

## PUBLIC-PRIVATE PARTNERSHIPS: HUD'S LOST OPPORTUNITIES TO FURTHER FAIR HOUSING

by  
Emily Rees Brown\*

*This Article examines important yet rarely discussed barriers to dismantling residential segregation in the United States: federal regulations that prevent recipients of federal housing dollars from productively engaging the private sector and effectively navigating the private housing market. These U.S. Department of Housing and Urban Development (HUD) regulations are among today's greatest impediments to affirmatively furthering fair housing. Indeed, they go as far as to render the creation of subsidized housing in desegregated neighborhoods untenable, and they help funnel new subsidized housing units into the same distressed, segregated neighborhoods that have historically contained the bulk of low-income housing.*

*This Article builds upon research and literature that examines why segregated housing patterns remain stark and seemingly intractable nearly fifty years after the Fair Housing Act (FHA), and why most subsidized housing is located in areas of highly concentrated poverty long after Congress mandated that federal housing dollars be used in a way that affirmatively furthers fair housing. Crucial to my account is the recognition that federal housing policy, discrimination, and sociopolitical and economic forces have maintained and reinforced residential segregation—compounding inequality for black Americans especially. Meanwhile, sustainable strategies to create affordable and public housing in areas that offer access to quality education, jobs, transportation, healthcare, and safety have been conspicuously missing from federal housing policy. In light of this deficiency, affordable housing in areas of opportunity has been on the decline for decades. And filling this housing gap will require major regulatory reform at the national level.*

*The federal regulatory obstacles to affirmatively furthering fair housing are particularly ironic in light of several facts. First, HUD has steadily increased its emphasis on private delivery of public housing since the*

---

\* Former Staff Counsel and Polikoff-Gautreaux Fellow at BPI (Business and Professional People for the Public Interest), a law and policy nonprofit in Chicago that focuses on the challenges of concentrated urban poverty. I am grateful to Julie Brown and Alex Polikoff for their prompt and invaluable comments on this article and for teaching me almost everything I know about federal housing policy. I would also like to thank Andrew Tonelli for his feedback, support, and patience during the writing of this Article.

early 1970s, and today it is nearly impossible to produce any housing—let alone housing in low-poverty neighborhoods—without the cooperation of private actors, yet HUD’s regulatory scheme actively disincentivizes private partnerships. Second, the Obama administration finalized a long-awaited regulation in July 2015 that aims to better enforce the requirements of the Affirmatively Furthering Fair Housing provision (AFFH) of the FHA among recipients. But the new regulation is silent as to any actions HUD itself will take to help recipients increase the production of publicly-supported housing in opportunity areas.

Third, though the Trump administration has not prioritized repealing the AFFH rule, Housing and Urban Development Secretary Carson has described the rule as “social engineering” and has taken issue with it as an imposition on local governments. At the very least, this signals a lack of enforcement commitment on the part of the new administration. But this Article argues that even with effective enforcement, the AFFH’s emphasis on local accountability was misplaced. Instead, HUD should focus on regulatory and programmatic reforms that will greatly expand acquisition options for recipients, enable more successful public-private partnerships, and expand housing and neighborhood choice and economic opportunity for residents. And because they are grounded in streamlining regulations, leveraging the private sector, and increasing economic mobility for residents, there is no justifiable reason the new Republican administration should reject the proposals put forth in this Article.

INTRODUCTION .....	737
I. LAWSUITS, GUIDANCE, AND REPORTING REQUIREMENTS ALONE WILL NOT MAKE PROGRESS TOWARD DISMANTLING SEGREGATION AND FURTHERING FAIR HOUSING IF THEY ARE NOT ACCOMPANIED BY REFORMS THAT BETTER ENABLE HUD RECIPIENTS AND DEVELOPERS TO CREATE HOUSING OPPORTUNITIES IN LOW POVERTY NEIGHBORHOODS.....	743
A. Fifty years after the passage of the Fair Housing Act, housing in America is still overwhelmingly segregated along racial lines, burdening minority (especially black) families with substandard access to education, jobs, health care, transportation, safety, political capital, and other life opportunities.....	743
B. Affirmatively furthering fair housing requires an increased investment in mobility strategies to promote integrated housing options.....	746
C. Judicial and regulatory enforcement of the AFFH provision does not adequately effectuate the principles, goals, and obligations embodied by the law .....	748
D. Additional legal directives that overlap the AFFH provision compel HUD and its recipients to create housing opportunities in low poverty neighborhoods.....	752
E. HUD has been increasing its reliance on the private sector for decades, and now HUD needs to enable better private sector	

	<i>cooperation to deliver the housing stock that affirmatively further fair housing</i> .....	753
II.	HUD NEEDS TO IMPLEMENT PROGRAMMATIC AND REGULATORY REFORMS TO FOSTER THE EFFECTIVE PUBLIC-PRIVATE PARTNERSHIPS NEEDED TO AFFIRMATIVELY FURTHER FAIR HOUSING.....	756
A.	<i>To further fair housing through brick and mortar development, HUD must enact regulatory reforms</i> .....	756
	<i>i. Restrictions on purchase price</i> .....	757
	<i>ii. ‘Double Subsidy’ prohibition</i> .....	760
	<i>iii. Environmental review</i> .....	762
B.	<i>To affirmatively further fair housing through the Housing Choice Voucher Program, HUD needs to enact significant program reforms</i> .....	766
	<i>i. Payment standards</i> .....	768
	<i>ii. Search times</i> .....	772
	<i>iii. Administrative fees, utilization, and SEMAP</i> .....	773
	<i>iv. Mobility counseling: share information</i> .....	776
	<i>v. The role of landlords</i> .....	779
	<i>a. Working with landlords in opportunity neighborhoods</i> ....	780
	<i>b. For landlords in high-poverty neighborhoods, HCVs are big business</i> .....	783
C.	<i>PHAs should start a conversation with HUD about these and other impediments to fair housing</i> .....	786
CONCLUSION	.....	787

## INTRODUCTION

This Article examines two aspects of contemporary federal housing policy: (1) the crucial role of public-private partnerships in creating subsidized housing opportunities in desegregated, low-poverty neighborhoods, and (2) the federal rules and regulations that hamper the sustainability and productivity of those partnerships. Commentary is offered against the backdrop of a new administration, which took office merely a year and a half after the U.S. Department of Housing and Urban Development (HUD)<sup>1</sup> passed a long-awaited regulation, called the

---

<sup>1</sup> HUD is a federal agency that funds housing and urban development programs, usually by issuing grants to local entities. HUD and its funding recipients must operate their programs in accordance with federal laws and regulations. In the context of public housing, HUD relies on public housing agencies (PHAs) to administer programs at a local level. PHAs usually own and operate public housing and administer all public housing programs in their jurisdiction. See Jaime Alison Lee, *Poverty, Dignity, and Public Housing*, 47 COLUM. HUM. RTS. L. REV. 97, 116–17 (2016). See generally ABOUT HUD, HUD.GOV, <https://portal.hud.gov/hudportal/HUD?sr>

Affirmatively Furthering Fair Housing rule (AFFH rule). The rule imposes new accountability measures to enforce section 3608(d) of the Fair Housing Act (FHA),<sup>2</sup> which requires HUD and its recipients to “administer [its] programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of [the FHA].”<sup>3</sup> Publishing the AFFH rule was largely seen as the federal government’s most powerful show of commitment to furthering fair housing.<sup>4</sup> But, aside from providing to the public a fairly comprehensive data and mapping tool that displays the location of subsidized housing against other variables that measure segregation and economic opportunity, the AFFH rule offers little in the way of practical tools for local recipients to advance desegregation efforts.<sup>5</sup>

Regardless, the Trump administration has taken a hostile stance toward affirmative, government-led fair housing efforts; efforts HUD Secretary Ben Carson has called “failed socialism” and “mandated social engineering scheme[s].”<sup>6</sup> Notably, Secretary Carson wrote an op-ed in the *Washington Times* comparing the AFFH rule to “failed” school desegregation busing programs.<sup>7</sup> Although President Trump made little mention of housing in his presidential campaign, he likely picked Secretary Carson for this position in part because he had specifically criticized the Obama administration’s fair housing policies.<sup>8</sup> It bears mentioning, of course, that President Trump began his career managing buildings that were sued for discriminatory rental practices; in other words, he had a hand in engineering certain groups of people *out* of the communities that housed his buildings.<sup>9</sup> And in early 2017 bills were

---

c=/about (last visited May 21, 2017) (reciting the history of HUD and listing all HUD programs).

<sup>2</sup> See Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (“Through this final rule, HUD provides HUD program participants with an approach to more effectively and efficiently incorporate into their planning processes the duty to affirmatively further the purposes and policies of the [FHA] . . .”); 42 U.S.C. § 3608(d) (2012).

<sup>3</sup> 42 U.S.C. § 3608(d).

<sup>4</sup> See Ben S. Carson, *Experimenting with Failed Socialism Again*, WASH. TIMES (July 23, 2015), <http://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish/> (criticizing federal government’s attempts to facilitate racial equality through public housing programs).

<sup>5</sup> See Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,272; *Affirmatively Furthering Fair Housing: Build an AFFH Map*, U.S. DEP’T OF HOUSING & URB. DEV., <https://egis.hud.gov/affht/#> (last visited May 21, 2017) (interactive map).

<sup>6</sup> Carson, *supra* note 4.

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., *id.* (“The Obama administration’s new agency rules rely on a tortured reading of the Fair Housing laws to empower [HUD] to ‘affirmatively promote’ fair housing, even the absence of explicit discrimination.”).

<sup>9</sup> Jonathan Mahler & Steve Eder, *‘No Vacancies’ for Blacks: How Donald Trump Got His Start, and Was First Accused of Bias*, N.Y. TIMES (Aug. 27, 2016), <https://nyti.ms/2bOYUVI>; Michael Kranish & Robert O’Harrow Jr., *Inside the Government’s*



introduced in the House and Senate to repeal the AFFH rule, which one Republican sponsor had called a “war on the suburbs.”<sup>10</sup> If the Trump administration or Congress repeals the AFFH rule, that would be seen by many as an abandonment of the federal government’s commitment to fair housing—a devastating blow to fair housing efforts to be sure. But, unless Congress goes as far as to repeal the statutory AFFH provision of the FHA, local public housing authorities and other HUD recipients will be in the same position: with a statutory mandate to further fair housing and few practical tools to do so.

Billed partially as an accountability mechanism for users of federal housing dollars, the 2015 AFFH rule responded to longstanding charges from advocates and stakeholders that the FHA’s mandate to use federally subsidized housing programs to reduce segregation and promote integration is neither prioritized nor adequately enforced.<sup>11</sup> The new rule clarifies in detail what it means to use federal funds to affirmatively further fair housing. And to increase accountability, it imposes a new and more extensive reporting requirement on recipients called the Assessment of Fair Housing (AFH), which utilizes the data and mapping tool to help guide funding recipients through analyzing geographic racial and economic disparities in subsidized housing, identifying their root causes, and setting goals to reduce disparities and ameliorate barriers to fair housing.<sup>12</sup> But, the rule contains a glaring omission: It does almost nothing at the federal level, let alone address HUD-promulgated regulations that prevent affordable housing development from expanding its geography within a funding infrastructure that relies almost entirely on the private market.

---

*Racial Bias Case Against Donald Trump’s Company, and How He Fought It*, WASH. POST (Jan. 23, 2016), [https://www.washingtonpost.com/politics/inside-the-governments-racial-bias-case-against-donald-trumps-company-and-how-he-fought-it/2016/01/23/fb90163e-bf6e-11e5-bcda-62a36b394160\\_story.html?utm\\_term=.4809c4b2fcac](https://www.washingtonpost.com/politics/inside-the-governments-racial-bias-case-against-donald-trumps-company-and-how-he-fought-it/2016/01/23/fb90163e-bf6e-11e5-bcda-62a36b394160_story.html?utm_term=.4809c4b2fcac).

<sup>10</sup> Tanvi Misra, *Affirmatively Furthering Fair Housing Faces an Uncertain Fate*, CITYLAB (Feb. 3, 2017). In January 12, 2017, Congressman Paul Gosar (R-AZ) introduced H.R. 482, the Local Zoning Decisions Protection Act and Senator Mike Lee (R-UT) introduced S.103, which is identical. The bills would repeal the AFFH rule and prohibit federal funds from being used to map geospatial racial disparities—in other words, it would eliminate the AFFH rule’s data and mapping tool. Thus far the bills have been referred to committee and no action has been taken. See CONGRESS.GOV <https://www.congress.gov/bill/115th-congress/house-bill/482> (last visited June 19, 2017). Housing experts are cautiously optimistic that the 2017-18 Congress is too occupied with other matters to pass the bill, and that regardless it will not garner support from moderate Republicans. See Daniel J. McGraw, *Is HUD’s Fair Housing Rule Here To Stay?*, NEXT CITY (May 2, 2017).

<sup>11</sup> See *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. at 42,273 (requiring “[i]ncorporat[ion] of fair housing priorities and goals more effectively into housing, and community development decisionmaking”).

<sup>12</sup> *Id.*

The purpose of this Article is to provide practical recommendations about federal programmatic and regulatory reforms that would help local HUD recipients put residents in healthier, safer neighborhoods that offer more opportunity. Far from “social engineering,” these recommendations would expand housing choice and help low-income renters achieve equal access to all communities by revising regulations that cause local recipients to funnel urban subsidized housing development and rental assistance to segregated neighborhoods. There is no reason a conservative administration should reject these suggestions as they are meant to achieve goals Republicans constantly profess to share, such as removing needless regulatory barriers to development, shifting decision-making authority and money back to local communities, relieving the burden of unfunded mandates on federal recipients, and increasing the odds that subsidized housing residents will succeed economically and move out of subsidized housing. Incidentally, before his confirmation, Secretary Carson officially expressed his support for deregulating land use restrictions—especially in high-income areas—to promote integration and improve low-income renters’ access to jobs.<sup>13</sup> Although the federal government does not regulate local zoning, one could read Secretary Carson’s statement as consistent with supporting the use of federal housing policy to promote economic mobility—a goal that is at the heart of every one of the following recommendations. But despite the theoretical compatibility between these fair housing solutions and conservative principles, the current HUD administration is unlikely to prioritize any regulatory reforms that would increase the supply of subsidized housing. And in that case, one could fairly question whether the administration is motivated by a disregard for the quality of life of low-income minority communities and an unwillingness to ask desegregated communities to welcome subsidized housing. Indeed, their rhetoric around fair housing would certainly bolster that proposition.

Before detailing the proposed reforms, it is important to note that this Article rests on several premises. First, housing in America remains deeply segregated, particularly between black and white households, and segregation maintains and perpetuates vast racial disparities in wealth, education, economic opportunities, health, and access to equal justice.<sup>14</sup>

---

<sup>13</sup> See DR. BEN CARSON, WRITTEN STATEMENT FOR THE RECORD, S. COMM. ON BANKING, HOUS., AND URBAN AFFAIRS 4–5 (2017), [http://www.banking.senate.gov/public/\\_cache/files/81838fb8-b48d-4714-b5af-6d5714c49f2f/4643FEF719ECD05E9ABB6E26F4578B67.011217-carson-testimony.pdf](http://www.banking.senate.gov/public/_cache/files/81838fb8-b48d-4714-b5af-6d5714c49f2f/4643FEF719ECD05E9ABB6E26F4578B67.011217-carson-testimony.pdf).

<sup>14</sup> See generally DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 84–85 (1993) (connecting disorder in poor urban neighborhoods to historic and current forces of segregation); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009) (examining the nexus of mass incarceration and state control, urban poverty, and segregation); SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM (2004) (arguing that American

Second, that particular divide was in large part created by decades of federal housing policy that contained and economically isolated black communities while financing the creation of upwardly-mobile white suburbs.<sup>15</sup> So the concept of affirmatively furthering fair housing speaks at least in part to the federal government's responsibility to help reverse the devastating effects of its own discriminatory actions. But so far federal housing policy and antidiscrimination laws have failed to alleviate—and have mostly worsened—housing segregation of low-income minorities, and especially black residents.<sup>16</sup> Therefore, today the federal government has failed to actualize the promise of fair housing embodied nearly half a century ago in the FHA.<sup>17</sup> Third, to make inroads toward dismantling segregation and affirmatively furthering fair housing, federal programs need to shift their focus toward creating more subsidized housing opportunities in integrated, low-poverty neighborhoods—many of which have been historically off limits to low-income residents, and especially low-income residents of color.<sup>18</sup> Finally, without taking a position on the

---

communities separates along the lines of race and class, and thus experiences and privileges vary greatly); PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 9–10 (2013) (discussing the “inherited ghetto,” or the ways in which segregation compounds inequality); MARY PATTILLO, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS* (2d. ed. 2013) (explaining the precariousness of the black middle class, partially due to its locus is more segregated, lower income neighborhoods than the white middle class).

<sup>15</sup> See, e.g., Emily Badger, *How Section 8 Became a “Racial Slur,”* WASHINGTON POST (June 15, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/06/15/how-section-8-became-a-racial-slur/?utm\\_term=.95d6eba39725](https://www.washingtonpost.com/news/wonk/wp/2015/06/15/how-section-8-became-a-racial-slur/?utm_term=.95d6eba39725).

<sup>16</sup> See MASSEY & DENTON, *supra* note 14, at 84.

<sup>17</sup> See Xavier de Souza Briggs, *Introduction to THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 1, 6 (Xavier de Souza Briggs ed., 2005) (“Outside a handful of progressive, self-consciously integrated neighborhoods and small cities, racial segregation has, as a public concern, receded into memory, the stuff of civil rights lore and integrationist aims of a bygone era . . . . Fighting discrimination in the private housing market is thought to be government’s only obligation, and as we will see, the public wrongly assumes that such discrimination is rare.”); Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 972 (2012) (“The FHA has not delivered true housing choice to consumers of color, however, because the integration many consumers of color would choose depends on the housing choices of third-party white consumers.”); Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> (tracing the history of federal disinvestment in integration from the Nixon administration to the present).

<sup>18</sup> In other words, to desegregate certain majority-minority neighborhoods, federal housing policy must also work to integrate other, predominately white neighborhoods. See SHARKEY, *supra* note 14, at 179 (advocating for small-scale residential mobility programs to help willing families move out of high-poverty violent neighborhoods); XAVIER DE SOUZA BRIGGS ET. AL., *MOVING TO OPPORTUNITY: THE STORY OF AN AMERICAN EXPERIMENT TO FIGHT GHETTO POVERTY* 68–69 (2010) (demonstrating that housing markets are overwhelmingly segregated by class and race, and that

wide-ranging debate about privatization of government services, I acknowledge that today the provision of subsidized housing is not possible in any type of market—but especially in thriving housing markets—without the cooperation of private landlords and developers.<sup>19</sup>

Building on these premises, this Article argues that HUD is currently failing to affirmatively further fair housing for reasons quite apart from simply the current administration's hostility toward desegregation measures. Even when the Obama administration consistently voiced a commitment to further fair housing, HUD's own regulatory infrastructure prevented recipients from putting that rhetorical commitment into action. In particular, regulations and program policies that pertain to financing brick and mortar development and administering the Housing Choice Voucher (HCV) program prevent recipients and private actors from creating housing opportunities in desegregated middle class and affluent neighborhoods.<sup>20</sup> To actually further fair housing, HUD needs to amend regulations to enable recipients to maneuver in high-demand housing markets and incentivize the right kinds of private actors to participate in subsidized housing programs. This Article is the first to offer specific recommendations to do just that in the capital acquisitions context, and it is one of the first to view the HCV program through the lens of private landlords in "opportunity areas."<sup>21</sup>

---

affordable rental housing in urban areas of economic growth has been on the decline for decades); Alex Polikoff, *Housing Mobility as a "Durable Urban Policy,"* 22 POVERTY & RACE 7, 8 (2013) (recommending the promotion and preservation of "well-located assisted housing"); Seicshnaydre, *supra* note 17, at 973 (arguing that as federal government policy has focused primarily on dismantling segregated neighborhoods, it has not provided corresponding "entrance strategies" to help black low-income residents enter desegregated neighborhoods).

