Fair Housing and Climate

Introduction

Salesforce’s commitment to sustainability arises out of its set of core values - trust, customer success, innovation and equality for all. One reason that the company identifies a sustainable environment as essential to its core value of equality is because - as detailed below – climate change has a disproportionate adverse effect on those who are socioeconomically disadvantaged. This impact has been increasingly visible as regions around the globe suffer ever increasing wildfires, dangerous temperature fluctuations and destructive weather-related events. This article analyzes legislation and policy that attempt to mitigate this disproportionate impact.

The Affirmatively Furthering Fair Housing provision (“AFFH”) of the Fair Housing Act (“FHA”) is an expansive tool to end housing discrimination that has not yet been applied to its fullest application. It represents one of the most sweeping efforts by the federal government to reverse segregation and prevent discrimination. This article examines the history of the AFFH, recent fluctuations in the regulations enacted to effectuate the AFFH and explores what those fluctuations may mean where housing regulation intersects with equal rights and climate change.

The Fair Housing Act

Title VIII of the Civil Rights Act of 1968 (the “Civil Rights Act”), known as the Fair Housing Act, became law when the Civil Rights Act was signed by President Lyndon Johnson on April 11, 1968, prompted by the assassination of Rev. Dr. Martin Luther King, Jr., whose name had become connected with fair housing legislation. The FHA was passed with a broad mandate to prohibit discrimination in the sale or rental of housing based on characteristics including race, color, sex and national origin where that housing has a designated relationship to the Federal Government. In his remarks upon signing the Civil Rights Act, President Johnson stated “[the Civil Rights Act] proclaims that fair housing for all – all human beings who live in this country – is now a part of the American way of life.” The climate emergency continues to have increasingly adverse impacts on housing, allowing this broad mandate to take into consideration climate concerns.

The Affirmatively Furthering Fair Housing Rule of the FHA

The FHA permits the Secretary of the Department of Housing and Urban Development (“HUD”) to issue rules to promote its broad mandate. The FHA states that “it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”
The FHA goes on to state that “the Secretary of Housing and Urban Development shall ... administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the FHA].” Given the inclusion of the “affirmatively further” language, the intent behind the FHA was not just to prohibit discrimination in housing but to advance the mission of fair housing. Despite its inclusion in the FHA, the AFFH historically has been minimally utilized by HUD to further the purpose of the FHA.

Courts and HUD have consistently interpreted the AFFH as requiring HUD to use its programs to do more than simply not discriminate and bar others from discriminating. Courts and HUD interpreted this obligation to mean that HUD was required to use its programs to take affirmative steps to proactively overcome historic patterns of segregation, promote fair housing choice and foster inclusive communities for all. In 1996, HUD began requiring the recipients of its grants to certify that the grantee is affirmatively furthering fair housing, thereby increasing the formal role of the AFFH. The guidelines published in 1996 enhanced HUD’s formalization of how to comply with the AFFH by requiring HUD funding recipients to complete an Analysis of Impediments to Fair Housing Choice (“AI”), which involved collecting an array of data on topics contributing to housing inequities.

**Fluctuations in the AFFH Mandate**

HUD issued its most robust means to date to implement the AFFH mandate in a 2015 rulemaking (the “2015 Rule”). The 2015 Rule developed new and comprehensive tools to affirmatively further fair housing. In lieu of completing an AI, the 2015 Rule required for HUD participants that were already required to develop plans consistent with statutory requirements for the use of HUD funds to also develop and update every three to five years an Assessment of Fair Housing (“AFH”) that would be reviewed by HUD. Recipients of applicable HUD funds that were required to submit an AFH included states, municipalities and public housing authorities. Requirements of an AFH included a summary of fair housing issues, an assessment of fair housing issues like contributing factors to segregation, identification of fair housing priorities, an outline of strategies and actions to affirmatively further fair housing, a summary of community involvement and a review of progress achieved. The 2015 Rule also stated that each AFH must include an analysis of HUD-provided data to identify, among other things, segregation trends, significant disparities and disproportionate housing needs. In summary, the purpose of preparing and reviewing each AFH was to collect data to assess fair housing issues and contributing factors in order to resolve the same and pursue HUD’s mandate to affirmatively further fair housing. We note that the breadth of these requirements could allow for the inclusion of climate change considerations, particularly given that the housing of underserved communities tends to be less structurally resilient to the adverse impacts of climate change.

In 2018, HUD suspended the implementation of the 2015 Rule based on the then-current administration’s view that the AFH created an unnecessary burden on HUD funding recipients. Then in 2020, HUD proposed a rule to repeal and replace the 2015 Rule (the “2020 Rule”). The
2020 Rule replaced the rigorous AFH regime with an approach that required HUD funding recipients to simply certify that the recipient took any action to promote fair housing.

The Current Status of the AFFH

At the outset of the most recent presidential administration, President Biden expressed that climate is a consideration for housing policy. In a January 2021 memorandum, the President noted that underserved communities face a disproportionate burden from the impacts of climate change, that people of color are disproportionately exposed to the risks of housing instability from flooding and wildfires and that the Secretary of HUD should examine the effects of the 2020 Rule and take all necessary steps to effectuate the AFFH. In July 2021, the Secretary of HUD acted on the President’s directive and published an interim final rule to restore certain provisions of the 2015 Rule (the “2021 Rule”). While the 2021 Rule does not require funding recipients to periodically complete an AFH, the 2021 Rule does require funding recipients to certify that they will affirmatively further fair housing and HUD to assist the recipients with their obligation by providing data and resources about how to engage in fair housing planning. The 2021 Rule defines affirmatively furthering fair housing as “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.” The 2021 Rule also defines meaningful actions as “significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity.” The restoration of robust definitions of affirmatively furthering fair housing and meaningful actions as part of the AFFH mandate ensures that HUD funding recipients must make meaningful certifications related to affirmatively furthering fair housing. Lastly, it is worth noting that in the Secretary of HUD’s justification for the 2021 Rule, the Secretary of HUD acknowledges that segregation and inequity have “been exacerbated by presently converging health, economic, and climate crises.” This indicates that the AFFH will take into consideration climate change going forward.

The Climate Emergency, Disadvantaged Communities and the Future of the AFFH

Low-income households are impacted the most by the effects of climate change as such households are located closer to air polluters and areas more susceptible to natural disasters. Low-income communities are also disproportionately exposed to extreme heat and pollution. Domestically, low-income Americans are more likely to suffer from the consequences of tropical storms due to inadequate infrastructure. Globally, climate change will increasingly affect the
poor because it exacerbates factors such as poor access to drinking water and dependency on economic resources such as agriculture and fishing which continue to be adversely impacted.

Through successive administrations, we see an opportunity for climate change to be considered as a pertinent factor for determining whether a recipient of HUD funds is affirmatively furthering fair housing. Given the current administration’s express discussion of climate change with regard to housing of underprivileged communities, we see room for climate change to be a material factor in analyses under the AFFH, in turn helping to reverse the harmful effects of segregation and disproportionate impact of climate change. Incorporating climate change explicitly into the AFFH analysis would help to ensure HUD funding recipients work to mitigate the disproportionate harm that climate change has on low-income communities. Given the disproportionate impact of climate on the housing of underprivileged communities, climate change is a legitimate criteria of this analysis.

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