

June 29, 2009

Regulations Division, Office of General Counsel
U.S. Department of Housing and Urban Development
451 Seventh Street, S.W., Room 10276
Washington, DC 20410-0500

**Re: Procedural Changes for Approval of FHA-Insured Mortgages Using LIHTC and Tax Exempt Bond Financing
Docket No. FR-5299-N-01**

By Electronic Submission to www.regulations.gov

To Whom It May Concern:

Please accept this letter as the comments of the undersigned organizations and individuals concerning the *Request for Recommendations Regarding Administrative and Procedural Changes to Expedite Approval of Applications for FHA-Insured Multifamily Mortgages Involving Low-Income Housing Tax Credits or Tax Exempt Bonds*. See, 74 Fed. Reg. 19576 (April 29, 2009). The request for recommendations is mandated by the Housing Tax Credit Coordination Act of 2008. The Coordination Act directs HUD to implement expedited approval procedures for multifamily housing projects that also use Low-Income Housing Tax Credits and tax exempt bond financing “in a manner that provides for full compliance with any existing requirements under law and regulation that are designed to protect families receiving public and assisted housing assistance, including income targeting, rent, and *fair housing provisions*...” Pub. L. 110-289, Div. I, Title II, §2832(a)(1) and (a)(3)(G); 122 Stat. 2867 (July 30, 2009) (emphasis added).

The comments set forth below ask you to adopt procedures to assure compliance by owners of assisted housing with federal laws prohibiting discrimination in housing programs. We also ask to you adopt procedures to carry out the obligation imposed on all federal agencies engaged in housing activities to “affirmatively further” the purposes of the Fair Housing Act. Without these actions, approval decisions in connection with HUD, LIHTC, and bond financing will reinforce widespread patterns of segregation, exclusion, and concentration of poverty that already exist in FHA programs and in the LIHTC program.

A. The Obligation to Further Fair Housing.

There is a very long and well documented history of the use of federal resources to create and perpetuate racial segregation in HUD-administered housing, including in the assisted and insured housing programs administered by the Federal Housing Administration. That history is

repeated in the LIHTC program.¹ Among the many consequences of these policies is the fact that a significant amount of assisted housing is located in highly segregated areas of concentrated poverty, isolated from good schools, access to jobs, and public services.

The legal authorities regulating the civil rights conduct of recipients of FHA assistance include Executive Order 11063, Title VI of the 1964 Civil Rights Act, the Fair Housing Act (Title VIII), Title IX of the Education Amendments of 1972, Section 504 of the 1973 Rehabilitation Act, and the Age Discrimination Act of 1975. These authorities prohibit discrimination and segregation based on race, color, national origin, disability, age, family status, gender, and religion. Most importantly for the underwriting functions associated with HUD transactional approvals and allocations of LIHTC, the Fair Housing Act requires that:

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of [Title VIII] and shall cooperate with the Secretary [of HUD] to further such purposes. 42 U.S.C. §3608(d).

The responsibility imposed by Title VIII means that federal agencies must avoid policies that are facially neutral but have the effect of discrimination, or have the effect of creating or perpetuating segregation. It means that federal agencies must exercise oversight over grantees to assure that they do not utilize policies that discriminate or further segregation. It also requires federal agencies and their grantees to gather information and assess the civil rights impact of funding decisions. Finally, federal agencies and their grantees must take affirmative steps to assure that over time, patterns of residential segregation are dismantled and truly open housing markets are established.²

The obligation to further fair housing applies to the programs administered by the FHA and also to housing programs administered by the Internal Revenue Service; the LIHTC and tax exempt bond programs. The statutory mandate and related executive orders assign a government-wide leadership role to HUD to assure that all agencies comply with the requirement. *See*, 42 U.S.C. §3608(e)(3) and Executive Order 12892 (January 17, 1994). The Coordination Act reinforces HUD's interagency role by requiring that any approval process

¹The use of Federal housing assistance to create residential segregation, and the human injuries resulting from those policies are described in detail in *American Apartheid: Segregation and the Making of the Underclass*, by Douglas R. Massey & Nancy A. Denton (Harvard University Press, 1993), and numerous other scholarly accounts. While segregation is less pronounced in HUD's multifamily programs than in public housing, studies indicate that a significant proportion of multifamily assisted housing serving families with children is located in racially segregated areas. *See*, Gray, Robert and Tursky, Steve, "Location and Racial/Ethnic Occupancy Patterns for HUD-Subsidized Family Housing in Ten Metropolitan Areas" from *Housing Desegregation and Federal Policy* (John Goering, ed., Univ. of North Carolina Press, 1986). For judicial decisions in which the use of FHA programs was held to perpetuate racial segregation, *see, e.g., United States v. Yonkers Bd. of Education*, 837 F.2d 1181, 1190 (2 Cir. 1987) (multiple FHA programs) and *Shannon v. U.S. Dept. of Housing and Urban Development*, 436 F.2d 809, 821 (3 Cir. 1970) (Section 221(d)(3) and Rent Supplement programs). Regarding segregation in the LIHTC program, *see, e.g., Florence Roisman, Mandates Unsatisfied: The Low-Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. Miami L. Rev. 1011 (July 1998), Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 Vanderbilt Law Review 1747 (2005).; *see also, Are States Using the Low Income Housing Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods?* (Abt Associates, Inc., July 28, 2006).

