

Recent Developments Show Promise for Enforcing Section 3*

Several notable developments in the use, enforcement and implementation of the Department of Housing and Urban Development (HUD) Section 3 program show promise. This article summarizes three of these developments. First, HUD has begun to aggressively enforce the use of form HUD-60002, which requires public housing agencies (PHAs) and other recipients of HUD funds to report annually on their compliance with Section 3 requirements. Second, HUD recently found that Saint Paul, Minnesota, has not complied with several provisions of Section 3, including obligatory reporting via form HUD-60002. Third, in an innovative move, the Connecticut Housing Finance Authority has decided to offer Low-Income Housing Tax Credit (LIHTC) points to proposed projects that demonstrate that they will comply with Section 3.

Overview of the Section 3 Program

Section 3 is a job training and economic development program geared toward very low-income residents and Section 3 businesses to guarantee low-income residents a chance to work on HUD-funded projects. There are three categories of Section 3 businesses: (1) businesses that are majority owned by Section 3 residents; (2) businesses that employ Section 3 residents for at least 30% of their full-time, permanent staff; and (3) businesses that subcontract to Section 3 businesses 25% or more of the dollar amount of a contract.¹ Section 3 requires recipients of certain types of HUD funding to ensure to the “greatest extent feasible” that a certain percentage of the job training, employment and contracting opportunities that arise from the expenditure of the funds benefit low- and very low-income individuals and such individuals who live in the area where the funds are expended.²

Section 3 applies to all public housing funding. Section 3 also applies to grantees who receive \$200,000 or more in other HUD funding. Additionally, Section 3 applies to contractors receiving \$100,000 or more for projects arising in connection with housing construction, demolition, rehabilitation or other public construction.³ Section 3 applies if these thresholds are met, regardless of the actual amount that is spent on each individual unit or property.⁴

Section 3 covers a multitude of HUD programs, including public housing operating, capital and modernization

funds, HOPE VI, Community Development Block Grants (CDBG), HOME Investment Partnerships, Disaster Recovery Assistance and Housing Opportunities for Persons with AIDS. Importantly, Section 3 applies to several stimulus programs, including the Neighborhood Stabilization Program (NSP). NSP funds have been given out in two rounds for the purpose of stabilizing communities that have concentrations of foreclosed and abandoned homes.⁵ Nearly \$4 billion in NSP1 funds were announced in 2008 for all states and selected local governments⁶ and distributed in March 2009. Nearly \$2 billion in NSP2 funds were appropriated as part of the American Recovery and Reinvestment Act (ARRA), and grantees will be announced by late 2009.

Section 3 applies to a number of other ARRA appropriations, including \$4 billion in public housing capital funds, \$1 billion in CDBG funds, \$510 million in Native American Housing Block Grants, \$250 million for Assisted Housing Energy and Green Retrofits, and \$78 million for lead hazard control.⁷ HUD announced the last round of awards in September 2009.⁸ Since ARRA funding is specifically intended to create jobs and other economic opportunities for those most impacted by the recession, it is especially critical for ARRA grantees to comply with Section 3.

HUD Renews Efforts to Enforce Section 3 Reporting

In October 2009, HUD sent letters to PHAs and other agencies nationwide to inform them of noncompliance with Section 3 reporting requirements, namely the filing of form HUD-60002.⁹ Since at least August 1994, HUD has required agencies to file annual reports using form HUD-60002.¹⁰ However, little emphasis has been placed on enforcing this requirement. Now, HUD is directing state and local governments and PHAs to file form HUD-60002

*The author of this article is Julieanna Vinogradsky, a Graduate Research Fellow at the National Housing Law Project.

¹12 U.S.C.A. § 1701u(c)-(d) (West 2008).

²§ 1701u(b).

³§ 1701u(b); 24 C.F.R. § 135.

⁴*Id.*

⁵The Applicability of Section 3 of the Housing and Urban Development Act of 1968 to Neighborhood Stabilization Program Funding, <http://www.hud.gov/offices/fheo/section3/HUD-NSP-sec3-Guidance.doc>.

⁶Notice of Allocations, Application Procedures, Regulatory Waivers Granted to and Alternative Requirements for Emergency Assistance for Redevelopment of Abandoned and Foreclosed Homes Grantees Under the Housing and Economic Recovery Act, 2008, 73 Fed. Reg. 58,330, 58,334-49 (Oct. 6, 2008).