<sup>19</sup> See Charles L. Edson, *Affordable Housing—An Intimate History*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 3, 7–8 (Tim Iglesias & Rochelle E. Lento eds., 2d ed. 2011); Anne Marie Smetak, *Private Funding, Public Housing: The Devil in the Details*, 21 VA. J. SOC. POL'Y & L. 1, 61 (2014). See generally OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., THE EVOLUTION OF HUD'S PUBLIC-PRIVATE PARTNERSHIPS 1 (2015) (describing the public-private nature of most HUD programs).

<sup>20</sup> See *infra* Part II.B; see, e.g., U.S. DEP'T OF HOUS. & URBAN DEV., 7417.1 REV-1, PUBLIC HOUSING DEVELOPMENT HANDBOOK 8-1 (1992), <https://portal.hud.gov/hudportal/documents/huddoc?id=74171c8PIHH.pdf> (highlighting an example of a rule that burdens recipients and private actors from creating housing opportunities in opportunity neighborhoods).

<sup>21</sup> "Opportunity area" or "area of opportunity" is a term of art in the affordable housing field that refers to neighborhoods with low poverty, low public housing saturation, and low segregation. It does not intend to imply that opportunity cannot be found in low-income minority neighborhoods. This Article uses the term "opportunity area" and "area of opportunity" for shorthand and ease of reference only, and acknowledges that opportunity can be found in any community, regardless of its demographic makeup.

Part I explains the legal and regulatory obligations that compel HUD and recipients of federal housing dollars to make units available for low-income public housing residents in low-poverty, desegregated areas, or opportunity areas. It explains in broad terms the evolution of fair housing enforcement and argues that the AFFH rule's focus on local accountability obscures the fact that HUD has been ignoring the top-down administrative impediments that prevent recipients from furthering fair housing in their own jurisdictions. Ultimately, I argue that HUD should promote desegregation by critically evaluating and revising its own policies and regulations.

Part II examines the federal regulatory obstacles to furthering fair housing through the lens of two HUD programs: capital acquisition of "scattered site" units and the HCV program. Part II.A. examines the regulatory impediments local public housing authorities (PHAs) and developers face when purchasing hard units in opportunity areas, either through direct acquisition or "turnkey" acquisition, and it suggests regulatory and policy reforms that would help them become more effective market actors in areas with a high demand for housing.

Part II.B. reviews the many structural and programmatic reasons the HCV program has not lived up to its potential to move public housing residents to desegregated neighborhoods. This Article will focus especially on ways in which the program's inspection protocols deter landlords in opportunity neighborhoods from participating in the program, while other HCV regulations create a blueprint for landlords in high-poverty areas to structure their business around exploiting HCV tenants. I conclude that removing regulatory barriers to placing affordable housing in desegregated markets will do far more to affirmatively further fair housing than the AFFH rule or a rhetorical commitment to fair housing from the federal government.

**I. LAWSUITS, GUIDANCE, AND REPORTING REQUIREMENTS  
ALONE WILL NOT MAKE PROGRESS TOWARD DISMANTLING  
SEGREGATION AND FURTHERING FAIR HOUSING IF THEY ARE  
NOT ACCOMPANIED BY REFORMS THAT BETTER ENABLE HUD  
RECIPIENTS AND DEVELOPERS TO CREATE HOUSING  
OPPORTUNITIES IN LOW-POVERTY NEIGHBORHOODS**

*A. Fifty years after the passage of the Fair Housing Act, housing in America is still overwhelmingly segregated along racial lines, burdening minority (especially black) families with substandard access to education, jobs, health care, transportation, safety, political capital, and other life opportunities.*

Passed in 1968, the FHA codified this country's commitment to

providing “fair housing throughout the United States.”<sup>22</sup> The FHA makes it unlawful to “make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>23</sup> In addition to prohibiting discrimination, it places the onus on recipients of federal housing dollars to take affirmative steps to “further fair housing,” or to further integration through their subsidized housing programs.<sup>24</sup> But five decades later, it is well documented that housing segregation—particularly segregation of publicly supported housing—persists at high levels throughout the United States.

At its most basic level, fair housing means the freedom for people to choose where they live, regardless of their race, family status, disability, or national origin. As a practical matter, however, it means taking active steps to make housing choices available to people who have historically lacked those choices—which necessarily includes opening housing markets that have been by and large closed to people of color, especially those with low incomes. This Article will focus on reforms to help low-income people—particularly minorities (and most especially Black Americans)—access neighborhoods that foster life opportunities, offer access to jobs, health care, and quality education, and that are relatively free from environmental hazards and crime. These well-resourced neighborhoods are directly correlated with wealth, they are most likely to be majority white (although there are certainly exceptions), and today many remain largely off limits to low-income residents of color.

Instead, the vast majority of subsidized housing residents of color remain concentrated in underserved areas.<sup>27</sup> This is due to the fact that remnants of de jure, state-imposed, and state-sanctioned discrimination have solidified what Patrick Sharkey called “the inherited ghetto”—intractable wealth, education, and opportunity disparities between black and white Americans that is generated, multiplied, and reinforced by the fact that black Americans are more likely than their whites of their same income level to live in neighborhoods plagued by violence, joblessness, and blight over multiple generations.<sup>28</sup> Scholars focusing on race in the

---

<sup>22</sup> Fair Housing Act of 1968, Pub. L. No. 90-284 § 801, 82 Stat. 81 (current version at 42 U.S.C. § 3601 (2012)).

<sup>23</sup> 42 U.S.C. § 3604(a) (2012).

<sup>24</sup> *See id.* § 3608(d).

<sup>27</sup> Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661, 669–70 (2011) (discussing data from a 2008 HUD study, *Characteristics of HUD-Assisted Renters and Their Units in 2003*, and available data from the Low Income Housing Tax Credit Program (LIHTC), both concluding that the programs were directing resources into neighborhoods where segregation and low-income housing already existed).

<sup>28</sup> *See* SHARKEY, *supra* note 14, at 9 (“Despite the high hopes of the civil rights era, the finding that emerges very clearly is that the stark racial inequality in America’s neighborhoods that existed in the 1970s has been passed on, with little change, to the current generation.”).

late twentieth and early twenty-first century demonstrated that despite the prohibition of legal housing segregation, American cities remain “hyper-segregated”: even controlling for income, black Americans in urban areas are disproportionately more likely to live in isolated areas that exert less political influence, receive far fewer educational resources and job opportunities, and expose residents to high levels of violence, stress, and economic hazards.<sup>29</sup> It has since been convincingly established that the continued alienation and segregation is due in part to the weak federal response to the spatial, political, and economic isolation of majority-black communities since the FHA.<sup>30</sup>

---

<sup>29</sup> See MASSEY & DENTON, *supra* note 14, at 6–7 (arguing that missing from William Julius Wilson’s findings about disorder in the urban ghetto was an account of systematic segregation as a decisive underlying cause); Sean F. Reardon & Kendra Biscoff, *Income Inequality and Income Segregation*, 116 AM. J. SOC. 1092, 1100 (2011) (describing how discriminatory housing practices and segregation have “compelled high- and low-income black households to live close to one another,” making it more likely that higher income black households will live in poorer neighborhoods than white households with comparable incomes); see also John Elgion and Robert Gebeloff, *Affluent and Black, and Still Trapped by Segregation*, N.Y. TIMES (Aug. 20, 2016), <https://www.nytimes.com/2016/08/21/us/milwaukee-segregation-wealthy-black-families.html> (showing that for instance in Milwaukee, 59% of black families with incomes of \$100,000/year live in poor neighborhoods, whereas only 6% of white families with the same income live in poor areas; nationally, the disparity is 37% to 9%).

<sup>30</sup> See SHARKEY, *supra* note 14, at 8–10 (“The [FHA] made discrimination in the public and private housing markets illegal, and carried with it the hope that America’s neighborhoods would no longer be divided by race. But in reality, the act was largely symbolic. The compromises that led to its passage gutted the enforcement mechanisms that were part of the original legislation and made it extremely difficult to prosecute cases of discrimination.”). It should also be noted that this geographic separation is not simply about income and wealth disparities, even though those disparities have remained shockingly consistent between black and white Americans since the end of the civil rights movement. Segregation, and the unequal opportunity it breeds over generations, is about race and economic privilege. See MASSEY & DENTON, *supra* note 14, at 85; SHARKEY, *supra* note 14, at 3 fig.1.1 (displaying “[t]he proportion of black Americans in each fifth of the overall U.S. income distribution”); Seicshnaydre, *supra* note 17, at 981–82. Studies have shown minority families living in poverty have significantly less access to these neighborhoods than similarly situated white families. See BRIGGS ET AL., *supra*, note 18, at 81 (noting that African American families with incomes of \$60,000 per year are more likely to live in high poverty neighborhoods than white families with half that income); SHARKEY, *supra* note 14, at 27 fig.2.1 (showing that a much larger proportion of blacks, from 1970 to 2000, grew up in high poverty neighborhoods. This cannot be explained by disparities in income alone: about half of middle-class blacks were raised in neighborhoods with poverty over 20% or more, compared with only 1% of middle-class whites.); Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 800 (2008) (detailing racial discrimination and racial steering still prevalent in the U.S. housing market, regardless of income). Furthermore, black/white segregation remains extremely high relative to the segregation experienced by Hispanic and Asian groups nationwide. See BRIGGS ET AL.,

*B. Affirmatively furthering fair housing requires an increased investment in mobility strategies to promote integrated housing options.*

HUD's stated goals have been to invest in and revitalize distressed neighborhoods; to afford subsidized housing opportunities in areas with low-poverty, access to jobs, transportation, and education; and to help willing families who have been living in distressed neighborhoods move to areas of opportunity.<sup>31</sup> This Article focuses on recommendations to improve the latter, which I will refer to as "mobility strategies."<sup>32</sup>

Despite their ideological misgivings about government desegregation efforts, the new administration ought to acknowledge certain truths about the merits of investing in mobility strategies. First, due to practical realities and historic policy priorities, federally subsidized housing programs already disproportionately focus on delivering housing

---

*supra*, note 18, at 81. This fact cannot be explained away by choice. African Americans report a strong preference for living in integrated communities. *See* Seicshnaydre, *supra* note 17, at 981–83 (discussing findings by Camille Zubrinsky Charles from the Multi-City Study of Urban Inequality, which examined neighborhood race-composition preference among ethnic groups in the 1990s). This has created a system wherein the black middle class, growing at a steady yet marginal rate, is more precarious than that of other groups, because those families are more likely to remain within or close to racially segregated areas. *See* SHARKEY, *supra* note 14, at 28 fig.2.2 ("If there is any difference between children in the previous generation and in the current one, the degree of neighborhood disadvantage experienced by African American children has worsened in the current generation."); *see also* PATTILLO, *supra* note 14, at 10 (describing how multiple generations of black Americans live in the neighborhood of Groveland).

<sup>31</sup> *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42, 272, 42,279 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) ("HUD's rule recognizes the role of place-based strategies, including economic development to improve conditions in high poverty neighborhoods, as well as preservation of the existing affordable housing stock, including HUD-assisted housing, to help respond to the overwhelming need for affordable housing. Examples of such strategies include investments that will improve conditions and thereby reduce disparities in access to opportunity between impacted neighborhoods and the rest of the city or efforts to maintain and preserve the existing affordable rental housing stock, including HUD-assisted housing, to address a jurisdiction's fair housing issues."); U.S. DEP'T OF HOUS. & URBAN DEV., PUBLIC AND INDIAN HOUSING CHOICE NEIGHBORHOODS: 2013 SUMMARY AND STATEMENT INITIATIVES TO CONGRESS N-2, <http://portal.hud.gov/hudportal/documents/huddoc?id=choice-neighb.pdf>; *see also* Shaun Donovan, Prepared Remarks at the Fifth National Conference on Housing Mobility at the Urban Institute (June 12, 2012), [https://portal.hud.gov/hudportal/HUD?src=/press/speeches\\_remarks\\_statements/2012/Speech\\_06122012](https://portal.hud.gov/hudportal/HUD?src=/press/speeches_remarks_statements/2012/Speech_06122012); U.S. DEP'T OF HOUS. AND URBAN DEV., PROPOSED 2017 BUDGET FACT SHEET 2 (2016), <http://portal.hud.gov/hudportal/documents/huddoc?id=ProposedFY17FactSheet.pdf> (requesting an additional \$15 million for mobility); *Mission Statement*, HUD.GOV, <https://portal.hud.gov/hudportal/HUD?src=/about/mission> (last visited May 22, 2017).

<sup>32</sup> In this Article, "mobility" refers to delivery of hard and soft public and affordable housing units in opportunity neighborhoods as well as the activities necessary to help subsidized-housing families move into those neighborhoods.



and investing in distressed areas. Further, many public and private “place-based” strategies have fallen short of expectations because their limited scopes have been overwhelmed by countervailing forces associated with market realities, intergenerational poverty, and violence.<sup>33</sup> Second, people who grow up in low-poverty neighborhoods fare better economically.<sup>34</sup> And when Secretary Carson was asked in his nomination hearing with the Senate Banking Committee whether he supports government aid for people who need it, he replied that the goal of any government aid should be to help people become self-sufficient.<sup>35</sup>

Incidentally, a large body of research—both academic and quasi-experimental—shows housing mobility programs do just that.<sup>36</sup> Children in families who willingly move from extremely poor neighborhoods to low-poverty neighborhoods fare better over time—both economically and academically—thus slowing, reducing, or eliminating the compounding effects of intergenerational poverty.<sup>37</sup> Results from the country’s first

---

<sup>33</sup> See SHARKEY, *supra* note 14 at 12, 179–99 (discussing policy proposals for durable, intergenerational investments in deteriorated neighborhoods and noting that the federal commitment to neighborhood revitalization and stabilization has been “erratic” at best). The Obama administration’s Choice Neighborhoods program is a promising model for holistic neighborhood investment, but its limited scope will likely prevent it from having a lasting impact on distressed urban areas. *Id.* at 178. Additionally, the Aspen Institute’s Roundtable for Community Change found that programs that invested in low-poverty neighborhoods instead of moving residents out “could point to positive developments in the targeted communities, [but] the impacts of the programs were typically limited to the community residents that were the direct recipients of resources made available through the initiatives.” *Id.* at 139–40.

<sup>34</sup> See Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, HARV. UNIV. & NBER 1 (2015), [http://www.equality-of-opportunity.org/images/mto\\_paper.pdf](http://www.equality-of-opportunity.org/images/mto_paper.pdf) (“Individuals who live in high-poverty areas fare worse than those who live in lower-poverty neighborhoods on a wide range of economic, health, and educational outcomes.”).

<sup>35</sup> Matt Flegenheimer & Yamiche Alcindor, *Ben Carson Urges Ending Reliance on Welfare in Bid to Be Housing Chief*, N.Y. TIMES (Jan. 12, 2017), <https://nyti.ms/2ip5Jjq>.

<sup>36</sup> See Chetty et al., *supra* note 32, at 1.

<sup>37</sup> The Gautreaux program, see *infra* Part II.B.iv., and the Moving to Opportunity (MTO) program show positive results for children of families that participated in the programs. See SHARKEY, *supra* note 14, at 148–51 (showing particular improvements in language and reading skills for children who moved out of distressed neighborhoods during the MTO program in Baltimore and Chicago, and concluding that these children demonstrated larger gains than those in New York, Boston, and LA because the Baltimore and Chicago children were overwhelmingly African American and moving from more distressed neighborhoods than their counterparts in other cities); Chetty et al., *supra* note 32, at 5 (concluding that young children of families who were given vouchers during the MTO experiment to move to lower poverty neighborhoods saw substantially higher earnings during their lifetimes); James E. Rosenbaum, *Changing the Geography of Opportunity by Expanding Residential Choice: Lessons from the Gautreaux Program*, 6 HOUSING POL’Y DEBATE 231, 243–44 (1995) (showing that initial results of the Gautreaux program indicated children who moved to lower poverty neighborhoods as part of the program had better economic and educational

targeted mobility program<sup>38</sup> also found that families who voluntarily moved continued to live in communities with lower poverty than their original neighborhoods fifteen years later.<sup>39</sup> Adults who had moved to healthier neighborhoods as children earned far higher incomes than their counterparts who did not; they also graduated college at higher rates, were more likely to live in low-poverty neighborhoods as adults, and less likely to become single parents.<sup>40</sup> Hence, this research demonstrates how geographical mobility can lessen or disrupt the intergenerational effects of poverty, particularly those that are aggravated by challenging neighborhood circumstances.

But, as low-income families face significant social, economic, and political barriers to entry, it is nearly impossible for them to make these successful moves to low-poverty areas without government intervention. In addition to those barriers, many integrated neighborhoods simply lack existing affordable housing and the collective will to build it (to say nothing of the active will to keep it out).<sup>41</sup> This is precisely why housing mobility is an indispensable strategy for affirmatively furthering fair housing. And in any case, mobility has been an express part of HUD's mission and the mission of entities that receive federal housing dollars.<sup>42</sup> Although that express commitment is likely to change in predictable ways with the new administration, local recipients of HUD dollars have made their own commitments to further fair housing, and indeed some have their own court-ordered obligations to do so.<sup>43</sup> Still, implementing successful mobility strategies nationwide will require better public-private partnerships between landlords, developers, and entities using federal housing dollars.

*C. Judicial and regulatory enforcement of the AFFH provision does not adequately effectuate the principles, goals, and obligations embodied by the law.*

The FHA generally prohibits housing discrimination on the basis of

---

outcomes).

<sup>38</sup> The Gautreaux program was part of a 1976 consent decree with HUD that gave about 5,000 families on the Chicago Housing Authority waitlist the opportunity to move to mostly white and/or integrated suburban areas around Chicago between 1976 and the mid-1990s. See Rosenbaum, *supra* note 37 at 232-33.

<sup>39</sup> SHARKEY, *supra* note 14, at 146.

<sup>40</sup> See Chetty et al., *supra* note 32, at 1, 39.

<sup>41</sup> See BRIGGS ET AL., *supra* note 18, at 68 (stating "entry-level rental housing affordable to low- and moderate-income families, remains the 'neglected child' of U.S. housing policy").