² *See, e.g., NAACP, Boston Chapter v. Sec'y of Housing and Urban Dev.*, 817 F.2d 149 (1 Cir. 1987).

involving assisted housing, LIHTC, and bonds provide for full compliance with fair housing, including the obligation to further the purposes of Title VIII.

B. Scope of the Coordination Act.

The request for recommendations indicates that the “category of assisted housing projects to which” the notice applies includes “projects with HUD insured mortgages” and also “projects that will no longer have FHA insured mortgages, but which request to continue to retain interest reduction payments under Section 236 of the National Housing Act.” It does not otherwise identify the programs or procedures for which recommendations are sought. In contrast, the Coordination Act requires expedited approval procedures for *all* the housing programs administered by the FHA when they are used together with LIHTC and tax exempt bond financing.

There are multiple approval procedures for FHA multifamily programs. Many of these programs involve the preservation and rehabilitation of assisted housing projects that were originally sited with segregative intent or effect, in violation of civil rights laws. Others involve new insured projects using LIHTC, a program that has a documented record of segregated siting outcomes. It is crucial that approval procedures in all these domains incorporate the type of civil rights review described in later sections of these comments. The programs to which civil rights-related approval procedures should apply include:

- Section 8 Housing Assistance Payment Contract Renewal, and Mark-to-Market Debt Restructuring, subject to 24 C.F.R. Parts 401 and 402 and the *Section 8 Renewal Policy* guide.
- Section 236 decoupling transactions, requiring approval under Notice H 00-8 (May 16, 2000).
- Any transfer of a property assisted under the Rent Supplement Program, the Section 221(d)(3) Below Market Interest Rate loan programs, and the Section 236 Interest Reduction Payment program, pursuant to HUD’s transfer of physical assets approval procedures. *See*, Handbook 4350.1, REV-1, *Multifamily Asset Management and Project Servicing*, Chapter 13.
- Multifamily revitalization programs, such as those that allow an owner to move insured debt and HAP contracts from one location to another. *See, e.g.*, 42 U.S.C. §1437f(bb) and Pub. L. 111-8, Division I, Title II, §213, 123 Stat. 973 (March 11, 2009).
- New commitments of mortgage insurance for the programs subject to the *Multifamily Accelerated Processing (MAP) Guide*.
- Disposition of HUD-owned properties pursuant to 24 C.F.R. Part 290.

There are other multifamily approval procedures carried out by participating administrative agencies and state agencies that act as HUD’s agent. For example, the multifamily insurance risk sharing program allows qualified housing finance agencies to underwrite federal mortgage insurance for loans or for credit enhancement facilities in connection with tax-exempt bond financing. Under risk sharing rules, HFAs assure borrower compliance with affirmative fair housing marketing requirements, but HUD retains approval responsibilities in other areas. In addition, the Coordination Act gives new authority to HUD to

engage in similar, shared processing of Section 202 capital grants and Project Rental Assistance Contracts. HUD also enters into contracts with PAEs to underwrite important elements of Mark-to-Market transactions. Procedures adopted by HUD under the Coordination Act should include a civil rights review for these and other similar approvals by non-HUD entities, as well as for the approvals carried out by HUD staff.

C. Civil Rights Approval Procedures.

HUD underwriting and approval procedures for multifamily processing are spread among a number of handbooks, guides, and notices, many of which are noted in the previous section of these comments. A few, but not all of the policies address civil rights considerations like the existence of fair housing complaints against an owner or management company, or compliance with architectural access requirements under Title VIII and Section 504. There are no procedures that reflect HUD's responsibility to further fair housing by locating assisted housing in racially integrated, low poverty locations, or to dismantle the patterns of racial segregation and concentration of poverty in the preservation of existing assisted housing. It is imperative that HUD incorporate uniform, consistent procedures addressing civil rights conditions for all multifamily programs in Coordination Act processing procedures. We urge you to take the following actions:

1. Adopt Site and Neighborhood Standards.

At one time, under the mandate of judicial decisions construing the obligation to further fair housing, HUD maintained site and neighborhood standards for its subsidized multifamily housing programs that substantially limited new construction of assisted housing in areas of minority concentration, and required that both new construction and rehabilitation activities be "suitable from the standpoint of facilitating and furthering full compliance with" Title VI, Title VIII, and Executive Order 11063. These rules were repealed because authority to enter into new commitments of funding ended.³ At present, there are no criteria that address conditions of segregation in subsidized multifamily properties targeted for preservation or revitalization. Nor are there site and neighborhood standards for the programs subject to the *MAP Guide*, which are commonly used in connection with LIHTC and bond financing. The high volume of preservation activity and the continuing HUD oversight for new projects with insured mortgages requires a new approach to fulfilling the obligation to further fair housing with respect to site selection:

i) New Projects. All family projects involving first-time commitments of HUD insurance or subsidies should be required to meet quantifiable measures of racial and ethnic integration, low levels of poverty and crime, and access to good quality schools, jobs, transportation, public services, and commercial and retail amenities. These criteria should apply whether a project involves new construction, or the first-time assisted rehabilitation of existing buildings.

