



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
Region VII, OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY  
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May 31, 2013

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

Catherine D. Lang, Department Director  
Nebraska Department of Economic Development  
301 Centennial Mall South  
P.O. Box 94666  
Lincoln, NE 68509-4666

Dear Ms. Lang:

SUBJECT: State of Nebraska- Analysis of Impediments to Fair Housing Choice

The purpose of this letter is to provide the State of Nebraska technical assistance on meeting its affirmatively furthering fair housing obligations, particularly regarding the State's Analysis of Impediments to Fair Housing Choice (AI). The U.S. Department of Housing and Urban Development's (HUD's) Office of Fair Housing and Equal Opportunity (FHEO) and Office of Community Planning and Development (CPD) previously completed a civil rights compliance review of the Community Development Block Grant (CDBG) Program and HOME Program administered by the State of Nebraska Department of Economic Development (DED) (hereinafter referred to as the State). During the review, HUD also assessed the extent to which the State is meeting its obligation to affirmatively further fair housing (AFFH) pursuant to Section 104 of Title I of the Housing and Community Development Act of 1974, 42 U.S.C. § 5304, and the implementing regulations at 24 C.F.R. Part 570.<sup>1</sup>

Grantees of the State CDBG program must certify that they will affirmatively further fair housing. 42 U.S.C. § 5304(b)(2). The certification that the State will affirmatively further fair housing shall specifically require the State to assume the responsibility of fair housing planning by: (1) conducting an analysis to identify impediments to fair housing choice within the State; (2) taking appropriate actions to overcome the effects of any impediments identified through that analysis; (3) maintaining records reflecting the analysis and actions in this regard; and (4) assuring that units of local government funded by the State comply with their certifications to affirmatively further fair housing. 24 C.F.R. § 570.487(b).

HUD issued a letter of findings (LOF) regarding the compliance review on May 31, 2013. In the LOF, HUD made several observations concerning the State's AFFH-related policies, procedures, and monitoring operations that the State should address to ensure that sub-recipients are affirmatively furthering fair housing. The State previously requested and HUD provided technical assistance on AFFH matters, including reviewing and providing comments on

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<sup>1</sup> See also 42 U.S.C. § 12705 and 24 C.F.R. Part 91 (consolidated plan requirements related to AFFH).

the State's 2005 AI in a letter dated March 15, 2011. The State updated its AI in 2011 and released the final AI on January 10, 2012 (2011 AI). This letter provides HUD's comments and recommendations on the State's 2011 AI.

This letter also provides comments on a sub-recipient of the State's CDBG program, the City of Fremont, Nebraska's AI, dated July 2011 (Fremont AI). HUD recommends the State utilize this information to provide guidance and technical assistance to its sub-recipients on AFFH matters.

### **State of Nebraska 2011 AI**

In 2005, the State completed an AI, identifying seven impediments which it planned to mitigate through implementing three strategies. The compliance review revealed that the State has not taken sufficient action on the majority of impediments, actions and strategies that it identified in the 2005 AI. As mentioned above, the State completed an updated AI in 2011 (dated January 10, 2012). The 2011 AI identified seven impediments in the private sector and nine impediments in the public sector. Many of the same impediments identified in the State's 2005 AI are identified in the 2011 AI, including violations of fair housing laws in rental markets, confusion regarding housing discrimination complaint process, inadequate enforcement of design and construction standards for accessible housing, and unfair lending practices in the home purchase market. The 2011 AI recognizes that expanded State efforts are needed to address these ongoing barriers to fair housing choice.