<sup>42</sup> See *supra* note 28 and accompanying text.

<sup>43</sup> See Matthew J. Termine, Note, *Promoting Residential Integration Through the Fair Housing Act: Are Qui Tam Actions a Viable Method of Enforcing "Affirmatively Furthering Fair Housing" Violations?*, 79 FORDHAM L. REV. 1367, 1370-1400 (2010) (describing lawsuits against HUD recipients for failing to affirmatively further fair housing).

“race, color, religion, sex, familial status, or national origin.”<sup>44</sup> And the AFFH provision of the statute states that when federal money is involved, it is not enough to simply avoid discrimination; recipients must engage in activities meant to “assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”<sup>45</sup> But the provision’s murky definition and uncertain enforcement mechanisms have long frustrated housing advocates; for instance, before the July 2015 rule, HUD required little more from recipients than a short boilerplate certification attached to their regularly required reports to satisfy their AFFH obligations.<sup>46</sup>

Commensurate with administrative law principles, courts are hesitant to weigh-in on whether HUD is adequately fulfilling its statutory mandates, but past cases demonstrate that judges will require HUD and its recipients to do more than nothing to further fair housing. For instance, courts have set aside HUD decisions when it is clear that they were made without any regard to existing racial segregation, as HUD discretion “must be exercised within the framework of the national policy against discrimination in federally assisted housing . . . and in favor of fair housing.”<sup>47</sup> And courts have held entities liable for violations of § 3608(d) when it is clear that recipients’ actions are perpetuating segregation without considering and pursuing obvious alternatives. For example, in *Thompson v. U.S. Department of Housing & Urban Development*,<sup>48</sup> the District Court of Maryland held HUD liable under the Administrative Procedure Act for failing to direct the Baltimore Housing Authority to consider a regional strategy to further fair housing.<sup>49</sup> Instead, the agency had chosen

---

<sup>44</sup> 42 U.S.C. § 3604(a) (2012).

<sup>45</sup> NAACP v. Sec’y of Hous. & Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987).

<sup>46</sup> See, e.g., Letter from NAACP Legal Defense Fund to U.S. Dep’t of Hous. & Urban Dev. (Sept. 17, 2013) (commenting on the proposed AFFH rule that “HUD should clarify that the central purpose of the Fair Housing Act’s *affirmatively furthering fair housing* mandate is to promote integration”); OPPORTUNITY AGENDA, PUBLIC POLICY BRIEF: REFORMING HUD’S REGULATIONS TO AFFIRMATIVELY FURTHER FAIR HOUSING 3 (2010), [https://opportunityagenda.org/files/field\\_file/2010.03ReformingHUDRegulations.pdf](https://opportunityagenda.org/files/field_file/2010.03ReformingHUDRegulations.pdf). As part of the old AI planning process, grantees must certify that their strategies will affirmatively further fair housing because 42 U.S.C. § 1437 amended the United States Housing Act, and introduced the 5-Year Plan and Annual Plan requiring certifications that PHAs will affirmatively further fair housing. § 1437c-1(d)(16). Additionally, the new Affirmatively Furthering Fair Housing regulations amend Title 24 of the Code of Federal Regulations to require PHAs, municipalities, and other grant recipients to undergo a standardized Assessment of Fair Housing using HUD-provided data to identify barriers to fair housing and develop strategies to overcome them. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,273 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

<sup>47</sup> Shannon v. U.S. Dep’t of Hous. & Urban Dev., 436 F.2d 809, 819 (3d Cir. 1970) (citing 42 U.S.C. §§ 2000d, 3601).

<sup>48</sup> 348 F. Supp. 2d 398 (D. Md. 2005).

<sup>49</sup> See *id.* at 408–09.

sites for public housing developments in majority black neighborhoods and justified its actions by the fact that those neighborhoods covered most of the city, as all but two neighborhoods in the city of Baltimore were majority black.<sup>50</sup> But the District Court reasoned that as an agency with national reach and a broad mission, HUD should have expanded Baltimore's subsidized housing stock throughout surrounding areas in suburban Baltimore County, most of which were desegregated areas.<sup>51</sup>

In a more recent case against the Westchester Housing Authority, plaintiffs enforced the AFFH requirement through the False Claims Act, proving that recipients of federal funds had made false or fraudulent certifications that they were taking steps to affirmatively further fair housing.<sup>52</sup> In their certifications, the county had declined to analyze race-based impediments to fair housing in direct contravention to the Fair Housing Guide which supplied HUD's principle AFFH guidance at the time, and instead identified only the general lack of affordable housing throughout the county as the source of fair housing impediment.<sup>53</sup>

We can learn from the Baltimore and Westchester cases that federal courts will enforce the AFFH provision when it is clear that entities are not even *considering* the factors that make up the backbone of affirmative furthering fair housing. Moreover, courts have made clear that affirmatively furthering fair housing is about the geographic placement of affordable housing in areas of non-minority concentration, rather than simply the production of affordable housing anywhere.<sup>54</sup> But as this article will discuss, federally-imposed regulatory obstacles and programmatic realities often obstruct affirmative desegregation efforts, even when they are ordered by federal courts.<sup>55</sup>

The AFFH rule was passed in July 2015 after decades of struggling against widespread political opposition to effective, federally-led fair housing enforcement while simultaneously facing well-earned criticism

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 668 F. Supp. 2d 548, 550, 562–65 (S.D.N.Y. 2009) (holding that Westchester County's certifications were false as a matter of law); see also *United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cty.*, No. 06 Civ. 2860 (DLC) (S.D.N.Y. 209) (Stipulation and Order of Settlement and Dismissal).

<sup>53</sup> See *Anti-Discrimination Center*, 668 F. Supp. 2d at 561–67.

<sup>54</sup> See *Thompson*, 348 F. Supp. 2d at 409 (“It is high time that HUD live up to its statutory mandate to consider the effect of its policies on the racial and socioeconomic composition of the surrounding area and thus consider regional approaches to promoting fair housing opportunities for African-American public housing residents in the Baltimore Region.”); *Anti-Discrimination Center*, 668 F. Supp. 2d at 552 (grantee must “analyze the impact of race on housing opportunities and choice in its jurisdiction”).

<sup>55</sup> See *infra* Part II.D.

from advocates about the lethargic pace of desegregation efforts.<sup>56</sup> Under previous regulations, certain HUD recipients were required to undertake an Analysis of Impediments (AI), wherein they surveyed housing patterns in their jurisdictions, identified barriers to fair housing, and created plans for overcoming those barriers.<sup>57</sup> The AI, however, was universally considered ineffective; recipients were required only to certify that they had conducted the analysis, and there was practically no follow-up or verification on HUD's part.<sup>58</sup> In 2010, a Government Accountability Office report raised concerns about the AI as a wholly inadequate means of enforcement, which finally spurred the agency's full commitment to revise the reporting requirement;<sup>59</sup> and HUD's promulgation of its new rule was certainly a victory for the agency, as its inability to offer adequate guidance on affirmatively furthering fair housing has long been seen as a weighing down other efforts to enforce the provision.<sup>60</sup> Unfortunately, HUD's victory in passing the rule—and thus in signaling a tangible federal commitment to fair housing—is likely short-lived, as the rule has been viciously criticized by Republicans, who as of Summer 2017 hold both branches of Congress and the Presidency.<sup>61</sup>

But the new AFFH regulation would not, by itself, have spurred change in the geography of subsidized housing because its emphasis on recipient accountability misses the mark—indeed, HUD has long delegated the affirmative obligation to further fair housing to its local recipients to no avail.<sup>62</sup> (Although some jurisdictions that have participated in HUD's first round of fair housing assessments under the new rule reported productive results).<sup>63</sup> And while the dismal results of federal desegregation efforts might be attributed to misguided strategy and lack of political will from PHAs, they more likely stem from local housing authorities' repeated decisions to take the "path of least

---

<sup>56</sup> See Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,275 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903); see also Hannah-Jones, *supra* note 17.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 31 (2010) ("Given that many AIs are outdated, they do not likely serve as effective planning documents to identify and address current potential impediments to fair housing choice."); see also Hannah-Jones, *supra* note 17 (summarizing results from the GAO report).

<sup>60</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at 34; Seicshnaydre *supra*, note 17 at 1012–13.

<sup>61</sup> See *supra* note 10.

<sup>62</sup> See Seicshnaydre, *supra* note 17 at 1012–13.

<sup>63</sup> Jake Blumgart, *Fair Housing Still Has a Chance Under Trump*, SLATE (March 14, 2017).

resistance<sup>64</sup> by creating desperately needed public housing units in the less-than-desirable neighborhoods where they are easier and less costly to acquire and develop.<sup>65</sup> As discussed above, resistance to public housing development of course takes many illusive forms, but there are some impediments over which HUD has direct control: the federal regulations that prevent the development of subsidized housing in desegregated, low-poverty neighborhoods through public-private partnerships.

*D. Additional legal directives that overlap the AFFH provision compel HUD and its recipients to create housing opportunities in low-poverty neighborhoods.*

Housing authorities are also currently required—by site selection guidelines<sup>66</sup> and, in some jurisdictions, court orders<sup>67</sup>—to make public housing available in low-poverty, non-minority concentrated areas. The landmark Supreme Court case *Texas Department of Housing and Community*

---

<sup>64</sup> Seicshnaydre, *supra* note 27, at 663, 674.

<sup>65</sup> *See id.* at 663, 674.

<sup>66</sup> Site selection regulations were promulgated in large part to help avoid perpetuating the effects of past government-driven housing segregation and prevent further segregation of public housing. For instance, the regulations quite intentionally prohibit construction of large, 100% public housing complexes by prohibiting construction that would “cause a significant increase in the proportion of minority to non-minority residents in the area.” 24 C.F.R. § 941.202(c)(1)(ii) (2013). Likewise, they promote the proliferation of public housing units that are scattered across areas of opportunity, requiring that housing be accessible to “social, recreational, educational, commercial, and health facilities and services, and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing.” 24 C.F.R. § 941.202(g). For a helpful discussion of the limits of siting regulations to create housing in areas of opportunity, which stem largely from difficulty of enforcement and the ease at which HUD officials can issue waivers, see Philip Tegeler et al., *Opportunity and Location in Federally Subsidized Housing Programs*, POVERTY & RACE RESEARCH ACTION COUNCIL (Oct. 2011), <http://www.prrac.org/pdf/OpportunityandLocationOctober2011.pdf>.

<sup>67</sup> For instance, the Chicago Housing Authority (CHA) has been implementing the federal Judgment Order from the first housing desegregation lawsuit, *Gautreaux v. Chicago Housing Authority*, for nearly fifty years. *See Gautreaux v. Chi. Hous. Auth.*, 304 F. Supp. 736, 737–38 (N.D. Ill. 1969) (requiring, among other things, that the CHA match every unit of public housing built in limited areas, i.e., areas with high levels of minority concentration, with units in general areas). Court orders in a large-scale Dallas public housing desegregation case, *Walker v. City of Mesquite*, require the Dallas Housing Authority “to develop, either through construction or acquisition, 3,205 new units of public housing in predominately white areas [where] the poverty rate does not exceed 13%.” *See Walker v. City of Mesquite*, 169 F.3d 973, 977 (5th Cir. 1999). Most recently, Westchester County was ordered to develop at least 750 units of public housing in low-poverty areas. *United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cty.*, No. 06 Civ. 2860 (DLC), at 6 (S.D.N.Y. 2009) (Stipulation and Order of Settlement and Dismissal). The agreement provides that at least 630 of the units be built in municipalities with African-American populations of less than three percent and Hispanic populations of less than seven percent. *Id.*

*Affairs v. Inclusive Communities Project, Inc.* held that disparate impact claims are cognizable under the FHA—meaning agencies that craft programs which perpetuate segregation could be held liable, even if they do so unintentionally and without racial animus.<sup>68</sup> In reaching its decision, the Court considered that Congress had intended to use the FHA to actively eliminate past vestiges of housing discrimination by both private and government actors.<sup>69</sup> HUD should consider *Inclusive Communities Project* a directive to produce more subsidized housing in more well-resourced, desegregated neighborhoods because the opinion specifically held that consistent decisions to develop subsidized housing in poor, majority-minority neighborhoods instead of integrated neighborhoods could violate the FHA.<sup>70</sup> Thus whether or not HUD’s current leadership believes in fair housing, they would be wise to enact reforms like those offered in this Article that could help recipients increase subsidized housing production in low-poverty neighborhoods and avoid patterns and practices that expose them to further liability.

*E. HUD has been increasing its reliance on the private sector for decades, and now HUD needs to enable better private sector cooperation to deliver the housing stock that affirmatively furthers fair housing.*

HUD’s near-total reliance on the private sector is the result of both deliberate policy choices by successive presidential administrations and consistent votes by Congress to reduce housing appropriations over the last 40 years.<sup>71</sup> For instance, rent vouchers that are issued to individuals for use on the private market (now called Housing Choice Vouchers (HCVs)), have been the preferred subsidy instrument ever since President Nixon placed a temporary moratorium on production of

---

<sup>68</sup> 135 S. Ct. 2507, 2525 (2015).

<sup>69</sup> See *id.* at 2516, 2522 (“Disparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers,’ . . . . The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.” (quoting *Griggs v. Duke Power, Co.*, 401 U.S. 424 (1971))).

<sup>70</sup> *Inclusive Cmty. Project*, 135 S. Ct. at 2525.

<sup>71</sup> See Smetak, *supra* note 19, at 10–11 (explaining that “federal funding levels have regularly failed to meet the needs of public housing”); Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy, 1949 to 1999*, 11 HOUSING POL’Y DEBATE 489, 490–92 (2000) (describing the “much diminished federal role of program design and outcomes” and the “ascendant role for state and local governments, and the opportunity for the recipients of housing vouchers to scout the private market for the best deal they can find”); see also 42 U.S.C. §§ 1437(a)(4) (2012) (encouraging local housing agencies to forge public-private partnerships to develop and manage subsidized housing).

publicly owned “hard” units in 1973.<sup>72</sup> Although the voucher program has evolved over the years—from long-term contracts that covered large “Section 8 buildings” to small-scale, scattered, project-based vouchers (PBVs) and tenant-based HCVs—it continues to be the largest source of federally subsidized housing.<sup>73</sup>

Similar to the voucher program, delivering “hard” units that are owned and occasionally operated by PHAs now requires private development and financing, and the operation of such buildings is often outsourced to private management companies.<sup>74</sup> Most recently, HUD announced the Rental Assistance Demonstration program, which allows PHAs to leverage their buildings to cover maintenance and operating shortfalls with infusions of private cash.<sup>75</sup> Around the time the program was announced, a report cited a \$25 billion funding deficit in the country’s public housing stock,<sup>76</sup> making it clear that funding realities have forced recipients of HUD money to seek private capital for basic maintenance of units, to say nothing of new construction.<sup>77</sup> It is safe to predict that if the Trump administration works to increase the supply of subsidized housing—which is unlikely, considering the administration’s stance toward government social programs—it will do so with continued and increasing emphasis on the private sector.<sup>78</sup>

HUD has defined the AFFH duty as “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that

<sup>72</sup> Orlebeke, *supra* note 71, at 490–91.

<sup>73</sup> U.S. DEP’T OF HOUS. & URBAN DEV., FY2016 CONGRESSIONAL JUSTIFICATIONS 6-1, 6-2 (2015), <http://portal.hud.gov/hudportal/documents/huddoc?id=9-FY16CJ-Tenant-BasedRA.pdf>; *United States Fact Sheet: Federal Rental Assistance*, CTR. ON BUDGET & POL’Y PRIORITIES, 1 (Mar. 30, 2017), <http://www.cbpp.org/sites/default/files/atoms/files/4-13-11hou-US.pdf>.

<sup>74</sup> See ECONOMETRICA, INC., U.S. DEP’T OF HOUS. & URBAN DEV., INTERIM REPORT: EVALUATION OF HUD’S RENTAL ASSISTANCE DEMONSTRATION iii (2016).

<sup>75</sup> See *id.*; OFFICE OF PUB. & INDIAN HOUS., PIH-2012-32 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, REVISION 2, at 5–6 (2013).

<sup>76</sup> MERYL FINKEL ET AL., ABT ASSOCS. INC., CAPITAL NEEDS IN THE PUBLIC HOUSING PROGRAM v–vi (2010).

<sup>77</sup> See Smetak, *supra* note 19, at 10–11.

<sup>78</sup> See Jose A. DelReal & David Weigel, *Carson Pushes Increased Private-Sector Role in HUD Programs*, WASH. POST (Jan. 12, 2017), [https://www.washingtonpost.com/powerpost/carson-to-face-questions-on-his-qualifications-to-head-hud/2017/01/11/c64103b8-d85d-11e6-9f9f-5cdb4b7f8dd7\\_story.html?utm\\_term=.8ac22e06ad25](https://www.washingtonpost.com/powerpost/carson-to-face-questions-on-his-qualifications-to-head-hud/2017/01/11/c64103b8-d85d-11e6-9f9f-5cdb4b7f8dd7_story.html?utm_term=.8ac22e06ad25); see also Joseph Tanfani, *Ben Carson at Confirmation Hearing: Too Many People Live in Public Housing, and I Want to Help*, L.A. TIMES (Jan. 12, 2017), <http://www.latimes.com/politics/la-na-pol-carson-hud-20170112-story.html>. Programs like the Low Income Housing Tax Credit (LITHC) are among the rare federal housing programs that enjoy bipartisan support—notably, it was the only corporate tax credit retained under Dave Camp’s (R-MI) draft tax reform legislation from the House Ways and Means Committee in 2014. See Tax Reform Act of 2014, H.R. 1, 113th Cong. § 3204 (2d Sess. 2014).



restrict access to opportunity based on protected characteristics.”<sup>79</sup> Making public housing units available in communities that have historically excluded protected classes—particularly black families—is at this point the principle means of “overcom[ing] patterns of segregation.”<sup>80</sup> Clearly then HUD recipients must work with private actors to make these units available, and they have several means of doing so.

First, they can use federal capital funds to purchase “scattered site” units in these neighborhoods.<sup>81</sup> The scattered site program is governed by capital regulations, and it enables PHAs to purchase existing individual apartment units, single-family homes, and small multiunit buildings just as private consumers would, and then operate these hard units as public housing.<sup>82</sup> PHAs can also acquire scattered sites through “turnkey development,” wherein they acquire units with the help of private developers who have access to private capital.<sup>83</sup> Second, under the project based voucher (PBV) program, PHAs can enter into long-term contracts under which the housing authority rents a unit or group of units from landlords in opportunity neighborhoods.<sup>84</sup> Third, PHAs can ensure that residents are able to use HCVs in middle-class and affluent neighborhoods with good amenities.<sup>85</sup> Both the PBV and HCV programs operate within Section 8 regulations, and they deliver “soft units,” which are privately owned but supported by public subsidies.<sup>86</sup>

All of these methods require PHAs and entities receiving HUD dollars to navigate markets with low poverty, good schools, and access to quality amenities—areas where competition for housing is fierce. Under the current federal regulatory scheme, unfortunately, PHAs and others

---

<sup>79</sup> For the full definition, see U.S. DEP’T OF HOUS. & URBAN DEV., AFFH FACT SHEET: THE DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING (2015).