⁷HUD Economic Stimulus Funding and the Creation of Jobs, Training, and Contracting Opportunities, <http://www.hud.gov/offices/fheo/section3/Econ-Stimulus-sec3-final.pdf>.

⁸*See, e.g.*, Press Release, HUD, HUD Announces \$95 Million in Recovery Act Grants to Improve Public Housing for Seniors, Persons with Disabilities (Sept. 24, 2009); Press Release, HUD, HUD Announces \$300 Million in Recovery Act Grants to Create Green Public Housing (Sept. 18, 2009), http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories.

⁹Press Release, HUD, HUD Takes Action to Expand Jobs and Training Opportunities for Low-Income Residents (Oct. 20, 2009), http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2009/HUDNo.09-200.

¹⁰Early versions of the form are dated August 1994. *See also* 24 C.F.R. § 135.90 (2009).

promptly or risk being debarred, suspended or denied participation in HUD programs.¹¹ According to a HUD press release, this action is “one of the first in a series of steps to more aggressively enforce Section 3 hiring and contracting requirements and assist state and local governments and housing authorities to identify, train, and promote job opportunities for low-income individuals and public housing residents and companies employing them.”¹²

HUD is directing state and local governments and PHAs to file form HUD-60002 promptly or risk being debarred, suspended or denied participation in HUD programs.

Form HUD-60002 asks fund recipients to list the number of individuals newly hired with Section 3 funds, including all new hires that are Section 3 residents.¹³ The form asks for the percentage of total hours worked that were allocated to Section 3 employees and trainees, the total number of Section 3 businesses receiving construction and non-construction contracts, and the total dollar amount awarded to Section 3 businesses via these contracts. PHAs and other fund recipients are required to indicate the efforts they have made to direct employment and other economic opportunities generated by HUD financial assistance toward low-income persons, particularly those who live in government assisted housing. Recipients are required to submit the form to the Office of Fair Housing and Equal Opportunity annually. Those that receive more than one type of covered financial assistance are required to submit a separate report for each funding source.

Though monitoring the use of form HUD-60002 is an important step toward more aggressively enforcing Section 3 hiring and contracting requirements, advocates have critiqued the structure and substance of the form, pushing HUD to request further information to ensure Section 3 compliance. The National Housing Law Project (NHLP) and other organizations have pressed HUD to ask PHAs to report the total number of jobs generated with HUD revenue in addition to the total amount of new hires to deter contractors who may attempt to circumvent the statute by categorizing new employees as old hires.¹⁴ Advocates have also urged HUD to require PHAs to

report the number of Section 3 applicants not hired, and the total dollar amount of contracts awarded to Section 3 businesses owned by public housing residents to ensure that PHAs are contracting with these business concerns to the greatest extent feasible.¹⁵

While the form remains imperfect, the transparency engendered by its use is vital in monitoring effective compliance with the provisions of Section 3. HUD has taken an important step toward realizing the goals and implementing the requirements of the Section 3 program by reminding agencies of their Section 3 obligations, requiring the use of form HUD-60002 and providing a deadline for compliance.

Saint Paul Out of Compliance with Section 3

HUD recently found that Saint Paul, Minnesota, has not complied with several Section 3 requirements in its use and administration of CDBG and HOME funds. In mid-2008, in response to administrative complaints filed with HUD regarding Saint Paul and the Saint Paul Housing and Redevelopment Authority (HRA), HUD began a formal investigation to determine whether, and to what extent, Saint Paul administered its HUD-funded programs in compliance with Section 3's contracting requirements. These administrative complaints followed unsuccessful litigation against Saint Paul claiming similar violations of Section 3.¹⁶ Because the court ruled that the plaintiffs lacked standing and did not have a private right of action, the administrative forum was the only option for addressing the alleged Section 3 violations.

Background

Saint Paul receives both CDBG and HOME program funds. Between 2006 and 2008, the city received more than \$24 million in CDBG funds and more than \$6.5 million in HOME funds. In addition, the city received more than \$4.3 million in NSP funds. As a recipient of these HUD funds, the city was required to comply with Section 3.¹⁷

In June 2008, a local business owner filed a complaint alleging that Saint Paul did not comply with Section 3 by (1) failing to award a sufficient percentage of contracts to Section 3 businesses; (2) failing to seek out and identify Section 3 businesses for contracting opportunities; (3) failing to exercise oversight over contractors hired with Section 3 funds to assure that contractors provided training, employment and sub-contracting opportunities to Section 3 persons and businesses; (4) failing to meet Section 3's reporting requirements; and (5) failing to file form HUD-60002.

