards should be reviewed for application in the real world. Before promulgating any standards, HUD should apply standards under consideration to several communities using their AIs and subsequent CDBG documents going back 15 years to make sure that the proposed standards are realistic and pragmatic. They should not be created in a vacuum or academic atmosphere.