<sup>80</sup> Black families comprise a disproportionately large segment of the public housing population, which is why the exclusion of subsidized housing is historically and intimately related to the exclusion of black families. Nationwide, black households make up 45% of public housing households but only 12% of all households. Nat’l Low Income Housing Coalition, *Who Lives in Federally Assisted Housing? Characteristics of Households Assisted by HUD Programs*, Nov. 2012, at 1, 3. In Chicago and Philadelphia, about 60% of public housing households are black; in St. Louis, the figure is 92%; and in New York, 53%. See *Resident Characteristics Report*, HUD.GOV, <https://pic.hud.gov/pic/RCRPublic/rcrmain.asp> (last visited May 23, 2017).

<sup>81</sup> See 24 C.F.R. § 905.400 (2016).

<sup>82</sup> See ENTER. FOUND., *DEVELOPING AND MANAGING SCATTERED-SITE RENTAL HOUSING* 1–3 (1999). See generally JAMES HOGAN, *SCATTERED-SITE HOUSING: CHARACTERISTICS AND CONSEQUENCES* xiv (1996) (examining the “origins and characteristics of scattered-site housing in the United States”).

<sup>83</sup> 24 C.F.R. § 905.600(a)(2).

<sup>84</sup> *Id.* §§ 880–882.

<sup>85</sup> *Id.* § 982.1(a).

<sup>86</sup> *Id.* § 982.1(b).

using HUD dollars are not viable competitors for reasons I will explain in the next section. Adding to the problem, of course, is an administration that is actively hostile toward fair housing.<sup>87</sup> But, under the auspice of an eventual federal recommitment to increasing quality housing for low-income people, the following sections describe some legal and regulatory reforms that will be necessary to expand subsidized housing opportunities in desegregated neighborhoods.<sup>88</sup>

## II. HUD NEEDS TO IMPLEMENT PROGRAMMATIC AND REGULATORY REFORMS TO FOSTER THE EFFECTIVE PUBLIC-PRIVATE PARTNERSHIPS NEEDED TO AFFIRMATIVELY FURTHER FAIR HOUSING

*A. To further fair housing through brick and mortar development, HUD must enact regulatory reforms*<sup>89</sup>

HUD recipients' ability to affirmatively further fair housing depends largely on their ability to create "entrance strategies" for subsidized housing residents to move to opportunity areas.<sup>90</sup> Two entrance strategies with lasting effects on neighborhood affordability are (1) the acquisition of hard public housing units through the scattered site program, and (2) the establishment of partnerships with mission-driven developers to execute long-term PBV contracts in opportunity neighborhoods.<sup>91</sup> But if executed in thriving housing markets, both of these strategies require

---

<sup>87</sup> See Emily Badger, *How Ben Carson Could Undo a Desegregation Effort*, N.Y. TIMES (Nov. 23, 2016), <https://nyti.ms/2ghvpKQ>.

<sup>88</sup> Current HUD civil servants might find a way to enact these reforms by packaging them in a Republican ideological commitment to efficiency, deregulation, and free markets. The environmental assessment reforms would be especially palatable to a Republican administration and conservative Congress.

<sup>89</sup> In this section, I rely on information gleaned from working to help develop public housing in desegregated neighborhoods in Chicago. Considering that the cost of for-sale housing property is lower in Chicago than in several other major American metropolitan areas (e.g., New York, Boston, San Francisco, Seattle, and Los Angeles) and comparable to many others (e.g., Minneapolis, Philadelphia, Denver, and Atlanta) it is fair to assume experiences there are common in other major metropolitan areas around the country. See *American House Prices: Realty Check*, ECONOMIST (Aug. 24, 2016), <http://www.economist.com/blogs/graphicdetail/2015/11/daily-chart-0> (charting America's housing market from 1980 to 2016).

<sup>90</sup> See Seicshnaydre, *supra* note 17, at 986–94. Seicshnaydre explains how federal responses to the "uneven geography" of race and opportunity have focused on diluting concentrations of urban poverty, but have not provided adequate strategies to residents of these areas for entering integrated or predominantly white neighborhoods. *Id.* at 974. The article concludes that until federal policy focuses on creating "entrance strategies" that may put local policymakers at odds with affluent constituents, and the mandate to affirmatively further fair housing will be unachievable. *Id.* at 1017–18.

<sup>91</sup> See *id.* at 1015.

users of federal money to compete with other private buyers. Unfortunately, policies and regulations render it nearly impossible to be successful in doing so. First, HUD generally does not allow recipients to acquire property at a purchase price that exceeds appraised value.<sup>92</sup> Second, a prohibition on “subsidy mixing” prevents PHAs from forging effective partnerships with private developers to purchase and rehabilitate the properties and operate the units with PBVs.<sup>93</sup> Third, purchasers must conduct a lengthy environmental evaluation, which delays contract execution far beyond what a reasonable seller in a good market will tolerate—especially if there are multiple offers. The regulatory and programmatic reforms suggested here are practical steps that could ameliorate some of the administrative barriers to development. This, in turn, could free up energy and resources PHAs need to focus on other objectives, such as providing services for residents and overseeing management of current housing stock.

*i. Restrictions on purchase price*

PHAs that purchase property with capital funds through the scattered site program are able to do so more effectively by working with a developer who can acquire property expediently and in larger volume.<sup>95</sup> Through this developer-partnership method, or “turnkey development,” developers purchase property (or convert property they already own), perform needed repairs and renovations in accordance with the federal Housing Quality Standards (HQS), and then sell the units to the housing authority for a price that includes a developer’s fee.<sup>96</sup>

However, in strong housing markets developers cannot acquire, rehabilitate, and sell properties to PHAs in accordance with federal regulations without losing money—a fact that eliminates housing authorities’ most efficient strategy to acquire units in desegregated, low-poverty neighborhoods. Federal law requires entities purchasing and/or rehabilitating property with the intention of selling it to a housing

---

<sup>92</sup> U.S. DEP’T OF HOUS. & URBAN DEV., 7417.1 REV-1, PUBLIC HOUSING DEVELOPMENT HANDBOOK 8-62 (1992), <https://portal.hud.gov/hudportal/documents/huddoc?id=74171c8PIHH.pdf> (“The Valuation Branch shall review the Offer of Sale of Land . . . to determine that the purchase price is consistent with the requirements of paragraph 8-5 and *does not exceed the appraised value* established by the Valuation Chief.” (emphasis added)).

<sup>93</sup> 24 C.F.R. § 983.54 (2016).

<sup>95</sup> Private developers—particularly large ones—have cash reserves and multiple lines of credit. PHAs, on the other hand, have only annual allotments from HUD and must seek HUD approval before purchasing property. See 24 C.F.R. § 905.606(a) (“Prior to developing public housing, either through new construction or through acquisition, with or without rehabilitation, a PHA must submit a development proposal to HUD in the form prescribed by HUD, which will allow HUD to assess the viability and financial feasibility of the proposed development.”).

<sup>96</sup> 24 C.F.R. § 941.102(a)(2).

authority within three years to comply with the Davis-Bacon Act.<sup>97</sup> The Act mandates that labor on federally funded or assisted contracts must be paid according to the local prevailing wage (as determined by the United States Department of Labor), and that contractors use certain procedures to document compliance.<sup>98</sup> The Act drives the costs of rehabilitations higher than those of typical private projects, particularly in cities that have widely variable construction wages.<sup>99</sup> And even in those that do have a high prevailing wage, the Act's costly recordkeeping requirements—which apply no matter the contractor's size or role in the project—also drive up costs.<sup>100</sup> The result is that the total cost of purchasing and developing a unit, home, or small apartment building will likely exceed the appraised value of the finished product.<sup>101</sup> Yet public housing authorities are generally restricted by HUD guidance from paying above appraised value for a property, regardless of the developer-incurred costs.<sup>102</sup> Furthermore, even if the appraised value does ultimately cover the development costs, developers have no way of knowing at the beginning of the process that it will—appraisals being more an art than a science.<sup>103</sup> And when developers foresee the probability—often the likelihood—of losing money on a PHA project in a high-property-value neighborhood, they understandably determine not to proceed.<sup>104</sup>

The appraised-value restriction also thwarts acquisitions in low-poverty neighborhoods even if housing authorities purchase properties outright without a developer intermediary.<sup>105</sup> Although regulations do

---

<sup>97</sup> 40 U.S.C. § 3141 (2012).

<sup>98</sup> *Id.* §§ 3141–3148; U.S. DEP'T OF HOUS. & URBAN DEV., HUD-52482, GUIDE FORM OF TURNKEY DEVELOPER'S PACKET 6 (2014).

<sup>99</sup> Interview with Nicholas Brunick, Partner at Applegate & Thorne-Thomsen (June 29, 2016). Mr. Brunick represents affordable housing developers in complex real estate transactions. He has expertise in HUD capital programs, tax credit financing, Section 8 and other operating subsidies, and has been working in the field of public and affordable housing field for more than 20 years as an advocate and attorney for developers.

<sup>100</sup> 24 C.F.R. § 570.490; U.S. DEP'T OF HOUS. & URBAN DEV., LABOR RELATIONS DESK GUIDE LR01.DG, DAVIS-BACON LABOR STANDARDS: A CONTRACTOR'S GUIDE TO PREVAILING WAGE REQUIREMENTS FOR FEDERALLY-ASSISTED CONSTRUCTION PROJECTS 2–4 (2012).

<sup>101</sup> Telephone Interview with Peter Levavi, Senior Vice President at Brinshore Development, LLC, Chicago, Ill. (July 18, 2016).

<sup>102</sup> U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 92, at 8-62.

<sup>103</sup> Interview with Nicholas Brunick, *supra* note 99. HUD does require “qualified” appraisers, but the regulations are silent on whether PHAs can “appraisal shop.” However, most PHAs keep a number of appraisers on retainer who have been through a procurement process, so the PHA is in practice usually restricted to that pool. *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*; Telephone Interview with Peter Levavi, *supra* note 101.

not explicitly forbid recipients of HUD funds from paying above the appraised value for property, internal guidance often leads HUD field offices to withhold approval on these deals. Convincing the field officers to do otherwise requires prolonged negotiation for which PHAs do not have the time.<sup>107</sup> By contrast, market-rate developers are typically paying cash on the spot for multiunit buildings in thriving areas.<sup>108</sup> Clearly, then, owners of desirable property have no reason to wait for PHAs to receive approval for a bid when they could otherwise sell to a quick and certain market-rate buyer, and this places public entities using HUD dollars at a significant disadvantage.

Housing authorities are under immense pressure to provide units for families in need; in many large jurisdictions public housing waitlists contain tens of thousands of families who wait years for units.<sup>109</sup> By making acquisitions in middle-class and affluent neighborhoods impossibly difficult, the appraised-value restriction in turn pushes HUD recipients to continue developing in distressed neighborhoods that already contain the bulk of subsidized housing.<sup>110</sup>

HUD should therefore revise its policies and practices with respect to appraised values. For example, HUD could negotiate yearly contracts that allow PHAs to make offers at a certain percentage above appraised value for units in low-poverty neighborhoods when specified conditions are met. HUD could also work with recipients and developers to agree on purchase prices that account for the Davis-Bacon Act imposed costs of turnkey development in low-poverty neighborhoods. Negotiating said agreements on an annual basis would also allow parties to consider the most up-to-date housing market indicators, thereby enabling PHAs and their partners to better compete against other private developers in

---

<sup>107</sup> Conversations with Jolene Saul, former Senior Director of Acquisitions at Chicago Housing Authority (Nov. 6, 2015; Apr. 11, 2016; May 9, 2016).

<sup>108</sup> Interview with Nicholas Brunick, *supra* note 99.

<sup>109</sup> See Lolly Bowean, *Chicago Housing Authority Opens Wait Lists for Public Housing Vouchers*, CHI. TRIB. (Oct. 27, 2014), <http://www.chicagotribune.com/news/ct-chawaiting-list-met-1028-20141027-story.html> (“Still, the current [opening of the waitlist] comes as the agency has been under fire for not doing enough to house the city’s poorest and most vulnerable populations. In July, a report from an independent think tank revealed that the agency had banked more than \$355 million rather than use the money for housing. Local officials and the U.S. Department of Housing and Urban Development have pressed the agency to serve more people.”); *All Things Considered: Some on Public Housing Waitlists Are Moving to Get Vouchers*, NAT’L PUB. RADIO (Oct. 29, 2014), <http://www.npr.org/2014/10/29/359892963/some-on-public-housing-waitlists-are-moving-to-get-vouchers>; Maryalice Gill, *Waiting List for Public Housing Can Stretch on for Years*, TELEGRAPH (Sept. 16, 2012), <http://www.classifiedsnh.com/news/975533-196/waiting-list-for-public-housing-can-stretch.html>.

<sup>110</sup> See Seicshnaydre, *supra* note 27, at 670–71; *see also Affirmatively Furthering Fair Housing: Build an AFFH Map*, *supra* note 5 (see, e.g., Map 5: Publicly Supported Housing and Race/Ethnicity for Cook County).

quickly acquiring properties. And crucially, developers would be enabled to buy, rehabilitate, and sell housing in high-property-value neighborhoods to PHAs without losing money.<sup>111</sup>

ii. *'Double Subsidy' prohibition*

Community disapproval in middle class and affluent neighborhoods continues to be a serious barrier to the creation of subsidized housing, despite the fact that housing authorities have more legal tools to overcome resident opposition at their disposal today.<sup>112</sup> But one vehicle for delivering subsidized units while avoiding the risk of community resistance is the PBV program. Buildings with PBVs are often privately owned and operated, so executing a deal to attach vouchers to their units typically does not trigger public hearings, zoning board approvals, and community meetings.<sup>113</sup> And affordable housing developers occasionally approach PHAs with PBV proposals for specific multiunit buildings in opportunity neighborhoods they want to buy and rehabilitate, which takes the leg work out of recruiting management companies into the program.<sup>114</sup>

Again, however, HUD-imposed barriers often prevent PHAs from making these promising deals. Federal regulations forbid mixing capital funds with operating subsidies in creating PBV arrangements, which means that housing authorities may not provide capital financing to a developer to buy and rehabilitate units and then attach PBVs to those same units.<sup>115</sup> But in order to make these deals viable in high-property-value neighborhoods, developers frequently need multiple subsidies.<sup>116</sup> For instance, in most desegregated, low-poverty neighborhoods in Chicago, developers cannot afford to rehabilitate a building in accordance with federal HQS and charge rents low enough to meet PBV payment standards unless they secure subsidized financing for the rehabilitation.<sup>117</sup>

---

<sup>111</sup> In addition to benefitting residents, stockpiles of high-value property could be leveraged for more maintenance and rehabilitation money in the long-term under the new RAD program. See OFFICE OF PUB. & INDIAN HOUS., *supra* note 73, at 5–6.

<sup>112</sup> See Corianne Payton Scally & J. Rosie Tighe, *Democracy in Action? NIMBY as Impediment to Equitable Affordable Housing Siting*, 30 HOUSING STUD. 749, 760–61 (2015); In making the case for “entrance strategies” to predominately white neighborhoods, which are inexorably correlated with neighborhoods of wealth and access to education, jobs, and amenities, Seicshnaydre highlights the “very real possibility that white choices in favor of homogeneity makes pro-integration choices unattainable.” Seicshnaydre, *supra* note 17, at 986–90.

<sup>113</sup> Telephone Interview with Peter Levavi, *supra* note 101.

<sup>114</sup> *Id.*

<sup>115</sup> 24 C.F.R. § 983.54 (2016).

<sup>116</sup> Telephone Interview with Peter Levavi, *supra* note 101; *The Cost of Affordable Housing: Does it Pencil Out?*, URB. INST., <http://apps.urban.org/features/cost-of-affordable-housing/> (last visited May 24, 2017).

<sup>117</sup> Telephone Interview with Peter Levavi, *supra* note 101.

Because affordable housing developers cannot use capital loans in combination with operating subsidies, many apply for the Low Income Housing Tax Credit (LIHTC) to partially finance buildings they plan to operate with PBVs.<sup>118</sup> LIHTCs, which are issued by the IRS and administered by state housing agencies, are extremely competitive; each year, states reject between 50% and 75% of tax credit applications—making them hardly a dependable financing stream for affordable housing developers.<sup>119</sup> Further, LIHTC-financed units are generally open to residents earning 50% or 60% of Area Median Income (AMI), meaning that unlike properties financed by public housing capital funds, LIHTC-financed properties cannot serve the lowest-income households.<sup>120</sup>

The prohibition on mixing capital and operating funds is meant to force developers to leverage federal financing as much as possible: if developers cannot finance their entire project with a subsidy from the housing authority, the assumption is that they will be forced to tap into private debt or generate revenue from other market-rate rental units.<sup>121</sup> But regardless of HUD's subsidy-mixing prohibition, savvy affordable housing developers familiar with the arcana of public financing will patch together deals using different state, local, and federal subsidies that they are otherwise permitted by law to mix. The result is often a slew of funding sources answering to different requirements and regulations—a funding cocktail that slows and complicates development considerably.<sup>122</sup> For example, a developer could use city-issued HOME or Community Development Block Grant (CBDG) funds to buy and rehabilitate a building and then use PHA-issued PBVs to cover the cost of operating the units. However, the whole process would take a year longer than it would with capital financing and operating subsidies from a common source—here, the housing authority.<sup>123</sup> In light of this fact, HUD's subsidy mixing

---

<sup>118</sup> See *Overview of the Low Income Housing Tax Credit Program*, NAT'L HOUSING L. PROJECT, <https://nhlp.org/lihtcoverview> (last visited May 24, 2017).

<sup>119</sup> *Id.*; see Nathaniel Baum-Snow & Justin Marion, *The Effects of Low Income Housing Tax Credit Developments on Neighborhoods*, 93 J. PUB. ECON. 654, 656 (2009) ("Most states receive [LIHTC] applications for between two and four times their allotment.").

<sup>120</sup> 26 U.S.C. § 42(g)(1) (2012); *Overview of the Low Income Housing Tax Credit Program*, *supra* note 118; *The Cost of Affordable Housing: Does it Pencil Out?*, *supra* note 116.

<sup>121</sup> See OFFICE OF THE COMPTROLLER OF THE CURRENCY, *LOW-INCOME HOUSING TAX CREDITS: AFFORDABLE HOUSING INVESTMENT OPPORTUNITIES FOR BANKS 3* (2014) (explaining that "project sponsors," here, developers, "use the tax credit to raise equity from private investors").

<sup>122</sup> Interview with Nicholas Brunick, *supra* note 99.

<sup>123</sup> *Id.* See generally *Home Investment Partnerships Program*, U.S. DEP'T OF Hous. & URB. DEV., [https://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/affordablehousing/programs/home/](https://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/programs/home/) (last visited May 24, 2017) ("The HOME Investment Partnerships Program (HOME) provides formula grants to States

prohibition seems arbitrary; worse, it frustrates the production of homes for needy families in opportunity neighborhoods. A far more efficient system would allow developers to use all PHA funds—both capital and operating—to rehabilitate and operate buildings with PBV units.