¹¹Letter from John Trasviña & Mercedes Márquez, HUD, to recipients of HUD Community Planning and Development Assistance (Oct. 9, 2009); Letter from John Trasviña & Sandra B. Henriquez, HUD, to Public Housing Authority Executive Director (Oct. 9, 2009).

¹²See Press Release, HUD, *supra* note 9.

¹³Form HUD-60002, Section 3 Summary Report (6/2001).

¹⁴Letter from Richard Glassman, Western Massachusetts Legal Services, to Valerie Hayes, HUD (Apr. 29, 2001) (on file with NHLP).

¹⁵Letter from Catherine Bishop, NHLP, to Linda Thompson, HUD (July 31, 2003) (on file with NHLP).

¹⁶*Nails Constr. Co. v. City of Saint Paul*, 2007 WL 423187 (D. Minn. Feb. 6, 2007).

¹⁷Letter from Barbara M. Knox, HUD Office of Fair Housing & Equal Opportunity, to Chris Coleman, Mayor of Saint Paul 2 (Aug. 25, 2009).

Investigation

During the course of its investigation, HUD conducted interviews to determine the working knowledge Saint Paul city staff had of Section 3. The interviews revealed that staff had very little understanding of Section 3 and the city's programmatic obligations. City staff often confused indispensable elements of Section 3 with the city's own efforts to increase participation by minority and women-owned businesses in city contracts. Staff in Saint Paul's Department of Planning and Economic Development testified that potential contractors were not notified of their Section 3 obligations, nor were Section 3 requirements included in pre-bid and pre-construction conferences. Further, the city employed no mechanism by which it could independently evaluate a sub-recipient's assertion of a business's Section 3 status.

Additionally, Saint Paul failed to annually submit form HUD-60002. City employees testified that they were not aware of this reporting requirement and that, to their knowledge, the city had never submitted a Section 3 annual report to HUD. While the city did submit an annual contract and subcontract activity report pursuant to Executive Order 2516, this filing did not obviate its obligation to file form HUD-60002. Nor did the HUD Office of Community Planning and Development (CPD) annual review of Saint Paul's activities preclude the need for self-reporting via form HUD-60002, as Section 3 compliance is not part of a CPD annual review.

Findings

On August 25, 2009, HUD formally found that the city and its HRA were not in compliance with Section 3. The city failed to implement any of the activities required as part of receipt of HOME and CDBG funds. Saint Paul had no procedures in place to: (1) notify Section 3 residents or businesses about training and employment opportunities generated by Section 3 funds; (2) notify potential contractors about the Section 3 requirements and ensure contractor and sub-contractor compliance; (3) incorporate the Section 3 clause in all solicitations and contracts; (4) facilitate the training and employment of Section 3 residents and the award of contracts to Section 3 business concerns; or (5) document actions taken to comply with Section 3 requirements and the results of those actions.

Next Steps

As a result of the finding, HUD and Saint Paul have entered into a voluntary resolution process to bring the city into Section 3 compliance as quickly as possible. As of this time, the outline of the compliance requirements is unknown. Possible enforcement strategies could include creating a community oversight committee to make sure that the city is complying with Section 3, asking HUD to require the city to report compliance more frequently than yearly for a period of time so that the oversight committee has more

information and can closely track the city's progress, conditioning future disbursement of HOME, CDBG and NSP funds on full resolution of any Section 3 compliance issues, and providing specific guidelines that Saint Paul must follow to meet Section 3 requirements. HUD may also require Saint Paul to develop a Section 3 plan to be included and revised in its Five-Year and Annual Consolidated Plans.¹⁸ The city could also designate a staff person responsible for Section 3 compliance.

Greater transparency will be a vital part of future compliance. Any standard or special reports that the city provides to HUD should immediately be made available to the public. In addition, any major steps taken to correct the noncompliance should be announced via the city's website, other media outlets and in any relevant public meetings.

