

Housing Plaintiffs Achieve Victory Against HUD

A federal court recently declared that the Department of Housing and Urban Development (“HUD”) unlawfully delayed implementation of a fair market rents rule (“New FMR Rule”), and required HUD to implement the rule on its originally scheduled effective date. *See Open Communities Alliance v. Carson*, CV 17-2192 (BAH), 2017 WL 6558502, at *1 (D.D.C. Dec. 23, 2017). In February, HUD agreed not to appeal this decision. As this case demonstrates, legal remedies exist when HUD changes a rule or policy without proper notice or without relevant factual evidence in support. More broadly, the decision confirms that when HUD fails to meet its legal obligations, it is subject to challenge in court.

In *Open Communities Alliance*, a number of residents and community organizations sued HUD to require implementation of the New FMR Rule on its original effective date. Under the new rule, the value of housing vouchers would be calculated for certain designated PHAs based on local, rather than metropolitan-wide, prevailing market rents. In August of 2017, HUD Secretary Ben Carson informed these PHAs—without giving prior notice or an opportunity for comment—that HUD was postponing implementation of the New FMR Rule by two years.

The court reviewed HUD’s action pursuant to the Administrative Procedure Act (“APA”). In accordance with the APA, HUD is generally required to engage in notice and comment procedures before changing a rule. This includes publishing notice in the Federal Register and giving interested parties an opportunity to submit data or arguments. The APA also prohibits arbitrary and capricious rule changes, including when the agency’s justification for its decision cannot be supported by the evidence before it or if the agency fails to consider an important aspect of a problem the rule was intended to address. In *Open Communities Alliance*, the court found that HUD violated both of these requirements.

The court first concluded that HUD failed to comply with applicable notice and comment requirements. The court found that delaying the planned implementation of the New FMR Rule qualified as a rule change under the APA, subject to the APA’s notice and comment requirements. In its defense, HUD pointed to a regulation allowing it to temporarily suspend FMR designations without notice and comment, but the court held that the regulation did not apply. The court explained that any suspension pursuant to that regulation had to be justified by reference to local market conditions, which HUD had failed to do. Instead, HUD relied on data from a pilot project involving only a limited number of PHAs. Moreover, HUD had already made adjustments to the New FMR Rule to address the concerns identified in the pilot project. The court concluded that HUD’s delayed implementation of the New FMR Rule was subject to, and violated, the APA’s notice and comment requirements.

The court went further, also concluding that HUD acted arbitrarily and capriciously. The court again criticized HUD’s reliance on data from its pilot project involving only a small number of PHAs. The court explained that the pilot project did not represent all areas that would be affected by the New FMR Rule, and that HUD had selected participants for the pilot project “partially randomly” using criteria “entirely different” from the New FMR Rule and for “entirely different objectives.” On this basis, the court found that HUD failed to consider an important aspect of the problem the rule at issue was intended to address: local rental housing market conditions in each affected area. As such, the court concluded that HUD’s two-year delay of the New FMR Rule’s implementation was arbitrary and capricious.

As the *Open Communities Alliance* decision confirms, PHAs may have legal remedies when HUD changes its rules without notice or otherwise acts without substantial justification. This is particularly true if HUD delays implementation of a rule without notice and comment or justifies its decision by citing inapplicable evidence.

Committed to serving public clients, Pacifica Law Group is prepared to advise on these matters. If you have any questions, please contact us.

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