When the updated draft 2011 AI was released for comment in October 2011, HUD conducted a limited review and found the new AI did not address all of HUD's comments provided in the March 15, 2011 letter. The final 2011 AI addresses some but not all of HUD's comments. It includes more specific actions and measurable outcomes for some impediments as HUD suggested and the AI reflects that the State made significant efforts to get public input on the AI. However, there are several areas the State should take action to address to ensure its AI is comprehensive and accurate. HUD also notes two problematic areas identified during the compliance review were also identified as impediments in the State's 2011 AI: lack of actions to affirmatively further fair housing by CDBG sub-recipients and language barriers. The State should take the actions identified in the AI to improve monitoring of sub-recipients. In the LOF, HUD also recommended that the State provide more training, examples and technical assistance to sub-recipients on AFFH and implement more stringent monitoring policies to ensure proper follow up and recordkeeping. A summary of HUD's comments and suggestions regarding the State's 2011 AI are set out below.

- The 2011 AI did not identify Fremont Ordinance No. 5165, which prohibits the harboring or hiring of illegal immigrants, as an impediment to fair housing choice in the State. The State's 2011 AI, concluded the Fremont Ordinance has "potentially unlawful race and national origin restrictions in the rental housing market in the City of Fremont." The AI further stated, "Notably, while the Fremont situation could be viewed as a local matter, the case will likely hold significant repercussions on a state level, or perhaps even a federal level, in terms of the impact that the case could have on calling into question the efforts of grantees to affirmatively further fair housing." Despite this, the State's AI did

not list the Fremont Ordinance as an impediment to fair housing choice and did not outline any actions to address the effects of the passage of the Fremont Ordinance. See below for additional discussion of the Fremont Ordinance.

- The 2011 AI did not sufficiently address language barriers as an impediment. The executive summary of the 2011 AI, page 11, listed only language barriers in permitting processes as an impediment. However, pages 101 and 102 of the 2011 AI indicated language barriers also posed an impediment in leasing and lending not just the permitting process. As noted in the LOF, the compliance review found the State and its sub-recipients had failed to take reasonable steps to ensure access to federally funded programs to persons with limited English proficiency (LEP).
- The 2011 AI did not adequately review statewide policies and laws that might affect fair housing choice. For example, Nebraska's state law which requires verification of lawful presence for purposes of public benefits, Neb. Rev. Stat. 4-108 – 4-114, Nebraska LB 403 (2009). See Section 3.6 of HUD's Fair Housing Planning Guide regarding reviewing statewide policies and laws.
- The statewide survey indicated problems with NIMBYism and restrictive land use and zoning in some cities that affected the location of affordable housing, group homes and mobile home parks. These were discussed in the analysis as a barrier to fair housing choice but these items were not identified as impediments and no specific actions were developed to address these issues.
- The actions to address the impediment of higher loan denial rates for minorities did not include education directed to lenders about fair housing and fair lending laws. In addition, the AI noted that HMDA data revealed large portions of the western part of the State had the highest denial rates but the AI did not have any specific actions targeted to this area.
- In several instances, the AI excluded possible impediments by stating they do not meet the HUD definition of an impediment, such as lack of affordable housing and accessible housing. HUD does not have a formal regulatory definition of "impediment to fair housing choice," but provides guidance in the Fair Housing Planning Guide. Section 2.7 of the Fair Housing Planning Guide defines impediments to fair housing choice as "Any actions, omissions, or decisions taken because of race, color, religion, sex, disability, familial status, or national origin that restrict housing choices or the availability of housing choice" or "Any actions, omissions, or decisions that have this effect." The lack of affordable housing or accessible housing would be an impediment to fair housing choice if it had the effect of restricting housing choice or the availability of housing choice because of race, disability, or another protected class, or was intended to restrict housing opportunities or the availability of housing choice because of a protected class.
- The AI concluded the Fair Housing Center of Iowa and Nebraska's concern over a State law that allows municipalities to deny use of Housing Choice Vouchers in their jurisdiction could not be included as an impediment because source of income is not a protected class. While source of income is not a protected class, the State law should be examined to determine if it has the effect of limiting housing choice for protected classes, including minorities and families with children. See the Fair Housing Planning Guide's definition at Section 2.7 noted above.
- The geographic scope of the AI was strictly limited to the non-entitlement areas of the State, excluding Lincoln and Omaha, the State's two largest cities. Although those cities

are required to conduct their own AIs, HUD recommends that the State review and reference those cities' AIs as appropriate in the State AI to fully assess fair housing choice in the State. This would enable the State to identify patterns of geographic segregation and possible impediments to mobility on a statewide level.