*iii. Environmental review*

Federal law prohibits the Secretary from releasing federal funds for a HUD project until he has received certification that the environmental review for the site is complete,<sup>124</sup> which delays execution of the purchase contract considerably.

It is of course prudent for private purchasers to conduct environmental review before contracting for a piece of property or executing an option contract that is dependent on satisfactory environmental certification.<sup>125</sup> A Phase I Environmental Site Assessment (ESA) determines the potential for environmental liabilities, and if further investigation is recommended, it typically takes two to three weeks to complete if no environmental hazards are discovered in the process.<sup>126</sup> After Phase I is complete, a private buyer can enter into a purchase contract knowing they are generally protected from liability that stems from environmental hazards on the property.<sup>127</sup> That is, the buyer would have a defense if subject to an enforcement action related to their property and hazardous materials.<sup>128</sup>

For property acquisitions made with federal money, however, a Phase I site assessment is not enough. Housing authorities must also comply with a litany of federal environmental laws and HUD environmental policies when purchasing property, including the National Environmental Protection Act (NEPA).<sup>129</sup> HUD has excellent

---

and localities that communities use, often in partnership with local nonprofit groups, to fund a wide range of activities including building, buying, and/or rehabilitating affordable housing for rent or homeownership or providing direct rental assistance to low-income people.”).

<sup>124</sup> 42 U.S.C. § 1437x(b) (2012) (“The Secretary shall approve the release of funds subject to the procedures authorized by this section only if, not less than 15 days prior to such approval and prior to any commitment of funds to such projects or activities, the public housing agency has submitted to the Secretary a request for such release accompanied by a certification of the State or unit of general local government which meets the requirements of [environmental certification].”).

<sup>125</sup> See Robert L. Falk et al., *Environmental Due Diligence in Real Property Transactions*, ENVTL. COUNS., Feb. 2008, at 1–2.

<sup>126</sup> *Frequently Asked Questions*, ALL APPROPRIATE INQUIRIES ENVTL. CORP., <http://www.aaienvcorp.com/faqs.html> (last visited May 24, 2017); J. Heaney, *How Long Does a Phase I Site Assessment Take to Complete?*, WALDEN ENVTL. ENG’G, <http://walden-assoc.com/environmental-services-blog/above-ground-storage-tank/long-phase-i-site-assessment-take-complete> (last visited May 24, 2017).

<sup>127</sup> See Falk et al., *supra* note 125, at 2.

<sup>128</sup> See *id.*; 40 C.F.R. § 312 (2016).

<sup>129</sup> See 24 C.F.R. §§ 58.5, 58.10, 58.36 (2016); U.S. DEP’T OF HOUS. & URBAN DEV., HUD-4128-OHF, ENVIRONMENTAL ASSESSMENT AND COMPLIANCE FINDINGS FOR THE



reasons for requiring an extensive environmental review, not least because many of the reviews are required by federal laws that are outside of HUD's control.<sup>130</sup> There is also an obvious interest in protecting the health and safety of public housing residents, as well as protecting the surrounding area from the dangers associated with hazardous materials.<sup>131</sup> However, in Chicago, for instance, the review process kills deals in low-poverty neighborhoods, many of which, although equally prone to environmental hazards, are at least less likely to be directly on top of or adjacent to major environmental hazards than, for instance, some of the industrial areas where large public housing projects were originally built.<sup>132</sup>

The environmental review has the potential to kill deals because the process is lengthy and encompasses wait times that are not in the control of the entity conducting the review.<sup>133</sup> And again, in low-poverty neighborhoods PHAs and developers purchasing property for PHAs are competing against other buyers who can buy immediately.<sup>134</sup> Faced with a choice between a private buyer who, if diligent, will complete a Phase I assessment in two to three weeks (or conduct no environmental review at all) and a PHA that could take months to complete a full environmental certification and execute a contract of sale, a property owner would always choose the private buyer.<sup>135</sup> Although HUD could revise its regulations to streamline and accelerate the environmental review in opportunity neighborhoods, the reforms would be unlikely to eliminate the problem altogether.

---

RELATED LAWS 3 (2002); U.S. DEP'T OF HOUS. & URBAN DEV., MULTIFAMILY ACCELERATED PROCESSING (MAP) GUIDE 296 (2016) [hereinafter MAP GUIDE].

<sup>130</sup> See PAUL MOHR ET AL., HUD OFFICE OF ENV'T & ENERGY, EVALUATING SITE CONTAMINATION FOR HUD PROJECTS (2012), [http://portal.hud.gov/hudportal/documents/huddoc?id=CPD\\_ENV\\_Slides8-22.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=CPD_ENV_Slides8-22.pdf).

<sup>131</sup> 24 C.F.R. §§ 58.5, 50.3 ("It is HUD policy that all property being proposed for use in HUD programs be free of hazardous materials, contamination, toxic chemicals and gases, and radioactive substances, where a hazard could affect the health and safety of occupants or conflict with the intended utilization of the property.").

<sup>132</sup> See ROBERT D. BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY 1987-2007, at x-xi (2007); Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 10 ENVTL. RES. LETTERS 1, 11 (2015); Robert D. Bullard, *Environmental Justice: It's More than Waste Facility Siting*, 77 SOC. SCI. Q. 493, 498 (1996).

<sup>133</sup> For instance, most property requires a Phase I Environmental Site Assessment (ESA), which involves an investigation into past uses of the site for possible contamination. Phase II of the ESA requires actual lab testing of material on the site, such as soil. HUD does not always require a Phase II ESA, but it must review the results of Phase I before making that determination. See 24 C.F.R. § 58.3; see also MAP GUIDE, *supra* note 129, at 296-97 (explaining the ESA process).

<sup>134</sup> Interview with Nicholas Brunick, *supra* note 99.

<sup>135</sup> *Id.*

HUD needs a solution that would enable PHAs and developers purchasing properties to work at the speed of the purchasers who can pay cash on the spot for properties without an environmental review of any kind.<sup>136</sup> The following suggestions, then, would make the largest impact on PHAs' ability to acquire these properties. HUD should allow PHAs to create a rotating environmental review fund of non-federal dollars to purchase properties before conducting the environmental review.<sup>137</sup> In instances where PHAs will lose a property because of the lengthy environmental review process, it could use the non-federal funds to execute a contract for the sale of property right away. Once the environmental reviews are completed to satisfaction, HUD would reimburse the PHA with capital funds. Of course, PHAs would have to absorb the risk of losing reimbursement (or delaying reimbursement) in the event of environmental issues. However, the cost would be far outweighed by the benefit of integrating neighborhoods and affording residents a place to live with good schools and neighborhood amenities.<sup>138</sup>

To bring this strategy to fruition, HUD would need to amend regulations. HUD currently considers executing contracts with non-federal dollars prior to environmental review to be a "choice limiting" activity, and it is prohibited under 24 C.F.R. § 58.22.<sup>139</sup> The purpose of the regulation is to prevent PHAs from taking steps toward risky transactions that may end up being unauthorized when they could be seeking out safer deals instead.<sup>140</sup> In other words, if a PHA commits its own staff time and its own funds to a deal in an opportunity neighborhood prior to environmental certification, it detracts from time and resources that could be spent on a more certain deal—that is, one where a seller would be willing to wait for completion of the environmental review. As discussed, those deals are likely to be found only in poor or distressed neighborhoods with low demand for for-sale property. In practice, then, this choice-limiting language forces PHAs to conduct most real estate deals in distressed neighborhoods where transactions can move slowly.

If revising § 58.22 is not an option, HUD should at least enact policies to shorten or streamline the environmental review process for property purchases in opportunity neighborhoods. First, it could expand

---

<sup>136</sup> *Id.*

<sup>137</sup> Conversations with Jolene Saul, *supra* note 107.

<sup>138</sup> See generally Margery Austin Turner & Lynette Rawlings, *Promoting Neighborhood Diversity: Benefits, Barriers, and Strategies*, URB. INST. (2009) (detailing studies that demonstrate the benefits of mobility for children whose families decide to move).

<sup>139</sup> 24 C.F.R. §§ 58.22, 58.71 (2016).

<sup>140</sup> *Id.*; *NSP Policy Alert!*, U.S. DEP'T OF HOUS. & URB. DEV. (Sept. 16, 2011), [https://www.hudexchange.info/resources/documents/NSPPolicyAlert\\_Environment alReview\\_091611.pdf](https://www.hudexchange.info/resources/documents/NSPPolicyAlert_Environment alReview_091611.pdf).

the category of projects that are exempt from NEPA review to encompass development activities in areas with less than 10% poverty. Currently, regulations exempt the acquisition of buildings with up to four units or small, scattered-site buildings that are more than 2,000 feet apart from NEPA requirements.<sup>141</sup> HUD could expand the exemption to cover slightly larger buildings in low-poverty neighborhoods, perhaps with six to eight units, keeping in mind the sites would still be subject to all other federal environmental laws and HUD policies. This would be fairly low-risk, especially because regulations already require an ESA to identify any contamination or hazardous material on the site for all HUD activities, whether or not the sites are categorically excluded from NEPA.<sup>142</sup> Phase I, which is always required, involves an investigation into past uses of the site by a preparer to determine whether the site requires actual testing for hazardous material and contaminants.<sup>143</sup> Once Phase I is complete, the entity responsible for the review must submit their findings to HUD to determine whether Phase II is required, which involves a lengthy laboratory testing process to detect contaminants and hazards.<sup>144</sup> Even if Phase II is not required, HUD usually takes several weeks to make that determination and notify the entity.<sup>145</sup> HUD should, at the very least, provide expedited approval for Phase I ESAs conducted on properties in low-poverty areas.

These suggested reforms are not intended to minimize the importance of protecting subsidized housing residents from environmental hazards, especially in the wake of our nation's long history of environmental racism.<sup>146</sup> After the high-profile and large-scale contamination of poor and mostly black communities of Flint and East Chicago came to light in 2016, even a casual observer is aware that minority neighborhoods are disproportionately subjected to poor air and water quality and environmental contamination.<sup>147</sup> But PHAs ought to be permitted to find a balance between hewing to extensive federal regulatory requirements and executing what should be high-priority development—especially in communities that may be less likely to contain hazards or contamination.<sup>148</sup>

---

<sup>141</sup> 24 C.F.R. § 58.35.

<sup>142</sup> 24 C.F.R. § 50.3; *see also* MAP GUIDE, *supra* note 129, at 296–97 (explaining the ESA process).

<sup>143</sup> MAP GUIDE, *supra* note 129, at 300.

<sup>144</sup> 24 C.F.R. § 50.3; *see also* MAP GUIDE, *supra* note 129, at 301.

<sup>145</sup> Conversations with Jolene Saul, *supra* note 107.

<sup>146</sup> *See* BULLARD ET AL., *supra* note 132, at vii (explaining that “environmental racism” is a reference to “toxic waste landfill siting in people of color communities”).

<sup>147</sup> *See* Mohai & Saha, *supra* note 132, at 15.

<sup>148</sup> *See id.* at 16 (explaining that “NIMBYism in more affluent, white communities” caused the waste siting industry to target “communities with fewer resources and political clout”).

*B. To Affirmatively Furthering Fair Housing through the Housing Choice Voucher Program, HUD Needs to Enact Significant Program Reforms*

HCV subsidies are tenant-based, meaning the voucher “travels” with the tenant wherever they can find agreeable housing, instead of being tied to a particular physical unit.<sup>149</sup> Thus, the HCV program is less burdened than brick-and-mortar programs by the weight of historic policies that created seemingly intractable concentrations of traditional public housing in segregated, isolated, low-income areas. As such, its shortcomings best highlight the way in which contemporary federal housing policies obstruct efforts toward affirmatively furthering fair housing.<sup>150</sup> Further, unlike hard unit programs—in which units of housing need to be physically moved from one place to another over time—the HCV program could realize measureable progress with thoughtful regulatory changes and program implementation alone.<sup>151</sup>

As this Article goes to print, the Trump administration’s proposed budget would result in nearly 250,000 families losing their vouchers.<sup>152</sup> This while rents are rising more than three percent per year nationwide.<sup>153</sup> As a result, housing authorities around the country have been preemptively holding off on distributing vouchers until the budget picture becomes more clear.<sup>154</sup> When it does, some may be tempted to further reduce their payment standards, which as I explain below will further increase the rate at which voucher holders are funneled into segregated neighborhoods.<sup>155</sup> This is one of the early manifestations of the ways President Trump’s proposed budget has decimated recent gains and will continue to disrupt progress toward fair housing. But putting that aside and looking toward a future federal government that may fully fund the program and want to more effectively use it to improve the lives of people in poverty, I offer the following:

The HCV program is structured to assume that the free market

---

<sup>149</sup> See Stefanie DeLuca et al., *Segregating Shelter: How Housing Policies Shape the Residential Locations of Low-Income Minority Families*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 268, 268 (2013).

<sup>150</sup> See Barbara Sard & Douglas Rice, *Realizing the Housing Voucher Program’s Potential to Enable Families to Move to Better Neighborhoods*, CTR. ON BUDGET & POL’Y PRIORITIES 1 (Jan. 12, 2016), <http://www.cbpp.org/sites/default/files/atoms/files/11-9-15housing.pdf>.

<sup>151</sup> See DeLuca et al., *supra* note 149, at 269 (“Since housing vouchers are not tied to specific residential developments, the HCV program could serve as a lever to deconcentrate poverty and reduce racial segregation . . .”).

<sup>152</sup> Douglas Rice, *Trump Budget Cuts 250,000 Housing Vouchers*, CTR. ON BUDGET & POL’Y PRIORITIES 1 (May 26, 2017).

<sup>153</sup> Douglas Rice, *Substantial Funding Boost Needed to Renew Housing Vouchers in 2017*, CTR. ON BUDGET & POL’Y PRIORITIES 1 (Jan. 25, 2017).

<sup>154</sup> Kriston Capps, *Tracking the Shadow of Public Housing Budget Cuts*, CITYLAB 1 (Apr. 11, 2017).

<sup>155</sup> *Id.*

choice of low-income public housing tenants will lead them to use their housing voucher in a neighborhood that best fits their needs and desires. As such, it does not anticipate the many predictable ways in which the private market perpetuates racial segregation.<sup>156</sup> The program takes no account of its users' likely deficit of knowledge about the greater housing market, given that being black and low-income has thus far limited their navigation to housing in underserved areas.<sup>157</sup> It does not, for instance, anticipate that landlords who have options will prefer unsubsidized tenants; some of course for prejudicial reasons, but others because of legitimate, animus-free administrative concerns.<sup>158</sup> Nor does it do anything to prevent exploitive landlords from luring voucher holders to properties where the HCV subsidy meets or exceeds the fair market rent of the unit.<sup>159</sup>

For most families, neighborhoods that meet basic needs would be characterized by low poverty and crime, good schools, and access to jobs and amenities; and extensive surveys show that subsidized housing tenants do in fact prefer to live in more racially integrated areas.<sup>160</sup> Not surprisingly, however, a disproportionate number of voucher holders continue to live in segregated, high-poverty areas. As of 2014, almost 300,000 children in families using vouchers lived in neighborhoods with extreme rates of poverty. Only one in eight families with children participating in the program lived in areas with less than ten percent poverty.<sup>161</sup> We also know that black voucher holders are significantly more likely to live in areas of high poverty than their white counterparts<sup>162</sup> and that predominately black census tracts tend to contain several times higher levels of concentrations of HCVs than white census tracts.<sup>163</sup> And again this is not by choice: Surveys of black families indeed show that a majority prefer to live in areas that are more racially and economically

---

<sup>156</sup> DeLuca et al., *supra* note 149, at 268–70.

<sup>157</sup> *Id.* at 289.

<sup>158</sup> See Jennifer Pashup et al., *Participation in a Residential Mobility Program from the Client's Perspective: Findings from Gautreaux Two*, 16 HOUS. POL'Y DEBATE 361, 376 (2005).

<sup>159</sup> See Eva Rosen, *Rigging the Rules of the Game: How Landlords Geographically Sort Low-Income Renters*, 13 CITY & COMMUNITY 310, 318–19 (2014) (explaining how landlords could exploit HCV program).

<sup>160</sup> See Seicshnaydre, *supra* note 17, at 985.

<sup>161</sup> See Sard & Rice, *supra* note 150, at 27.

<sup>162</sup> Martha M. Galvez, *What Do We Know About Housing Choice Voucher Program Location Outcomes?*, WHAT WORKS COLLABORATIVE 6 (2010), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412218-What-Do-We-Know-About-Housing-Choice-Voucher-Program-Location-Outcomes.PDF> (noting that in recent studies over 25% of black and hispanic voucher holders lived in census tracts with over 30% poverty compared with only 8% of white HCV holders).

<sup>163</sup> *Id.*; see also *Affirmatively Furthering Fair Housing*, *supra* note 5 (see, e.g., Map 6, Cook County, Housing Choice Voucher with race/ethnicity dot density).

integrated.<sup>164</sup>

There is a litany of factors that explains why voucher holders continue to live in segregated, high-poverty neighborhoods, including to a limited extent the personal preferences of some to remain in original communities.<sup>165</sup> But voucher holders who do wish to move to opportunity neighborhoods face information deficits and programmatic barriers, including: (1) the method used to determine maximum rent a voucher will cover; (2) the procedures and timelines imposed on families trying to secure housing with a voucher; (3) HUD policies and regulations that incentivize PHAs to lease their vouchers quickly and with no regard to where tenants locate; (4) HUD's inability to bridge tenants' deficits in knowledge of and access to the private housing market outside high-poverty areas; (5) the regulatory requirements for landlords who either enter into Housing Assistance Payments (HAP) contracts with housing authorities or lease their units to voucher holders; and (6) market pressures that render voucher landlords profitable when they rent in high-poverty neighborhoods. Housing advocates at organizations like the Center on Budget and Policy Priorities and the Policy and Race Research Council have been tracking these barriers and offering mobility-promoting policy solutions for decades. Below I offer a roundup of some recommendations offered by experts far better versed in the issue than I, and I conclude by urging HUD to focus on disrupting the ways the HCV program creates market dynamics that push vouchers into high-poverty neighborhoods.

*i. Payment Standards*

Until the waning days of the Obama administration the HCV payment standard formula, which determines the maximum rent a voucher will cover, confined voucher holders to low-income neighborhoods. Standards were generally based on regional Fair Market Rents (FMRs) that are set at either the 40th or 50th percentile (50th for large metropolitan areas) of regional market rents.<sup>166</sup> In major cities, FMRs and payment standards were based on average rents for the entire metropolitan area.<sup>167</sup> And unless PHA contracts stated otherwise, payments for HCVs could not exceed 110% of the FMR,<sup>168</sup> resulting in payment standards that were too low for units in areas with low poverty, low crime, and low public housing concentration and often higher than necessary in areas with high poverty and unstable housing stock.<sup>169</sup> This

---

<sup>164</sup> See Seicshnaydre, *supra* note 17, at 985; CASHIN, *supra* note 14, at 48.

<sup>165</sup> See Seicshnaydre, *supra* note 17, at 985.

