December 21, 2010

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 Seventh Street, SW
Room 10276
Washington, DC 20410-0001

Re: Comments on Docket No. FR-5246-P-02, Housing Trust Fund – Proposed Rule

Dear colleagues,

The new Housing Trust Fund (HTF) program has the potential to be the most important source of new and rehabilitated rental units for very low income families. As with other deeply income-targeted housing assistance programs, it also has the potential to exacerbate racial and economic segregation in metropolitan communities and schools. For this reason, it is important to ensure that the program includes strong civil rights requirements in the areas that matter most: site selection, project density, tenant selection and admissions, and affirmative marketing. The proposed regulation falls short in this respect and should be substantially revised.

Site & Neighborhood Standards

The decision to reflexively apply existing HOME program siting regulations to the HTF program (24 CFR § 92.726, referencing 24 CFR § 92.202) effectively exempts most HTF units from meaningful civil rights siting review, because the HOME siting regulations at 24 CFR § 92.202 do not apply to rehabilitated rental units.[1] This oversight can be remedied by adopting the site and neighborhood standards applicable to the project-based voucher program directly into the HTF regulations (rather than indirectly, through HOME program regs), as follows:

> § 92.726 Site and neighborhood standards
> The site and neighborhood standards contained in 24 CFR § 983.57 apply to the HTF.[2]

The new HTF program will be creating new housing opportunities on a scale not contemplated in the HOME regulations. Unlike the HOME program, both the project-based voucher program and HTF are primarily targeted to extremely low-income

[1] HOME program regulations at 24 CFR § 92.202 selectively incorporate site & neighborhood standards applicable to the project based voucher program for new construction only.

[2] Please also note that site and neighborhood standards for the Project-Based Voucher program were **renumbered** in 2005 to 24 CFR § 983.57. The regulation currently cited at 24 CFR § 92.202 (24 CFR § 983.6(b)) – is **incorrect** (that latter provision states that "All PBC and project-based voucher units for which the PHA has issues a notice of proposal selection or which are under an Agreement or HAP contract for PBC or project- based voucher assistance count against the 20 percent maximum."). The Project Based Voucher site and neighborhood standards, now at 24 CFR § 983.57, should be cited in the final regulation.

families, making the need to avoid (and prevent adding to) existing concentrations of poverty more essential. If stronger site & neighborhood standards are not adopted, the HTF program has the potential to become a powerful engine driving a new generation of HUD-sponsored racial and economic segregation in our metropolitan areas. HUD's obligation to affirmatively further fair housing in all of its programs requires a change to this section of the proposed regulations.

Project density

As currently drafted, the regulations have no cap on the number of deeply income targeted units in a particular building, development or neighborhood. Because the program is primarily targeted to Extremely Low Income (ELI) families (§ 92.736), there is a potential for the unintended consequence of requiring ELI families to live in an all-poverty development as a condition of receiving HTF assistance. We recommend that developments over a certain size include some reasonable mixed income standards to avoid this outcome.

Tenant Selection and Admissions

Although the proposed regulations contain a fleeting reference to non-discrimination in tenant selection at § 92.747 (d)(3)(ii), we recommend a direct prohibition of local residency or employment preferences in any HTF development. The track record of these types of preferences is dismal,[3] and there is no reason to perpetuate these discriminatory rules in this new generation of HUD housing.

The proposed requirement of "selection of tenants from a written waiting list in the chronological order of their application" at § 92.747 (d)(5) would also have a discriminatory effect, because it favors the initial applicants to a project (who are often from the immediate area or who hear of the development through local social networks). This provision should be replaced by a more modern lottery based system coupled with strong affirmative marketing and outreach requirements to insure a fair and balanced pool of potential applicants.[4]

[3] See, e.g., *Langlois v. Abington Hous. Auth.*, 207 F.3d 43 (1st Cir. 2000) which affirmed a preliminary injunction followed by the district court summary judgment decision, 234 F. Supp. 2d 33 (D. Mass. 2002) finding that the residency violated the Fair Housing Act. See also *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) ; *Vargas, et al. v. Town of Smithtown*, Case No. 07-CV-5202 (E.D.N.Y. 2009).

[4] First-come first-served and in-person application systems invariably violate fair housing and civil rights laws, especially for people with disabilities and members of minority groups. Recognizing this, housing providers in many jurisdictions have changed to various forms of random selection, often using initial application lists compiled from wider geographic areas than just the local neighborhood or community. For instance, in Massachusetts, after guidance issued from the local HUD office in the late 1990s, the Department of Housing and Community Development (DHCD) and almost all PHAs stopped requiring in-person first-come, first-served applications. Instead, DHCD and approximately 80 PHAs administering the HCV program have switched to a centralized one-stop lottery application that has proved to be generally effective and fair. See http://www.massnahro.org/S8_Home.php

Affirmative Marketing

The proposed regulation's incorporation of the weak affirmative marketing requirements in the HOME program (proposed § 92.760, incorporating by reference 24 CFR § 92.351) is not likely to lead to racially integrated HTF developments. Consistent with the duty to affirmatively further fair housing, we urge the Department to adopt stronger and more effective affirmative marketing requirements, consistent with current legal guidelines and based on modern marketing principles, including performance goals.

Other provisions

HTF properties should be held to local housing code standards for health and safety, as proposed at§ 92.741 and 742, but should not be held to strict compliance with local zoning requirements that impose regulatory barriers to the development of multifamily and/or affordable housing. The provision requiring compliance with local zoning, as proposed, would give many exclusionary suburban jurisdictions veto power over HTF developments before they are even proposed. Deference to discriminatory local zoning rules has no place in the HTF regulations. In addition to allowing the state to grant waivers from compliance with local land use requirements that have exclusionary or discriminatory impacts, the regulations should affirmatively allow HTF funds to be held for a development in process where local opposition has delayed a project or where exclusionary local zoning is being challenged.[5]

Likewise, states should be prohibited from incorporating provisions in their plans for the allocation of federal HTF funds that resemble the discriminatory "local veto" now found in some state LIHTC Qualified Allocation Plans. Whether structured as a threshold veto, or a condition for scoring competitively under the state's ranking and rating formula, these requirements go beyond generally applicable land use rules and single out affordable housing. Sections 91.215, 220 and 315 should specify that HTF allocation plans must certify that the allocation of federal HTF funds will not be subject to state or local policies or laws that impose local approval or contribution requirements that exceed land use requirements applicable to similar residential uses that do not involve housing subsidies.

[5] For example, the 2011 Qualified Allocation Plan for Pennsylvania (governing allocations of Low Income Housing Tax Credits, provides: "The Agency reserves the right, in its sole discretion upon review and approval of a committee of the Board, to provide an allocation of Year 2011 Tax Credits to a development, without requiring re-ranking under the Year 2011 Allocation Plan. The development must be currently holding a valid allocation of Tax Credits and, due to circumstances beyond its control, be unable to meet Tax Credit program placed in service deadlines. The Year 2011 Tax Credits will be allocated upon release and return of the prior allocation. Such circumstances may include delays caused by local government's opposition to affordable housing; delays due to the failure of the federal government to release program guidelines or regulations in a timely manner or due to temporary freezes in federal government budget authority for program activity; or similar extraordinary and compelling basis (and but for such circumstance, Agency program deadlines and requirements would have been met.)" (page 19, "Processing Procedures," www.phfa.org/forms/multifamily_program_notices/qap/2011_qap.pdf.

Thank you for the opportunity to comment on the proposed regulations. We look forward to working with the Department in the future development and implementation of this important program.

Sincerely,

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