- The AI identified the shortage of fair housing services and inadequate fair housing outreach and education activities as public sector impediments and developed actions and measurable outcomes to address these impediments (Impediments 2 and 3). HUD recognizes these efforts but recommends more specificity and actions targeted to certain areas of the State that were identified as having increased fair housing problems or lack of fair housing knowledge, i.e., rural areas of the State and cities with high immigrant populations. See p. 120 of the AI.

HUD also discovered several technical inaccuracies in the AI that are identified below.

- On page 53, the AI inaccurately describes the design and construction requirements of the Fair Housing Act. The AI states, "All ground floor units must comply with the requirements, and all units must be served by an elevator." The design and construction requirements of the Fair Housing Act apply to "covered multifamily dwellings" built for first occupancy after March 13, 1991, which are defined as buildings consisting of four or more units if such buildings have one or more elevators; and ground floor units in other buildings consisting of four or more units. See 42 U.S.C. § 3604(f)(3)(C) and (f)(7).
- On page 59, the AI stated there were not any U.S. Department of Justice (DOJ) cases filed in the past 10 years in the non-entitlement areas of Nebraska. By contrast, DOJ filed a lawsuit on November 23, 2011, against the University of Nebraska at Kearney (UNK) alleging that UNK engaged in a pattern or practice of violating the Fair Housing Act by denying reasonable accommodation requests of students with psychological or emotional disabilities seeking to live with emotional assistance animals in university housing. This case originated from an election referral from HUD, who issued a Charge of Discrimination in the case on September 30, 2011.
- On page 67, the discussion of the HUD Fair Housing Act complaint process contains some misstatements that need to be corrected. If HUD finds reasonable cause, HUD issues a Charge of Discrimination. The case may be heard before an administrative law judge (ALJ) or either of the parties can elect to go to federal court. If one of the parties elects federal court, HUD refers the case to DOJ for prosecution. An ALJ or federal judge or jury determines whether a violation of the Fair Housing Act has occurred and then would determine damages. In federal court, punitive damages are available but they are not available in the HUD administrative forum. See 24 C.F.R. Part 103.
- On page 68, the maximum civil penalties the ALJ may assess for violations of the Fair Housing Act needs to be revised. The amounts have been increased to \$16,000 for a first violation, \$42,500 for a second violation within a five-year period, and \$70,000 for two or more violations of the Act within a seven-year period. See 24 C.F.R. § 180.671 and 78 Fed. Reg. 4057 (Jan. 18, 2013).
- On page 96, when discussing the data on complaints filed with HUD, the AI refers to complaints that were successfully conciliated as complaints found to be with cause. This information should be confirmed or clarified. The fact that a case was conciliated does

not mean it was found to be with cause. Complaints can be conciliated prior to a determination of cause or no cause.

- On page 99, the AI indicates that individuals may advertise a gender preference if they reside in the dwelling or the dwelling permits no more than two families living independently. Advertising a gender preference in a non-roommate situation where two families live in independent units is not permissible under the Fair Housing Act.

### **City of Fremont, Nebraska AI**

Each unit of general local government that receives CDBG funds from the State must also certify that it will affirmatively further fair housing. 42 U.S.C. § 5306(d)(7)(B). Pursuant to the State's certification to affirmatively further fair housing, the State must assure that units of local government funded by the State comply with their certifications to affirmatively further fair housing. See 24 C.F.R. § 570.487(b). The State must make reviews and audits of units of general local government as may be necessary and appropriate to ensure compliance with CDBG requirements. See 24 C.F.R. § 570.492(a). Sub-recipients are not specifically required to complete an AI to meet their AFFH obligations under HUD's regulations, however, it may be considered when reviewing the sub-recipient's actions to affirmatively further fair housing.