<sup>166</sup> See QUADEL CONSULTING CORP., U.S. DEP'T OF HOUS. & URBAN DEV., 7420.10G, VOUCHER PROGRAM GUIDEBOOK: HOUSING CHOICE 7-4 (2001), [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_11751.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11751.pdf).

<sup>167</sup> See *id.* 7-3, 7-4.

<sup>168</sup> See *id.* at 7-4.

<sup>169</sup> Sard & Rice, *supra* note 150, at 12.

not only foreclosed housing possibilities for HCV holders in low-poverty neighborhoods, it also created incentives for landlords in high-poverty neighborhoods to compete for voucher holders<sup>170</sup> by making their listings readily available to housing authorities to create a more seamless and appealing transaction with subsidized tenants.<sup>171</sup>

Although exception payments were available to help families cover higher rents with vouchers, actuating the exceptions required PHAs to invest time in administering exception rent vouchers—an investment PHAs were often not incentivized to make. For certain Moving to Work (MTW)<sup>172</sup> jurisdictions, HUD had, in the past, allowed up to 300% FMR payment standards (or “exception payments”) for families that had good credit.<sup>173</sup> In Chicago, however, the caps were reduced to 150% following political outcry about so-called “supervouchers,”<sup>174</sup> which enabled a very small number of voucher holders to live in luxury apartment buildings.<sup>175</sup> In non-MTW jurisdictions, exception payments above 110% FMR required recipients or PHAs to demonstrate that suitable housing could not otherwise be found outside an area of concentrated poverty within their allotted search time.<sup>176</sup> Again, however, requesting exception payments required PHAs’ staff time and resources, which are not covered by HUD administrative fees.<sup>177</sup> In theory, the 150% payment standard available to MTW jurisdictions should have opened a fair number of

---

<sup>170</sup> Rosen, *supra* note 155, at 314.

<sup>171</sup> See POVERTY & RACE RESEARCH ACTION COUNCIL, *CONSTRAINING CHOICE: THE ROLE OF ONLINE APARTMENT LISTING SERVICES IN THE HOUSING CHOICE VOUCHER PROGRAM 1* (2015). For a more comprehensive discussion about how this dynamic funnels HCV holders into poor neighborhoods, see *infra* Part II.B.v.b.

<sup>172</sup> Moving to Work is a demonstration program that allows certain housing authorities flexibility in their use of funds and exemptions from some specific public housing and voucher rules. The flexibility allows jurisdictions to use HUD funds to provide needed services to residents, and in some cases, it allows higher payment standards for HCVs. There are 35 PHAs participating in the Moving to Work program. See *Moving to Work (MTW) FAQ*, HUD.GOV, [https://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/ph/mtw/faq](https://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/mtw/faq) (last visited May 25, 2017); see also U.S. DEP’T OF HOUS. & URBAN DEV., *MTW STANDARD AGREEMENT, STATEMENT OF AUTHORITIES 5* (2007), [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_10242.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_10242.pdf) (“The Agency is authorized to develop and adopt a local policy designed to provide for deconcentration and income mixing in public housing communities.”).

<sup>173</sup> See Michelle Manchir, *After Scrutiny, CHA Cuts Value of ‘Supervouchers,’* CHI. TRIB. (Aug. 18, 2014), <http://www.chicagotribune.com/news/local/breaking/ct-cha-housing-vouchers-met-0818-20140818-story.html>.

<sup>174</sup> *Id.*

<sup>175</sup> See *id.* (“The CHA said its ‘exception payments’ . . . affect less than 2 percent of its overall voucher portfolio.”).

<sup>176</sup> See QUADEL CONSULTING CORP., *supra* note 166, at 7-4.

<sup>177</sup> See *infra* Part II.B.iii.

middle-class neighborhoods to voucher holders,<sup>178</sup> but the onus was on housing authorities to make families aware of exception payment standards.<sup>179</sup> As I will discuss, this runs contrary to the housing authorities' interest in keeping their utilization rates high and maintaining an uninterrupted flow of administrative fee payments by leasing vouchers quickly.<sup>180</sup>

HUD is currently making progress toward establishing equitable payment standards that would cover reasonable rents in low-poverty neighborhoods in all jurisdictions, not just those covered by MTW agencies. In November 2016, the agency published a final rule that will require metropolitan areas with concentrations of voucher holders in high-poverty neighborhoods to move to Small Area Fair Market Rents (SAFMR), meaning the FMR would be calculated by zip code, rather than region.<sup>181</sup> The regulation was introduced after a series of SAFMR pilot programs showed promising results.<sup>182</sup> Under the pilot program, the SAFMR vouchers had enabled more families to move to neighborhoods with better schools, less poverty, violent crime, and unemployment, and it had done so without raising program costs.<sup>183</sup> Moving to SAFMRs also will help to eliminate the "voucher premium" in poorer neighborhoods by lowering the payment standard in high-poverty neighborhoods,<sup>184</sup> which should disincentivize landlords in those markets from funneling voucher holders into low-value rental properties.<sup>185</sup> It is difficult to predict whether the Trump administration will repeal the new SAFMR rule. On the one hand, both President Trump and Secretary Carson have voiced

---

<sup>178</sup> See *Voucher Holders Need Not Apply: An Audit Report on the Refusal of Housing Choice Vouchers by Landlords in the Austin MSA*, AUSTIN TENANTS' COUNCIL 7 (2012), <http://www.austintexas.gov/edims/document.cfm?id=211114>.

<sup>179</sup> See QUADEL CONSULTING CORP., *supra* note 166, at 7-4 (explaining when a PHA may request an exception amount above 120% of the FMR).

<sup>180</sup> See *infra* Part II.B.iii.

<sup>181</sup> See Establishing a More Effective Fair Market Rent System, 81 Fed. Reg. 80,567 (Nov. 16, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983, 985).

<sup>182</sup> The SAFMR pilot was launched as part of a settlement agreement negotiated in 2011 by Inclusive Communities Project, Inc. See POVERTY & RACE RESEARCH ACTION COUNCIL, FIFTY YEARS OF "THE PEOPLE V. HUD" (2015); see also Notice, Section 8 Housing Choice Voucher Program—Demonstration Project of Small Area Fair Market Rents in Certain Metropolitan Areas for Fiscal Year 2011, 75 Fed. Reg. 27,808 (May 18, 2010); Section 8 Housing Choice Voucher Program—Demonstration Project of Small Area Fair Market Rents in Certain Metropolitan Areas, Discussion of Comments, and Request for Participation, 76 Fed. Reg. 22,122 (Apr. 20, 2011) (describing the SAFMR pilot); Will Fischer, *Neighborhood-Based Subsidy Caps Can Make Housing Vouchers More Efficient and Effective*, CTR. ON BUDGET & POL'Y PRIORITIES 4 (June 10, 2015), <http://www.cbpp.org/sites/default/files/atoms/files/6-10-15housing.pdf>.

<sup>183</sup> See Fischer, *supra* note 182, at 1.

<sup>184</sup> See *id.*

<sup>185</sup> See *id.* at 4.



objections to the general principles underpinning fair housing,<sup>186</sup> but at the time this Article goes to print it remains to be seen whether rolling back payment standard reform is part of the administration's priorities.

Moving to SAFMRs will benefit the HCV program tremendously. But as with all federal payment standards, they need to be able to respond to changes in the rental market. Some have commented that regional FMRs ignore annual inflation factors that accurately reflect relative increases in the rental market.<sup>187</sup> For instance, as the economy rebounded from the Recession, housing costs in low-poverty neighborhoods rose quickly while congressional appropriations for housing and urban development remained stagnant.<sup>188</sup> The lag time made it even more difficult for some housing authorities to place tenants in low-poverty neighborhoods during the last eight years.<sup>189</sup> Stephen Norman, director of the King County Housing Authority in suburban Seattle, noted that although the authority received exception payments to fund rents in opportunity neighborhoods, funding cutbacks and failures of HUD to account for annual inflation had frozen payment standards for half a decade.<sup>190</sup> For instance, between 2009 and 2014, it had been authorized to pay \$300 per month above payment standards for apartments in opportunity neighborhoods; however, market analysis showed that the rent differential between low-poverty (less than 12%) neighborhoods and medium-to-high poverty neighborhoods had increased to about \$480.<sup>191</sup> This increase in rent differential would not necessarily have changed the average FMR for King County—rents in higher poverty neighborhoods could have gone down as areas became more distressed—but it did increase the amount of money needed to house a voucher family in a middle-class or affluent area.<sup>192</sup> To realize their potential, the SAFMR formula should be written to respond more accurately to market fluctuations and widening disparities in housing rental prices.<sup>193</sup>

---

<sup>186</sup> See generally Carson, *supra* note 4.

<sup>187</sup> See Stephen Norman, *Children and Housing Vouchers: A Practitioner's Perspective*, NYU FURMAN CTR. (Oct. 2014), <http://furmancenter.org/research/iri/essay/children-and-housing-vouchers-a-practitioners-perspective> (considering rent inflation in the Seattle area).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> See Jason Furman & Peter Orszag, A Firm-Level Perspective on the Role of Rents in the Rise in Inequality, Presentation at "A Just Society" Centennial Event in Honor of Joseph Stiglitz, Columbia University 2 (Oct. 16, 2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151016\\_firm\\_level\\_perspective\\_on\\_role\\_of\\_rents\\_in\\_inequality.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf); Alan Berube & Natalie Holmes, *City and Metropolitan Inequality on the Rise, Driven by Declining Incomes*, BROOKINGS INST. (Jan. 14, 2016), <http://www.brookings.edu/research/papers/2016/>

ii. *Search Times*

As it stands, HCV families report inadequate search times as one of the principle reasons they land in less than ideal rental situations.<sup>194</sup> Federal regulations require the “term” of a voucher, or the time a family is given to lease a unit after receiving their voucher, to be a maximum of 60 calendar days, and PHAs have the discretion to set longer search times and grant extensions to families who apply.<sup>195</sup> The search term policies decrease families’ chances of moving into low-poverty neighborhoods for two reasons: (1) families do not have a vague estimate—even within years—of when they will be issued a voucher, making it difficult to plan for an apartment search and move; and (2) leasing an apartment within 60 days is difficult even for market-rate renters and, as I will discuss in the following section, it is contrary to a PHA’s operational interests to grant extensions.<sup>196</sup> PHAs and families are under pressure in part because vouchers are in high demand. There is a limited supply of HCVs—nationally, about one in four eligible families have vouchers (which does not include non-citizens who would otherwise be income-eligible), and that number will become larger if Republicans move forward on a budget proposals that would further cut the number of housing vouchers.<sup>197</sup> In many larger jurisdictions, the proportion of eligible families to vouchers is much higher than the national average, and many of those larger jurisdictions have abandoned the first-come, first-serve waiting list model and switched to a lottery, so families have even less of an inkling of when their number might be drawn for a voucher.<sup>198</sup> Federal regulations also specify no requirement that PHAs make more than one effort to notify a voucher recipient, so some families have reported missing a call from a PHA, and hearing their spot had been forfeited by the time they called back.<sup>199</sup>

As a result, families are often unprepared to move when they receive their vouchers, particularly when their search time is limited.<sup>200</sup> As such, voucher holders in numerous studies have also reported not having enough time to avail themselves of information about units in less-known neighborhoods that are farther from where they live, which led them to

---

01/14income-inequality-cities-update-berube-holmes.

<sup>194</sup> See DeLuca et al., *supra* note 149, at 279–81.

<sup>195</sup> 24 C.F.R. § 982.303 (2016).

<sup>196</sup> See DeLuca et al., *supra* note 149, at 278 (describing the frustration of mothers on the waitlist).

<sup>197</sup> LINDA COUCH, NAT’L LOW INCOME HOUS. COAL., HOUSING CHOICE VOUCHERS: 2015 ADVOCATES’ GUIDE 4-41; Rice, *supra* note 176.

<sup>198</sup> See, e.g., Ryan Yamamoto, *Lottery Registration for Seattle’s Housing Voucher Program Opens*, <http://komonews.com/news/local/lottery-registration-for-seattles-housing-voucher-program-opens> (last visited May 25, 2017).

<sup>199</sup> See DeLuca et al., *supra* note 149, at 277–79.

<sup>200</sup> See *id.*; Erin Graves, *Rooms for Improvement: A Qualitative Metasynthesis of the Housing Choice Voucher Program*, 26 HOUS. POL’Y DEBATE 346, 356 (2016).

make unsatisfactory decisions.<sup>201</sup> This is not surprising: the lives of many low-income people are not conducive to apartment hunting, and especially not to aggressive, time-limited searches that take them outside the area where they already live or work.<sup>202</sup> For instance, many work jobs with odd hours for an hourly wage, meaning they cannot take time off to meet landlords without losing money or even risking losing their jobs.<sup>203</sup> Many also lack access to reliable transportation, making it even less likely they will be able to conduct a geographically broad housing search.<sup>204</sup> Finally, landlords often take up to a week to respond to HCV inquiries, particularly in tight rental markets, and that time cuts into a voucher family's 60 days.<sup>205</sup>

To alleviate search time pressure on HCV families, HUD could encourage PHAs to create search time extension policies that take the onus off HCV families. For instance, PHAs could call voucher holders after 50 days to ask if they need more time to find an apartment, and they could automatically extend the search time by 30 days if the family says yes. The call could also be an opportunity to discern whether the family needs assistance finding a unit in a safe, low-poverty neighborhood; if so, the PHA could make a referral to a housing choice service provider.<sup>206</sup>

### *iii. Administrative Fees, Utilization, and SEMAP*

Unfortunately, the pressure to lease as many vouchers as quickly as possible is partially created by HUD's administrative fees and utilization rules. HUD currently pays PHAs to administer the HCV program on a per-voucher basis.<sup>207</sup> The fees cover only the activities required to lease a voucher, or "to cover costs incurred to perform PHA administrative responsibilities for the program in accordance with HUD regulations and

---

<sup>201</sup> See Graves, *supra* note 220, at 356; Xavier de Souza Briggs & Margery Austin Turner, *Assisted Housing Mobility and the Success of Low-Income Minority Families: Lessons for Policy, Practice, and Future Research*, 1 NW. J.L. & SOC. POL'Y 25, 40–41 (2006); Michelle Wood et al., *Housing Affordability and Family Well-Being: Results from the Housing Voucher Evaluation*, 19 HOUSING POL'Y DEBATE 367, 392 (2008).

<sup>202</sup> See DeLuca et al., *supra* note 149, at 278; Rosen, *supra* note 183, at 332; Sard & Rice, *supra* note 150, at 13.

<sup>203</sup> DeLuca et al., *supra* note 149, at 278.

<sup>204</sup> Graves, *supra* note 220, at 352.

<sup>205</sup> DeLuca et al., *supra* note 149, at 279.

<sup>206</sup> There are roughly 15 "mobility programs" in the United States as of 2015. See AUDREY BERDAHL-BALDWIN, HOUSING MOBILITY PROGRAMS IN THE U.S. 4 (2015), <http://prrac.org/pdf/HousingMobilityProgramsInTheUS2015.pdf> (displaying the programs on a map). Some are simply service providers that help families use vouchers in low-poverty neighborhoods, others are demonstrations that are part of federal desegregation remedies. See *id.* at 4–5. Some accept referrals from housing authorities for individual mobility counseling. *Id.* at 8.

<sup>207</sup> See 24 C.F.R. § 982.152 (2016).

requirements.”<sup>208</sup> Once the vouchers are leased, PHAs receive ongoing fees for each leased voucher in the beginning of each month.<sup>209</sup> In fact, the main determinate of the amount of money PHAs receive to administer the HCV program is their “success rate,” that is, the rate at which they lease the vouchers.<sup>210</sup> The fees do not, then, pay for costs associated with helping families find homes at all, let alone in low-poverty neighborhoods that have more competitive rental markets about which tenants might be unfamiliar. Likewise, they do not accommodate the increased time staff may need to assist a family wishing to use a voucher in a low-poverty neighborhood. And administrative fees do not cover the cost of certain activities, such as recruiting landlords in opportunity areas. Indeed, a 2015 study commissioned by HUD found that very few metropolitan PHAs spend time trying to expand housing opportunities, concluding that “[t]he small amount of time recorded for expanding housing opportunities likely reflects the severe funding restraints . . . . The PHAs in the study reported that they did not have the resources to invest substantial staff time in expanding housing opportunities even though they valued these activities.”<sup>211</sup> Under the current fee scheme, PHAs have every incentive—and possibly need—to issue and lease HCVs as quickly and seamlessly as possible. This minimizes the chance staff will spend time or funding on mobility and increases the likelihood staff will direct voucher holders toward readily available units in high-poverty neighborhoods.

HCV policies also require PHAs to maintain a certain “utilization” rate to keep their current levels of Section 8 funding.<sup>212</sup> A voucher is “utilized” when it is issued by a PHA and leased by a resident.<sup>213</sup> The *Housing Choice Voucher Program Guidebook* states that PHAs are expected to maintain an average utilization rate “at or above 98 percent.”<sup>214</sup> In the guidebook’s discussion of “turnover,” it is implied that HUD expects PHAs to actually lease vouchers quickly—not just issue them—to maintain a high utilization rate in spite of families leaving the program.<sup>215</sup> Utilization rates decrease when a PHA extends search times because residents are looking in neighborhoods with tighter markets, which threatens funding.<sup>216</sup> Although regulations afford PHAs the discretion to

---

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> ABT ASSOCS., HOUSING CHOICE VOUCHER PROGRAM: ADMINISTRATIVE FEE STUDY FINAL REPORT 128 (2015).

<sup>211</sup> *Id.* at 130.

<sup>212</sup> QUADEL CONSULTING CORP., *supra* note 166, at 24-1.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 24-2.

<sup>215</sup> *See id.* at 24-3 (“If ten families leave the program every month, the PHA will need to issue enough vouchers to ensure that ten families *will execute new leases* each month.” (emphasis added)).

<sup>216</sup> *See id.* at 24-2 (“If a PHA’s utilization rate falls below 90 percent of the units

both set search times (as long as they are at least 60 days) and issue extensions to applicants,<sup>217</sup> these utilization requirements create pressure to lease vouchers as quickly as possible. As a result, PHAs have little incentive to encourage and assist voucher holders in conducting time-consuming searches in neighborhoods with more opportunity.<sup>218</sup>

HUD should change its administrative fees and utilization requirements to count a voucher as utilized when it is issued, rather than when it is leased. By conditioning fees and utilization on actually leasing the voucher, HUD incentivizes PHAs to spend as little time and resources as possible to lease a voucher.<sup>219</sup> If, on the other hand, HUD counted a voucher as utilized and paid PHAs its administrative fee at the outset, it would take pressure off the PHA to lease vouchers quickly, minimizing the risk they will funnel tenants to eager landlords in distressed neighborhoods.<sup>220</sup> If a voucher is not leased eventually, perhaps within six months, it could be retroactively deducted from a PHA's utilization rate and administrative fees.