ii) Preservation Activities. HUD procedures for preservation of assisted housing through such programs as Mark-to-Market, Section 8 contract renewal, and Section 236 decoupling should include an evaluation of the extent of distress in the project and the neighborhood by examining factors like segregation, concentration of poverty, crime, low

³ See, 60 Fed. Reg. 47262 (September 11, 1995) (repealing project selection criteria in 24 C.F.R. Part 200, subpart N) and 61 Fed. Reg. 13587 (March 27, 1996) (repealing site and neighborhood standards for multifamily projects with Section 8 contracts).

performing schools, and isolation from jobs, transportation, and public services. Situations involving high levels of distress should result in alternative preservation strategies that provide residents with a range of housing options outside the distressed area, and accommodate the residents who choose to remain at the site.

iii) Revitalization Activities. Proposals for revitalization where assisted housing is to be demolished or substantially rehabilitated and replaced under the authority of Section 8(bb), Section 213, and similar programs should also evaluate conditions of neighborhood distress. While we support preservation of all rental subsidies, current residents should have a right to exercise a housing choice. This means that current residents who choose to live in the revitalized development should have a right to return. It also means that current residents who choose not to return should be afforded the option to move to an area where their race does not predominate. Revitalization projects in higher income, integrated areas should preserve as much housing as possible on-site, or in the immediate area of the site. Projects in distressed locations should construct replacement housing outside the distressed area in high opportunity locations, and build on the original site only enough units to accommodate the residents who choose to return.

2. Specify Threshold Civil Rights-Related Eligibility Criteria.

Several of HUD's processing guides include underwriting provisions that examine the level of an owner and management agent's compliance with civil rights laws. The provisions are not present in all programs, nor are they consistent among the programs where there are provisions. They do not identify the processing outcome in the event of non-compliance, and they do not specify the non-compliance events that should be examined.

We suggest that approval procedures for all multifamily programs incorporate threshold eligibility standards similar to those utilized in HUD's competitive grant programs. An owner who is a respondent in an individual complaint alleging violations of fair housing and civil rights laws must establish that steps are being taken to resolve the underlying dispute. Complaints alleging systemic violations of civil rights laws should result in a determination of ineligibility until the complaints are satisfactorily resolved.

3. Underwrite for Civil Rights Responsibilities.

Approval procedures should also address the civil rights-related requirements associated with multifamily assisted housing.

i) Affirmative Fair Housing Marketing. Current HUD procedures address compliance with affirmative fair housing marketing requirements principally by requiring completion of form HUD-935.2A. For new projects expected to involve initial lease up, we urge you to adopt policies for marketing, applications, and waiting lists that assure the broadest possible participation for all eligible groups protected by fair housing laws, including the use of lotteries for initial waiting lists, and a prohibition on the use of local resident selection preferences, especially in situations where the housing is located in areas of high opportunity. For projects involving preservation of existing affordable housing, occupancy and waiting list characteristics should be examined. In circumstances where the waiting list and rent roll indicate racial and ethnic disparities, the owner should be required to carry out a corrective action plan as a condition of approval.

ii) Limited English Proficiency. Owners of assisted housing are required by Title VI to develop language assistance plans to assure meaningful access by individuals who are not

proficient in English. Owners should be required to submit and HUD should review and approve LAPs as a condition of approval.

iii) People with Disabilities. The *MAP Guide* includes detailed standards for assuring compliance with architectural access requirements for people with disabilities as part of the underwriting and approval process for insured mortgage programs. Most other processing guidance do not. *MAP Guide* standards should be made uniform for all multifamily approvals. In addition, processing standards should require submission and review an owner's Section 504 transition plan and self-evaluation, and a description of the owner's plan for alternative forms of communication and reasonable accommodations, all required by Section 504 regulations in 24 C.F.R. Part 8.

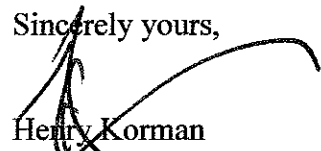
iv) Violence Against Women Act. Underwriting should include the submission and review of tenant selection plans and the project lease to assure that they include the protections required by the Violence Against Women Act. *See*, Notice H 08-07 (September 30, 2008).

v) Participation Data. Title VI and Section 504 rules and associated handbook guidance require owners to collect information on the race, ethnicity, gender, and disability of applicants and participants in assisted housing. For existing projects, that information should be reported to and reviewed by HUD during the underwriting and approval process to determine civil rights compliance, and to require any necessary corrective action as a condition of approval.

D. Conclusion.

We believe that furthering fair housing is consistent with, and indeed, is a necessary component of a metropolitan focus that is one of the Obama administration's priorities. We thank you for your consideration of our comments. Representatives of our group are prepared to meet with you to discuss our comments at your convenience.

Sincerely yours,



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