It appears that HUD has taken decisive action in a relatively short period of time in responding to administrative complaints regarding noncompliance by Saint Paul. Prompt action is particularly important because of the inherent tenuous nature of small Section 3 businesses and the lack of other effective remedies. Without a judicial remedy, any resolution to Section 3 violations will necessarily depend on administrative action. Advocates, Section 3 businesses and Section 3 individuals faced with similar situations should consider filing administrative complaints to address Section 3 noncompliance.¹⁹

Connecticut Qualified Allocation Plan

In its draft 2010 Qualified Allocation Plan (QAP), the Connecticut Housing Finance Authority (CHFA) has allocated up to 10 points for projects that will subcontract with a HUD Section 3 business concern and/or create new jobs for Section 3 residents. This action was taken in response to comments submitted to CHFA by NHLP and Connecticut Legal Services.²⁰

Qualified Allocation Plans and LIHTC

The LIHTC program provides tax incentives, written into the Internal Revenue Code, for private developers to create affordable housing. Although these tax credits are federal, each state has an independent agency (such as the CHFA) that decides how to allocate their share of federal housing tax credits via a Qualified Application Plan (QAP). The annual QAP informs developers and advocates of the criteria the state will use to select the projects to which it will award coveted tax credits.

¹⁸24 C.F.R. Part 91, subparts D & E (2009).

¹⁹For more information about other administrative complaints, see <http://nhlp.org/resourcecenter?tid=115>.

²⁰Memorandum from Catherine Bishop, National Housing Law Project to Executive Director, State Housing Credit Agency (May 22, 2009).

NHLP Welcomes Law Fellows

The National Housing Law Project is pleased to announce two recent additions to its staff, Soros Justice Fellow Catherine McKee and Skadden Fellow Kent Qian.

The focus of Catherine's work is access to federally assisted housing for people with criminal records, including individuals leaving correctional facilities. Catherine will partner with community organizations to encourage public housing authorities and private owners of federally assisted housing to adopt more flexible admission policies for people with criminal records and to set aside units for individuals returning to the community.

Catherine is available to provide technical assistance and training to advocates trying to help individuals with criminal records secure housing. She would like to organize a working group and regular conference calls so that advocates can share problems, strategies and successes. Please feel free to contact Catherine by email at cmckee@nhlp.org or phone at (510) 251-9400 ext. 3109 with any input or requests.

The focus of Kent's work is protections for tenants in foreclosure. He will also be working on ensuring that communities use funding from the Neighborhood Stabilization Program (NSP) to develop long-term affordable housing that serves low-income families.

Kent will provide technical assistance and training to advocates for tenants facing evictions due to foreclosure. Many of these trainings will center on the implementation of the federal Protecting Tenants at Foreclosure Act (PTFA). He is also available to help legislative advocates who are pushing for additional local and state protections for these tenants. He would also like to hear your observations of how the PTFA has been implemented in your communities.

Additionally, Kent hopes to partner with non-profit agencies, community development officials and housing advocates to ensure that local governments use NSP resources to develop long-term affordable housing. He is interested in hearing from advocates who have been monitoring NSP implementation in their communities. Please feel free to contact Kent by email at kqian@nhlp.org or phone at (510) 251-9400 ext. 3112 with questions and comments.

Connecticut's Qualified Allocation Plan

Connecticut's 2010 draft QAP states that applications will be rated and ranked on the degree to which the development is consistent with enriching the housing and community environment.²¹ As part of this preference category, CHFA will give five points to projects that will subcontract with a Section 3 business concern and an additional five points for providing employment for Section 3 residents. A developer must present evidence of intent to subcontract or evidence of a commitment from an employer which is not a member of the development team to create new jobs for Section 3 residents. Incentivizing developers to subcontract with low-income business and hire Section 3 residents via QAP point allocation will ensure that tax credit projects will benefit local communities on several levels by providing affordable housing as well as employment and skill-building.

CHFA anticipates approving a final version of the QAP with the Section 3 LIHTC point allocation by the end of 2009. This QAP is the first in the nation to include such a provision. The significance is particularly impressive because CHFA is not obligated to require LIHTC recipients to comply with Section 3. CHFA's action was motivated by a desire to create more jobs in the community. Though CHFA attempted to have a job creation provision in its 2009 QAP, the results were less than successful. Because definitions of who did and did not qualify for the LIHTC points were vague, the provision did not achieve its intended goal and few, if any, new Section 3 local jobs were created. In 2010, CHFA decided to turn to Section 3 to encourage job creation and support of the local economy. Because Section 3 has long-established and well-delineated definitions, CHFA is optimistic that the 2010 QAP will effectively incentivize builders to employ local Section 3 businesses and individuals. ■

²¹Connecticut Housing Finance Authority, Low-Income Housing Tax Credit Qualified Allocation Plan (2010), <http://www.chfa.org/TaxCredits/DRAFT2010QAP.pdf>.