Finally, HUD evaluates PHAs' administration of the HCV program using the Section 8 Management Assessment Program (SEMAP), through which HUD collects data and awards "points" to PHAs based on HCV management metrics.<sup>221</sup> The rating system, however, does nothing to incentivize PHAs to expand housing choices for voucher holders in opportunity areas, nor does it help HCV families move to low-poverty neighborhoods.<sup>222</sup> The maximum point score is 135 points, of which 100 relate to housing administration and 30 relate to housing quality standards.<sup>223</sup> HUD awards comparatively few SEMAP points for expanding housing options in opportunity areas; only five points are awarded for expanding housing opportunities, and five "bonus" points are awarded for "deconcentration" of vouchers, which entails dispersing vouchers throughout many geographic areas instead of concentrating them within

---

contracted and annual budget authority, the agency risks losing a portion of its funding at the time renewal funding decisions are made. HUD will issue the PHA a warning. The warning will require the PHA to increase leasing to 95 percent of contracted units by the time of its second budget submission after receiving the warning. If the PHA fails to meet the required goal, its unexpended annual budget authority will become subject to reallocation.").

<sup>217</sup> DeLuca et al., *supra* note 149, at 278.

<sup>218</sup> *Id.* at 281.

<sup>219</sup> See Sard & Rice, *supra* note 150, at 22 n.41 ("PHAs primarily earn fees based on the number of vouchers in use. Leasing units in high-opportunity areas typically takes longer than leasing in neighborhoods where vouchers are commonly accepted.").

<sup>220</sup> *Id.*

<sup>221</sup> See DeLuca et al., *supra* note 149, at 286.

<sup>222</sup> See *id.*; Sard & Rice, *supra* note 150, at 21 n.35.

<sup>223</sup> See 24 C.F.R. § 985.3 (2016); Sard & Rice, *supra* note 150, at 21 n.35.

segregated neighborhoods with high saturations of subsidized housing.<sup>224</sup> The number of points aside, designating deconcentration points as merely bonus points communicates that those efforts are inessential and that moving families to low-poverty neighborhoods should be a relatively low priority for PHAs. The SEMAP metrics should be rewritten to award at least equal points to the assessment areas for deconcentration and expansion of housing opportunities, housing administration, and housing quality standards.<sup>225</sup>

*iv. Mobility Counseling: Share Information*

Evidence shows that in addition to practical and programmatic barriers, HCV holders face numerous social barriers when searching for apartments. First, many are not accustomed to navigating the private market—particularly the markets in higher-income neighborhoods.<sup>226</sup> They also may have deep concerns about leaving their social and family networks behind for a new neighborhood where they may face discrimination, loneliness, and isolation<sup>227</sup> and fears about higher costs of transportation, childcare, and groceries.<sup>228</sup> In sum, moving to a new community—particularly one comprised of a drastically different demographic—is emotionally and psychologically taxing, and people who do it need practical and social support. Empirical research has shown, however, that many families living in poverty do wish to make a move to better neighborhoods, and they are more likely to relocate successfully and sustainably with the help of “mobility counseling” or holistic housing and case management support prior to, during, and following such a move.<sup>229</sup> In addition to producing measurably positive

<sup>224</sup> 24 C.F.R. § 985.3(g)–(h). The “bonus” is that PHA is awarded five points if it can certify that either 50% of HCV families with children live in low-poverty neighborhoods, or that the number of families with children moving to low-poverty neighborhoods has been steadily increasing. *See id.* § 985.3(h).

<sup>225</sup> *See* Sard & Rice, *supra* note 150, at 11 (suggesting HUD revise SEMAP and give more weight to location outcomes).

<sup>226</sup> *See* DeLuca et al., *supra* note 149, at 284–85 (“poor families do not necessarily have adequate information or experience with low-poverty neighborhoods”).

<sup>227</sup> *See* Camille Zubrinsky Charles, *Can We Live Together?*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA*, *supra* note 17, at 74.

<sup>228</sup> *See id.* at 187.

<sup>229</sup> *See* Margery Austin Turner & Xavier de Souza Briggs, *Assisted Housing Mobility and the Success of Low-Income Minority Families: Lessons for Policy, Practice, and Future Research*, URB. INST. 4 (Mar. 2008), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411638-Assisted-Housing-Mobility-and-the-Success-of-Low-Income-Minority-Families-Lessons-for-Policy-Practice-and-Future-Research.PDF> (suggesting “[p]re-move counseling should seek the best-possible initial placements for families, not the quickest placements”); John Goering, *Expanding Housing Choice and Integrating Neighborhoods: The MTO Experiment*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA*, *supra* note 17, at 143 (summarizing an interim evaluation of the MTO; finding fairly

results for participants, mobility programs help close the gap in access to knowledge about—and ability to navigate—open, low-poverty housing markets.<sup>230</sup>

The first mobility program was ordered by a federal judge as part of the *Gautreaux* desegregation remedy.<sup>231</sup> Between 1976 and 1990, the Gautreaux mobility program afforded thousands of families from the Section 8 waitlist the support needed—namely, counseling and moving assistance—to relocate to predominately white and mixed-race neighborhoods in and around Chicago.<sup>232</sup> In the 1990s, HUD sponsored a five-city demonstration called Moving To Opportunity (MTO).<sup>233</sup> Results of the MTO were extensively researched and found to be generally positive over the long term,<sup>234</sup> which HUD has recognized.<sup>235</sup> But it bears mentioning that despite mobility programs' positive outcomes, HUD continues to spend far more resources maintaining, stabilizing, and revitalizing distressed neighborhoods than it spends affirmatively helping low-income residents of subsidized housing access neighborhoods of opportunity.<sup>236</sup> So although HUD claims to support

---

positive results for families, but especially for people who were young children when their families moved); Mary Cunningham & Susan J. Popkin, *CHAC Mobility Counseling Assessment*, URB. INST. 31 (2002); Mary K. Cunningham & Susan J. Popkin, *CHAC Mobility Counseling Assessment*, URB. INST. 1–2 (Oct. 2002), [http://webarchive.urban.org/UploadedPDF/410588\\_CHACReport.pdf](http://webarchive.urban.org/UploadedPDF/410588_CHACReport.pdf) (describing CHAC's mobility program methods, such as “individual counseling, life-skills training, landlord negotiation seminars, neighborhood tours, and a security deposit loan assistance program”).

<sup>230</sup> See Xavier de Souza Briggs & Margery Austin Turner, *Assisted Housing Mobility and the Success of Low-Income Minority Families: Lessons for Policy, Practice, and Future Research*, 1 NW. J.L. & SOC. POL'Y 25, 55–58 (2006).

<sup>231</sup> *Hills v. Gautreaux*, 425 U.S. 284, 306 (1976) (concluding that the District Court had authority to direct HUD to engage in remedial measures—such as creating a mobility program to move willing public housing families to surrounding suburbs in Chicago using tenant-based vouchers—and remanding the case to the District Court for further proceedings).

<sup>232</sup> Rosenbaum, *supra* note 39, at 232–33.

<sup>233</sup> *Dataset: Moving to Opportunity*, DEP'T OF HOUS. AND URBAN DEV., <https://www.huduser.gov/portal/datasets/mto.html> (last visited May 27, 2017). Over 5,300 public housing families in five cities applied to participate in Moving to Opportunity. Turner & Briggs, *supra* note 229, at 2.

<sup>234</sup> See Goering, *supra* note 249, at 143; Chetty et al., *supra* note 38, at 22 (finding as of 2015 an approximate 30% increase in educational attainments for people who were children when their families participated in the MTO).

<sup>235</sup> See U.S. DEP'T OF HOUS. & URBAN DEV., FY2017 BUDGET PROPOSAL CONGRESSIONAL JUSTIFICATIONS 6-1, 6-6 (2016), [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/cfo/reports/fy17\\_CJ](http://portal.hud.gov/hudportal/HUD?src=/program_offices/cfo/reports/fy17_CJ).

<sup>236</sup> Seicshnaydre, *supra* note 17, at 993 (“The resources spent on this ‘entrance strategy’ certainly pale in comparison to the federal resources spent on creating, maintaining, and revitalizing ghettos.”) By 2005, the MTO cost \$80 million in federal and philanthropic funds, while HUD's proposed budget for FY2011 was \$48.5 billion.

mobility as a concept,<sup>237</sup> it does not consistently provide financial support for mobility programs. Indeed for most PHAs,<sup>238</sup> HUD does not provide any earmarked funding for mobility counseling in regular allotments, making it unlikely that they will use their funds toward mobility.<sup>239</sup> And although MTW jurisdictions may use portions of the annual lump sum they receive from HUD for mobility counseling,<sup>240</sup> they must do so while maintaining “substantially the same” rates of housing assistance for needy families as they would if they were not operating under the MTW program.<sup>241</sup> If providing mobility counseling might reduce the number of vouchers an MTW agency can issue, then the agency would have to make up for those units or risk violating of the terms of the program.

Thus, HUD needs to make a more clear and sustained commitment to providing additional funding to recipients nationwide to provide for mobility counseling. For non-MTW agencies, it should provide funds and guidance to establish a federally funded program. For MTW agencies, it should add funds to their block grant for agencies to put toward their existing mobility counseling programs, or to start one if no such program exists.<sup>242</sup>

HUD does require authorities to provide free access to rental listings that also identify all landlords who are willing to accept rent vouchers. Under recently-revised regulations, however, PHAs must provide families

---

*Id.* at 993–94 n.157.

<sup>237</sup> See, e.g., Question and Answer with Katherine M. O'Regan, Assistant Sec'y for Pol'y Dev. & Research, *Investing in People and Places for Upward Mobility*, OFF. POL'Y DEV. & RES., [https://www.huduser.gov/portal/investing\\_people.html](https://www.huduser.gov/portal/investing_people.html) (“HUD’s current policy and policy proposals are consistent with these findings. First, we need to expand our Housing Choice Voucher program to give more precariously housed families the housing assistance they need with a tool, the voucher, that allows them choice in the neighborhood they live. As research shows, stable housing is critical, and for some families stable housing in a low-poverty neighborhood can have long-term benefits for young children.”).

<sup>238</sup> MTW agencies may use a portion of their funds on mobility counseling. See U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 172, at 2 (“This authorization waives Sections 8 and 9 of the 1937 Act and 24 C.F.R. 982, and 990 as necessary to implement the Agency’s Annual MTW Plan.”) The MTW program allows certain high-performing local agencies to use HUD allotments as block grants, and to use funds for services including the “provision of housing or employment-related services or other case management activities, such as housing counseling.” *Id.* at 3.

<sup>239</sup> See 42 U.S.C. § 1437(q)(1) (2016). HUD’s administrative fee structure compensates PHAs based on how many units it has leased, and does not provide funding for mobility counseling.

<sup>240</sup> See U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 172, at 3.

<sup>241</sup> Consolidated Appropriations Act, 2016, Pub. L. 114-113, 129 Stat. 2242 (2015). Although the “substantially the same” language exists in statute, HUD has never issued clear guidance about what is required to comply with the language. See *id.*

<sup>242</sup> In its FY2017 Budget, HUD did request \$15 million for a Mobility Counseling Demonstration. See U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 235, at 6-6.



with the following:

A list of landlords known to the PHA who may be willing to lease a unit to the family or other resources (e.g., newspapers, organizations, online search tools) known to the PHA that may assist the family in locating a unit. *PHAs must ensure that the list of landlords or other resources covers areas outside of poverty or minority concentration.*<sup>243</sup>

New regulations recently added the “outside of poverty or minority concentration” language—a positive step, to be sure.<sup>244</sup> Still, the most frequently used websites for HCV landlord listings—GoSection8 and Socialserve—primarily list units in segregated, underserved communities.<sup>245</sup> A survey of major metropolitan housing authorities found that only 6.7% of listings on the New York City Housing Authority’s GoSection8 website were in areas with less than 10% poverty, while nearly 50% were in areas that have more than 30% of persons living below the poverty line.<sup>246</sup> Nearly 62% of the units were in areas with 90% to 100% minority populations.<sup>247</sup> In Los Angeles City, almost 38% of total rental units are located in low-poverty areas, but only one unit in the GoSection8 sample was in a low-poverty area.<sup>248</sup> In Miami-Dade County, which uses a different platform called Socialserve, 82.5% of units were listed in tracts with more than 90% minority populations, and only 2.5% were located in low-poverty areas.<sup>249</sup>

Adding the “outside minority concentration” requirement to landlord listing regulations is a positive step, although it is too soon to tell whether PHAs will be able to comply, as compliance will depend on a PHA’s ability to recruit landlords in opportunity areas. As discussed in the next section, lack of staff time and the onerous landlord inspection make that an unlikely prospect.

#### *v. The Role of Landlords*

The HCV program relies entirely on private landlords to accept rent subsidies and take on the extra contractual burdens associated with participating in the program. The success of a public-private partnerships in government subsidy programs depends on (1) the government’s ability to recruit good, competent private partners with desirable goods and services, and (2) the government’s ability to protect people served by its programs from private actors wishing to take advantage of government

---

<sup>243</sup> 24 C.F.R. § 982.301(11) (emphasis added).

<sup>244</sup> *Id.*

<sup>245</sup> See POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 190, at 4.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 6.

<sup>249</sup> *Id.* at 14.

contracts by exploiting or mistreating them. Research about landlords in the HCV program suggests that HUD has fallen short on both fronts: Landlords with good track records and good properties in opportunity neighborhoods do not want to participate in the HCV program; and landlords with property in suboptimal neighborhoods use the program to reap high profits, with many exploiting tenants in the process.

*a. Working with landlords in opportunity neighborhoods*

To the extent landlords in opportunity neighborhoods would be willing to participate in the HCV program, they are often dissuaded by administrative headaches. Of course, research has also shown that discrimination based on race, religion, and source of income (SOI) is still rampant in the HCV program.<sup>250</sup> But it is also common for landlords to refuse to participate in the HCV program because of legitimate concerns about regulatory headaches and inspections.<sup>251</sup> There are reforms HUD could enact, however, to ease some of these contractual burdens.

As discussed above, payment standards can place serious limitations on eligible rental stock,<sup>252</sup> making it difficult for voucher holders to find apartments in opportunity neighborhoods. If voucher holders do find a unit in a low-poverty neighborhood, it is less likely that those apartments will also meet the fairly onerous inspection requirements because they are at the lower end of the housing stock. But even more difficult to overcome is the fact that research from the MTO showed that many landlords would prefer to avoid the bureaucratic obligations of the HCV program if they are confident they could attract unsubsidized renters, which makes it incredibly difficult for tenants to lease apartments using HCVs in opportunity areas where rental properties are in high demand.<sup>253</sup>

When explaining their hesitation to participate in the HCV program, landlords principally cite concerns about long wait times for inspections, approvals, security deposits, and the cost of making repairs to meet

---

<sup>250</sup> See Turner, *supra* note 30, at 800 (detailing racial discrimination and racial steering still prevalent in the U.S. housing market, regardless of income); LANCE FREEMAN, THE IMPACT OF SOURCE OF INCOME LAWS ON VOUCHER UTILIZATION AND LOCATIONAL OUTCOMES vii (2011); Lance Freeman & Yunjing Li, *Do Source of Income Anti-Discrimination Laws Facilitate Access to Less Disadvantaged Neighborhoods?*, 29 HOUSING STUD. 88, 88–89 (2014).

<sup>251</sup> Pashup et al., *supra* note 158, at 376; see ELIZABETH BONVENTRE ET AL., EXERCISING CHOICE WITH HOUSING CHOICE VOUCHERS 48 (2014); PHILIP TEGELER ET AL., POVERTY RACE & RESEARCH COUNCIL, KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM 121 (2005); see also Victoria Basolo & Mai Thi Nguyen, *Does Mobility Matter? The Neighborhood Conditions of Housing Voucher Holders by Race and Ethnicity*, 16 HOUSING POLYDEBATE 297, 316–17 (2005).

<sup>252</sup> See *supra* Part IV.B.iii.

<sup>253</sup> BRIGGS ET AL., *supra* note 18, at 76.

HUD's Housing Quality Standards (HQS).<sup>254</sup> Although PHAs are responsible for carrying out inspections—either in-house or through contractors—HQS are set by federal regulation.<sup>255</sup> On their face, the regulations enumerate reasonable health and safety requirements, but they can be interpreted to allow housing inspectors to fail units at any slight defect. For instance, the regulations require PHAs to take “prompt and vigorous action to enforce the owner obligations,” and they may suspend, terminate, or reduce housing assistance payments to the landlord for any breach.<sup>256</sup> PHAs may also charge landlords a fee for inspections if the landlord notifies the PHA that a repair has been made.<sup>257</sup> Until Congress passed the Housing Opportunity Through Modernization Act of 2016 (HOTMA),<sup>258</sup> PHAs were not required to give landlords notice or reasonable time to fix the defect, in fact they were required “not [to] make any housing assistance payments for a dwelling unit that fails to meet HQS” unless the owner corrected the defect within a time period specified by the PHA.<sup>259</sup> Now, in the event of “non-life-threatening conditions,” the law requires PHAs to give landlords 30 days to correct an infraction before withholding funds.<sup>260</sup> It remains to be seen whether HOTMA will measurably reduce the inspection burden on landlords.

Imagine this scenario: an owner leases all the units in her building to HCV families. The building is in a neighborhood with fairly low-poverty and demand for rental units in the area is high, however, the landlord participates in the HCV program because she believes in its mission. During the course of a regular inspection, for which the owner was required to be available during an eight-hour window and thereby miss a full day of work, the PHA housing inspector finds that there is loose wiring around the circuit breaker in the basement. Citing the requirement that “electrical fixtures and wiring must ensure safety from fire,” the inspector fails the landlord and her payments are immediately suspended.<sup>261</sup> The landlord normally relies on HCV payments to pay her mortgage, so she must draw on her building maintenance reserves that month to pay the hefty mortgage on her multiunit building. This leaves limited funds to fix the wiring on the circuit breaker. The landlord

---

<sup>254</sup> See 24 C.F.R. § 982.401(a) (2016) (listing the required HQS); BONVENTRE ET AL., *supra* note 251, at 48, 55.

<sup>255</sup> See 24 C.F.R. § 982.401(a).

<sup>256</sup> *Id.* § 982.404(a) (2).

<sup>257</sup> 24 C.F.R. § 982.405(f) (PHA initial and periodic unit inspection).

<sup>258</sup> Housing Opportunity Through Modernization Act of 2016, Pub. L. 114-201, 130 Stat. 782.

<sup>259</sup> See § 101, 130 Stat. at 783.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* § 982.401(f) (1).

eventually fixes the circuit breaker, schedules a subsequent inspection for which she must be available for another eight-hour window, and her payments are reinstated. Still, when it comes time to renew her HCV contract, she declines because she knows she can get private renters who are unlikely to withhold rent payments when the building needs minor, routine repairs that do not affect their quality of life.