The City of Fremont is a sub-recipient of the State's CDBG program. A majority of voters in Fremont passed Ordinance No. 5165, which prohibits the harboring and hiring of illegal aliens, on June 21, 2010. Since July 2010, the City has been engaged in federal litigation defending the validity of the Ordinance, currently on appeal to the U.S. Court of Appeals for the Eighth Circuit, and has not implemented the housing provisions of the Ordinance. As detailed in the LOF, HUD has significant concerns about the Ordinance and its effect on fair housing choice in the City of Fremont and State of Nebraska.

Around September 2010, City of Fremont officials inquired with the State of Nebraska what they could do to affirmatively further fair housing. The State recommended to the City of Fremont that it conduct an AI and the State awarded CDBG funds to Fremont to pay the costs associated with conducting the AI. The City of Fremont also amended its Fair Housing Ordinance in November 2010.<sup>2</sup>

The Fremont AI was conducted between January and July 2011 and released in July 2011. Page 5 of the Fremont AI states, "The results of these research activities revealed that the City of Fremont has few, if any, serious impediments to fair housing choice. The City is doing well in providing affordable housing and protecting the rights of persons and families of low- to moderate-incomes." However, the Fremont AI later identified the following "significant" impediments to fair housing choice:

1. Lack of availability of affordable housing and the high cost of housing
2. High cost of utilities
3. Excessive application fees and rental deposits; and excessive down payment and closing costs to purchase a home
4. Consumers' lack of knowledge of how to file a fair housing complaint

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<sup>2</sup> HUD has not certified Fremont's local fair housing ordinance as substantially equivalent to the Fair Housing Act.

As discussed above and following suggestions and examples in the Fair Housing Planning Guide, items (1) through (3) need to be presented in the context of their effect on housing choice or the availability of housing with respect to a person's race, color, religion, sex, disability, familial status, or national origin.

The AI did not recognize the housing provisions of the anti-illegal immigration ordinance as an impediment. Page 52 of the Fremont AI identified the anti-illegal immigration ordinance as a *potential* impediment to fair housing choice. It states:

This Ordinance could prove an impediment to fair housing in the City. Though some residents currently residing in Fremont are not legal U.S. Citizens, the process to become legal is a very drawn-out and lengthy. This Ordinance may also impede upon the honest efforts of illegal aliens to become citizens and occupy an affordable owner or renter housing unit, potentially leading to claims of racial profiling and creating unnecessary hardships to persons and families during this process.

Section 2.7 of the Fair Housing Planning Guide states, "Policies, practices, or procedures ... which operate to deny or adversely affect the availability of housing to persons because of race, ethnicity, disability, and families with children may constitute such impediments." It goes on to state that impediments to fair housing choice include actions or omissions in the jurisdiction that constitute violations, or potential violations, of the Fair Housing Act; are counterproductive to fair housing choice; or have the effect of restricting housing opportunities on the basis of race, color, religion, sex, disability, familial status, or national origin. To the extent that the Ordinance's passage discourages housing providers from serving persons on the basis of national origin or discourages persons on the basis of national origin from seeking housing, the Ordinance's housing provisions can be seen as an impediment rather than a potential impediment.

The AI does not identify or describe any action that the City will take to prevent the Ordinance from becoming an impediment or to mitigate the effect of the Ordinance. Although the City has not implemented the housing provisions of the Ordinance, the citizen initiated petition and passage of the Ordinance have created an atmosphere of tension for minorities and promoted the idea that Hispanics are not welcome in the City and must be recognized as an impediment to fair housing choice in the community.

