Secretary Ben Carson  
U.S. Department of Housing and Urban Development  
451 7th Street SW  
Washington, D.C. 20410

July 20, 2017

Dear Secretary Carson:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole, to urge you to immediately begin the process of rescinding HUD’s Affirmatively Furthering Fair Housing (AFFH) rule.¹

The Washington Examiner reports that you have suggested that because the Supreme Court has upheld the validity of the AFFH rule,² HUD should “reinterpret” rather than rescind such rule. I respectfully submit that the AFFH rule is incapable of such reinterpretation in a manner consistent with good and fair public policy. It is a profoundly flawed rule, representing a significant assertion of federal control over matters of local concern.

In your confirmation hearing, you expressed skepticism about the AFFH.³ As a longtime critic of the rule, I find this heartening. However, it is important that HUD immediately begin the process of formally rescinding the rule.

There are several reasons for this urgency. First, even though under your leadership HUD presumably will not enforce the AFFH, HUD has already forced some communities into overreaching agreements. These communities include New York’s Westchester County and Dubuque, Iowa.⁴ These communities have already been deprived of a degree of self-government, and that injury persists as long as these agreements are in effect. Dubuque already has a waitlist for Section 8 housing assistance, but a “Voluntary” Compliance Agreement requires it to advertise in Chicago in an attempt to attract more Section 8 voucher holders.⁵ Dubuque residents

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¹ 80 FR 42272.  
continue to be harmed by the Compliance agreement, which prohibits Dubuque from preferring its own residents who are in need of housing to those from outside the area, or even outside the state.\textsuperscript{6} The people on the housing assistance waitlist in Dubuque are too white, so the city must try to attract out-of-state African-Americans to join its waitlist – which of course makes the list even longer.

Insofar as any such agreements require communities to build types of housing mandated by HUD – for example, constructing apartment buildings in communities where the residents prefer to have single-family homes – the character of these communities will be irreversibly changed. I respectfully request that HUD revisit any such compliance agreements reached under the “disparate impact” theory of fair housing embodied in AFFH and consider rescinding them.

Regrettably, the Supreme Court has held that disparate impact claims are permitted under the Fair Housing Act.\textsuperscript{7} However, the fact that disparate impact claims may presently be brought under the FHA is a far cry from the intrusive racial bean-counting and micromanagement that is the substance of the AFFH. My objections to AFFH are discussed in detail in the public comment I submitted to HUD while the rule was being considered. That comment is attached. However, if AFFH is not withdrawn, courts will defer to its interpretation of the FHA in disparate impact cases that come before them. This is in contrast to the more limited approach envisioned by Justice Kennedy in his majority opinion in Texas Department of Housing:

Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely “remov[ing] … artificial, arbitrary, and unnecessary

\textsuperscript{6} Id. at 19.

Availability of Application: remove the clause that “or may accept only applications meeting certain criteria such as limiting the waiting list to applicants with local preference only.”

Local Preferences: Delete the final paragraph pertaining to residency preferences.

barriers.” And that, in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system.

It must be noted further that, even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that “arbitrar[ily] … operate[s] invidiously to discriminate on the basis of rac[e].” If additional measures are adopted, courts should strive to design them to eliminate racial disparities through race-neutral means. ("[T]he city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races."). Remedial orders that impose racial targets or quotas might race more difficult constitutional questions. ⁸ (citations omitted)

The approach outlined by Justice Kennedy envisions the use of race as a last resort in remedying disparate impact claims. AFFH uses race first, last, and always. Even if under your leadership HUD does not enforce AFFH, private plaintiffs will rely on it. Once that case law is established, it will be hard to return to a world in which housing policy is not heavily influenced by racial bean-counting.

Thank you for considering these concerns. If I can be of any assistance, please contact my special assistant, Carissa Mulder, at cmulder@usccr.gov.

Sincerely,

Peter Kirsanow
Commissioner

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⁸ Id. at 2524.