Understandably, landlords in opportunity neighborhoods frequently cite inspections as their reason for refusing to accept HCV families.<sup>262</sup> Those interviewed in a Boston area study reported failing inspections for minor issues such as a cracked tile around a window or lack of an anti-tip bracket on a stove (even when there were no children in the apartment), or a plate cover missing from an electric outlet in the basement.<sup>263</sup> Landlords also complained that inspectors were unprofessional and unaccommodating when scheduling inspections: many gave a window of eight hours during a weekday, which was highly problematic for owners with busy schedules, particularly for those with other jobs.<sup>264</sup>

On the other hand, the HUD Office of the Inspector General regularly releases reports that local PHAs have failed to enforce HQS,<sup>265</sup> and an independent report ordered by Congress revealed that “HQS is not being applied consistently across PHAs.” So the requirement in HOTMA that landlords be given 30 days to correct non-life-threatening infractions before PHAs may withhold payments<sup>266</sup> is an excellent step toward improving the inspection process,<sup>267</sup> but the problem also appears to be rooted in the variable and often unprofessional performance of inspectors.<sup>268</sup> Although HUD can only exert limited control over inspectors, who are often contractors for PHAs, the agency should offer more precise guidance regarding HQS inspections and participant service standards. HUD should also revise their guidelines to make inspections more convenient for owners by requiring that they be

---

<sup>262</sup> BONVENTRE ET AL., *supra* note 251, at 48.

<sup>263</sup> *Id.* at 38, 48, 52.

<sup>264</sup> *Id.* at 48.

<sup>265</sup> See, e.g., OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOUS. & URBAN DEV., AUDIT REP. NO. 2016-AT-1005, HOUSING AUTHORITY OF THE CITY OF DURHAM, NC: SECTION 8 HOUSING CHOICE VOUCHER PROGRAM HOUSING QUALITY STANDARDS 4 (2016); OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOUS. & URBAN DEV., AUDIT REP. NO. 2015-LA-1003, ORANGE COUNTY HOUSING AUTHORITY, SANTA ANA, CA: HOUSING CHOICE VOUCHER PROGRAM HOUSING QUALITY STANDARDS 4 (2016); OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOUS. & URBAN DEV., AUDIT REP. NO. 2016-PH-1002, WESTMORELAND COUNTY HOUSING AUTHORITY, GREENSBURG, PA: HOUSING CHOICE VOUCHER PROGRAM 4 (2016); OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOUS. & URBAN DEV., AUDIT REP. NO. 2016-AT-1004, PUERTO RICO DEPARTMENT OF HOUSING, SAN JUAN, PR: HOUSING CHOICE VOUCHER PROGRAM HOUSING QUALITY STANDARDS 4 (2016).

<sup>266</sup> Housing Opportunity Through Modernization Act of 2016, Pub. L. 114-201, 130 Stat. 782, 783.

<sup>267</sup> See 42 U.S.C.A. § 1437f(o)(8) (West 2016) (describing inspection process).

<sup>268</sup> See BONVENTRE ET AL., *supra* note 251, at 48.

notified of specific times or shorter time windows during which they must be available. In short, HUD needs to find a way to both ensure the units it subsidizes are safe and in good working order and to keep as many units in opportunity areas in the program as possible. This is not possible when the current regulations afford inspectors the discretion to needlessly discard apartments and alienate landlords in opportunity areas.

*b. For landlords in high-poverty neighborhoods, HCVs are big business*

Just as some federal regulations deter landlords in opportunity neighborhoods from participating in the HCV program, others incentivize landlords in high-poverty neighborhoods to attract and retain voucher holders. Of course, increasing the number of landlords familiar with HCV rules and administrative processes, as well as with the personal challenges faced by low-income residents, is not a bad thing; it could improve landlord-tenant relationships and avoid tenants having to move frequently.<sup>269</sup> But the current program only inspires this expertise in owners of property with units in poorer neighborhoods whose business models depend on luring subsidized housing tenants who come with steady, above-market rent. This creates an HCV market that further minimizes the chances of creating more housing opportunity in low-poverty neighborhoods.

From a business standpoint, renting to low-income residents at market rate is a challenging endeavor. Low-income tenants are usually rent-burdened, meaning typical rent, even in less desirable neighborhoods, is well over one-third of their income.<sup>270</sup> For landlords, this increases the likelihood of delinquent rents, neglected utility bills, and evictions.<sup>271</sup> However, HUD has created conditions whereby landlords who know the ins and outs of the voucher system can reap healthy profits by recruiting and retaining HCV tenants in units that would otherwise see frequent turnover and unreliable rent collection.<sup>272</sup> One study by Eva Rosen also documented the practices of a number of large companies in Baltimore that primarily invest in neighborhoods where they can make a profit off renting to Section 8 tenants—that is,

---

<sup>269</sup> See Rosen, *supra* note 183, at 317–18.

<sup>270</sup> *All Things Considered: Living From Rent to Rent: Tenants on the Edge of Eviction*, NAT'L PUB. RADIO (Mar. 29, 2016), <http://www.npr.org/2016/03/29/471347542/living-from-rent-to-rent-tenants-on-the-edge-of-eviction> (“One in four low-income families pays more than 70 percent of its income on rent . . .”).

<sup>271</sup> Rosen, *supra* note 183, at 317–18.

<sup>272</sup> See *id.* (discussing how landlords in Baltimore’s low-income neighborhoods have structured their business models around renting to HCV holders, aided in part by regulations that help them trap families in apartments, which helps avoid the cost of turnover).

neighborhoods with moderate-to-high poverty; high vacancy, turnover, and eviction rates; and low homeownership.<sup>273</sup> Observing the concentration of vouchers to certain neighborhoods in most major metropolitan areas nationwide, one can predict that the Baltimore situation is not unique.<sup>274</sup>

In her study, Rosen interviewed landlords about how they can create this profitable business model by manipulating the rent-reasonableness formula.<sup>275</sup> The HCV payment standards, as discussed above, are calculated using the FMR of fairly large regions.<sup>276</sup> The FMR of a city is often substantially higher than market rent in a poor neighborhood.<sup>277</sup> However, PHAs also conduct a rent reasonableness analysis for each unit before lease-up to ensure the payment standard is commensurate with similar units in the area.<sup>278</sup> But savvy landlords would strategically add certain amenities—or even create extra bedrooms—to make rent seem reasonable, even when it is higher than other units in the neighborhood,<sup>279</sup> which allows them to secure a payment standard above typical market rents in the immediate neighborhood. Then, they steer certain voucher holders toward the units in the most undesirable neighborhoods.<sup>280</sup> They also offer incentives to entice HCV holders to live in less desirable units than their voucher would normally cover.<sup>281</sup> Vouchers usually do not cover things like utilities, security deposits, or furniture<sup>282</sup> so landlords can entice very low income voucher holders to take hard-to-rent units by offering to waive or discount those expenses.<sup>283</sup>

Finally, regulations empower PHAs to terminate a voucher if the resident owes rent or any other money in connection with the unit, which landlords recognize as a way to trap tenants and reduce maintenance and turnover costs.<sup>284</sup> If residents owe a PHA any money

<sup>273</sup> See *id.* at 319–21.

<sup>274</sup> See generally *Affirmatively Furthering Fair Housing*, *supra* note 110 (displaying how HCVs overlap with areas of concentrated poverty and race/ethnicity, see HCV and Race/Ethnicity; Housing Choice Vouchers and Race/Ethnicity for any major metropolitan area).

<sup>275</sup> Rosen, *supra* note 183, at 318–319.

<sup>276</sup> *Id.* at 319.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 318–19.

<sup>279</sup> *Id.* at 319.

<sup>280</sup> Here is a representative quote from a landlord with regard to white voucher holders: “I won’t take a white client and put her right down in the middle of Park Heights. . . . [W]hen we place whites . . . I’ll try to place them in a more safer type neighborhood, if I have a white I won’t try to place a white down in the middle of a war zone. It wouldn’t—you can call it discrimination, but to me, it just wouldn’t be right.” *Id.* at 326.

<sup>281</sup> *Id.* at 324–25.

<sup>282</sup> See *id.* at 325.

<sup>283</sup> See *id.* at 324–25.

<sup>284</sup> 24 C.F.R. § 982.552(a) (2016).

toward landlord repair or rent reimbursements they can lose their voucher.<sup>285</sup> Landlords in the Baltimore study waited until the tenant did some minor damage to the unit or missed a utility payment, made the repair or paid the bill themselves, and then refrained from informing the PHA.<sup>286</sup> This indebted the tenant to the landlord such that if the tenant attempted to move, the landlord could threaten to tell the PHA about the damage and demand reimbursement, knowing the tenant could not afford the cost of repairs.<sup>287</sup>

HUD can and should do more to change these dynamics and protect HCV holders. Instituting the SAFMR program in many cities will go a long way toward disrupting this market and its associated business practices: If reasonable rents are decided on a smaller scale, landlords will not count on HCVs to deliver above-market rents in very poor neighborhoods.<sup>288</sup> To protect tenants from predatory landlords in distressed neighborhoods, HUD should also offer moving subsidies for residents who lack expendable income for security deposits and furniture so that landlords cannot exert leverage over residents, making it harder for landlords in high-poverty neighborhoods to entice residents to lease undesirable units in the poorest areas by offering those things for free. Further, HUD should consider revisions to section 982.552(c), which gives PHAs the authority to terminate assistance to a family if the family owes a PHA money for any amount paid to the owner for damages to the unit, rent, or other amounts,<sup>289</sup> which would remove landlord's ability to exert leverage over tenants by threatening to report small amounts of money they are owed for damages or utilities.<sup>290</sup> For instance, when HCV tenants owe money, section 982.552 does not oblige PHAs to consider mitigating factors, such as whether the damage was actually the fault of the tenant, whether the landlord is claiming reimbursement from a PHA in retaliation for a tenant's complaints, or whether overdue rent or utilities are due to temporary hardship.<sup>291</sup> Under the regulations, PHAs should be obliged or at least encouraged to consider the circumstances and negotiate a payment plan with the tenant in the event they do legitimately owe money.

---

<sup>285</sup> *Id.* § 982.552(c) (v-vii).

<sup>286</sup> *See Rosen, supra* note 183, at 329–31.

<sup>287</sup> *Id.*

<sup>288</sup> *See Fischer, supra* note 182, at 3.

<sup>289</sup> 24 C.F.R. § 982.552(c).

<sup>290</sup> *See Rosen, supra* note 183, at 330.

<sup>291</sup> *See* 24 C.F.R. § 982.552(c) (v).

*C. PHAs should start a conversation with HUD about these and other impediments to fair housing.*

Even if HUD repeals the AFFH Rule, forward-thinking PHAs and housing advocates could use the assessment format it provided to look beyond the next four years. First, the assessment would be a valuable exercise for jurisdictions looking to decrease segregation and diversify their public housing offerings. Second, the data and mapping tool HUD has provided to help recipients complete the assessment offers valuable information about the locations and concentrations of subsidized housing in each region relative to factors such as concentrations of poverty, race, economic opportunity, and public health.<sup>292</sup> Local PHA recipients could use the HUD-provided data and the Assessment Tool to undertake their own regional planning processes,<sup>293</sup> even without federal oversight, and they could voluntarily share their findings with HUD.<sup>294</sup> Recipients could follow the lead of the Philadelphia Housing Authority, for instance, which has already submitted its Assessment of Fair Housing and plans to continue efforts toward achieving the city's fair housing goals, with or without leadership from Washington.<sup>295</sup>

In completing the assessment, PHAs should identify specific federal programmatic barriers as factors that contribute to impediments to fair housing.<sup>296</sup> The Assessment Tool specifically prompts agencies to examine data, identify fair housing issues and their contributing factors, and set goals to overcome impediments to fair housing in their region.<sup>297</sup> For example, the tool directs the participant to identify as a "Fair Housing Issue" any Racial and Ethnic Concentrations of Poverty

---

<sup>292</sup> Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,272; *Affirmatively Furthering Fair Housing*, *supra* note 139.

<sup>293</sup> *HUD Rule on Affirmatively Furthering Fair Housing*, OFFICE OF POLICY DEV. & RESEARCH 1, [https://www.huduser.gov/portal/sites/default/files/pdf/AFFH\\_Final\\_Rule\\_Executive\\_Summary.pdf](https://www.huduser.gov/portal/sites/default/files/pdf/AFFH_Final_Rule_Executive_Summary.pdf).

<sup>294</sup> Secretary Carson stated in his nomination hearing that his first order of business would be to go on a "listening tour" around the country. Kriston Capps, *Does Ben Carson Believe in HUD?*, CITYLAB (Jan. 12, 2017), <http://www.citylab.com/housing/2017/01/does-ben-carson-believe-in-the-role-of-hud/512915/>; Tanfani, *supra* note 78. If he follows through on that promise, HUD recipients should use the listening tour as an opportunity to explain the negative impact of regulatory and programmatic regulations like those discussed in this Article and suggest ways to revise them.

<sup>295</sup> Sheryl Gay Stolberg, *Critics Worry Over How Ben Carson, Lacking Expertise in Public Housing, Will Lead It*, N.Y. TIMES (Dec. 5, 2016), <https://nyti.ms/2gJCLdM> ("Mr. Kenney, [mayor of Philadelphia, Pa.,] in a carefully worded statement, make [sic] clear that he would push back against any changes. 'We will continue with our efforts to overcome patterns of segregation, promote fair housing choice and foster inclusive communities,' the statement said.").

<sup>296</sup> U.S. DEP'T OF HOUS. & URBAN DEV., ASSESSMENT OF FAIR HOUSING TOOL 8 (2015).

<sup>297</sup> *Id.* at 1.



(R/ECAP) in its jurisdiction<sup>298</sup> and then choose from a list of potential contributing factors, including deteriorated and abandoned properties, displacement of residents due to economic pressures, lack of private investment, etc., to the existence of R/ECAP.<sup>299</sup> Once the participant has identified Fair Housing Issues and their contributing factors, they memorialize goals to tackle the Fair Housing Issues by confronting the contributing factors and identify metrics, milestones, and timetables they will use to measure progress.<sup>300</sup> The reporting exercise is meant to help recipients think more concretely about local conditions that perpetuate segregation and to hold recipients accountable for furthering fair housing.<sup>301</sup> When local recipients complete the exercise, though, they should not let HUD off the hook for their part in stalling desegregation efforts. If appropriate, they should identify obstructionist HUD regulations, like those discussed in this Article, as contributing factors, and use the submission to start a dialogue with HUD about federal regulatory reforms that are needed to further fair housing. Even if the Trump administration proves unwilling to discuss fair housing efforts, local recipients should be ready with recommendations if and when an administration that prioritizes fair housing takes office.

## CONCLUSION

Federal and local housing authorities must do more to increase the supply of subsidized housing in opportunity neighborhoods if they are to make inroads toward dismantling deeply entrenched patterns of racial segregation.<sup>302</sup> To accomplish this, HUD needs to enable funding recipients to acquire properties more quickly, enable mission-driven developers to both rehabilitate and manage properties for PHAs, and make participation in the HCV program a more attractive option for private landlords. I have detailed some recommendations for regulatory

---

<sup>298</sup> *Id.* at 3.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 11.

<sup>301</sup> *HUD Rule on Affirmatively Furthering Fair Housing*, *supra* note 321, at 1 (“The rule responds to recommendations of the Government Accountability Office and stakeholders for HUD to enhance its fair housing planning obligations by providing greater clarity and support to jurisdictions receiving HUD funding . . . HUD’s rule clarifies and simplifies existing fair housing obligations for HUD grantees to analyze their fair housing landscape and set locally-determined fair housing priorities and goals through the Assessment of Fair Housing (AFH).”).

<sup>302</sup> See Seicshnaydre, *supra* note 17, at 971–72 (“The housing-choice discussion more often than not has been framed in terms of those whose housing choices historically have been the most suppressed—people of color. In this way, a central thrust of the fair-housing message is that housing consumers of color should be able to ‘choose’ their housing and neighborhoods on the basis of criteria apart from—or at least, in addition to—race.”).

reforms that would help HUD and its funding recipients do just that. Throughout, I have argued that a number of HUD regulations, programs, and policies hamper recipients' and developers' efforts to produce desperately needed affordable housing in low-poverty communities. Instead, these rules push housing production back to segregated, distressed neighborhoods where the bulk of subsidized housing already exists, reinforcing and multiplying inequality through "the unequal geography of opportunity."<sup>303</sup>

Although HUD's efforts to enforce the AFFH provision of the FHA were the strongest they had ever been under the Obama administration, they were not correctly calibrated to make real progress toward housing integration. The AFFH rule, for instance, imposes obligations that local recipients were unlikely to fulfill under the agency's regulatory regime. But, the AFFH rule's Assessment of Fair Housing might still offer an interesting medium for local recipients to identify HUD-imposed programmatic and regulatory impediments to fair housing, and to start a conversation with HUD about regulatory reform. Whether or not the Trump administration repeals the AFFH rule, that conversation should still take place. Secretary Carson has signaled his interest in removing onerous regulations that impede integration, expanding families' choices of where to live, and using subsidized housing to boost residents' economic mobility.<sup>304</sup> In fact, he based his written statements to the Senate Committee on Banking, Housing, and Urban Affairs upon several of the same studies about the benefits of housing mobility cited in this Article.<sup>305</sup> All of the recommendations included here would further Secretary Carson's stated goals.

There is no reason—other than animus toward desegregation—the recommendations in this Article should not be well received by the new Republican administration, considering the party's rhetorical support for choice, deregulation, and the use of government aid to promote economic mobility and self-sufficiency.<sup>306</sup> Chief among the current federal impediments to fair housing are regulations that render

---

<sup>303</sup> Zubrinsky Charles, *supra* note 247, at 76.

<sup>304</sup> See Carson, *supra* note 4, at 3.

<sup>305</sup> See *supra* notes 2 and 10; see also CARSON, *supra* note 13, at 4–5; *How Can We Improve Economic Opportunities for Our Children*, EQUAL. OF OPPORTUNITY PROJECT, <http://www.equality-of-opportunity.org/> (last visited May 27, 2017); Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence Declined?* (Hutchins Ctr. on Fiscal & Monetary Policy, Working Paper No. 21, 2016), [https://www.brookings.edu/wp-content/uploads/2016/08/wp21\\_ganong-shoag\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2016/08/wp21_ganong-shoag_final.pdf) (arguing that increasingly strict land use regulations, also known as exclusionary zoning, has disrupted regional income convergence and led to increased inequality by limiting the supply of housing in high-income areas and excluding unskilled workers. This in turn disrupts generational economic mobility, because unskilled workers are excluded from areas where their children might find greater opportunity).

<sup>306</sup> See Carson, *supra* note 4, at 2.

acquisition of hard units in opportunity areas nearly impossible, and laws that make it untenable for developers to purchase multiunit buildings in low-poverty neighborhoods and operate them as public housing. And President Trump is certainly on record as being in favor of deregulation in almost every sector of the American economy.<sup>307</sup> If, for some reason, his administration was to oppose deregulation measures that would help low-income minority families to live in healthy communities, observers would then be justified in their skepticism. If, on the other hand, the new administration is really willing to listen to the concerns of its funding recipients, the reforms suggested in this Article might offer one area where it can find common ground with progressives.

---

<sup>307</sup> See Ben Lane, *Your Handy Guide to All of Trump's Promised Deregulation*, HOUSINGWIRE (Feb. 27, 2017), <http://www.housingwire.com/articles/print/39116-your-handy-guide-to-all-of-trumps-promised-deregulation>.