HUD's review also revealed that the Fremont AI did not sufficiently focus on barriers to fair housing choice based on protected classes but instead focused on affordable housing more generally. A sufficient AI must analyze more than affordable housing – for example, the lack of affordable housing for persons within racial or national origin groups. Also, the Fremont AI identified a need for LEP services but did not list this as an impediment. The record that HUD examined appears to show that the Hispanic community was not well represented in the responses to the Fremont survey conducted during the AI process.

## **Actions to Address the Fremont Ordinance**

The Fremont and State AIs referenced the Fremont Ordinance as a potential impediment but did not recognize the effects the passage of the ordinance may have had on fair housing choice and did not identify any actions to address the Ordinance. HUD's review did not reveal any follow-up efforts by the State or City to determine any adverse effects that the passage of the ordinance might have had, such as reduced rental activity for Hispanic persons. In letters dated March 15, 2011, and June 2, 2011, HUD notified the State that the impact of the Fremont Ordinance must be addressed in the State and Fremont AIs. Neither AI sufficiently addressed the Ordinance. Pursuant to the City and State's obligations to affirmatively further fair housing, the City and State must take concrete actions to try to mitigate the effect the Ordinance has had on limiting fair housing choice for minorities, specifically Hispanics. To have an effective AI, concrete actions with specific timeframes and measureable outcomes to address the Ordinance should be included in the City and State AIs. The LOF suggested several actions the City could pursue to address the impediment created by the Ordinance. The State should also identify and implement actions to address the Ordinance and could partner with the City in some efforts. Both the City and State should maintain appropriate documentation of their actions. Such actions may include, but not be limited to, the suggested actions below.

- Develop and implement a fair housing education and outreach program for the City and/or partner with surrounding communities to ensure that government officials, real estate professionals, landlords, tenants and all residents are knowledgeable about fair housing laws.
- Implement a fair housing and diversity education program in local schools. HUD recommends the City partner with the U.S. Department of Justice Community Relations Services (DOJCRS) staff in Kansas City, Missouri, and the Nebraska Equal Opportunity Commission to conduct outreach in schools.<sup>3</sup> Mr. Pascual Marquez is the Regional Director of DOJCRS and may be contacted at (816) 426-7433 or Pascual.Marquez@usdoj.gov.
- Conduct targeted testing on the effect the Ordinance has had on minority rental applications in the City and surrounding communities.

## **CONCLUSION**

This letter is intended to provide the State technical assistance in meeting its AFFH obligations. However, if the State fails to take action to meaningfully address the comments outlined in this letter, HUD may determine that the State or City has failed to comply with civil rights related program requirements and HUD may request a corrective action plan. See 24 C.F.R. § 570.495(a). If the State's response is not sufficient, HUD may take additional action, including issuing a letter of warning or notifying the State further assurances are necessary to ensure the State's certifications are satisfactory. 24 C.F.R. § 570.495(a)(1) and (2). A critical component of the State's AFFH responsibilities is monitoring the compliance of sub-recipients with their AFFH and civil rights certifications, including the City of Fremont. See 24 C.F.R. §§ 570.487(b) and 570.492. The Department will be reviewing the State's ongoing compliance with

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<sup>3</sup> The DOJ Community Relations Staff in Kansas City, MO also serves the state of Nebraska.

affirmatively furthering fair housing and civil rights requirements, including whether the State has appropriately monitored its sub-recipients, and may provide additional comments when the State submits Annual Plans and Consolidated Annual Performance Evaluation Reports (CAPERs) to the Department for review. See 24 C.F.R. § 570.493.

In the interim, please contact Kitty Amaya, Equal Opportunity Specialist, Omaha HUD Office at (402) 492-3197, if you have any questions.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon a third party's request. In the event that the Department receives such a request, we will protect, to the extent provided by law, personal information, which if released, would constitute an unwarranted invasion of privacy.

Sincerely,

A handwritten signature in cursive script, appearing to read "Betty J. Bottiger".

Betty J. Bottiger  
Director  
Region VII Office of Fair Housing  
and Equal Opportunity



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