

Voluntary Compliance Agreement

Section 3 of the Housing and Community Development Act

(12U. S. C. 1701u)

between

U. S. Department of Housing and Urban Development

and

The City of Saint Paul, MN

Section 3 Compliance Review Conducted May 2009

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Introduction

The city of Saint Paul, Minnesota ("City" or "recipient") is a Community Development Block Grant ("CDBG") entitlement community and a HOME program participating jurisdiction. As such, it is a recipient of financial assistance from the U. S. Department of Housing and Urban Development ("HUD" or the "Department"). Certain projects carried out by the City utilizing HUD funds constitute "Section 3 covered projects" as defined in 24 CFR 135.3.¹ Between 2006 and 2008, the City received HUD funds in the following amounts:

2006 ²	CDBG \$8,211,748	HOME \$2,291,390
2007 ³	CDBG \$8,225,675	HOME \$2,277,962
2008 ⁴	CDBG \$7,941,344	HOME \$2,202,555

On June 23, 2008, Fredrick Newell filed a complaint alleging that the Saint Paul Housing and Redevelopment Authority ("Saint Paul HRA"), an agency of the City, failed or refused to comply with the requirements of Section 3. On June 24, 2008, Mr. Frederick Newell filed a second complaint alleging that the City failed or refused to comply with the statutory and regulatory requirement of Section 3 of the Housing and Community Development Act of 1968-12 U.S.C. 1701u and 24 CFR § 135. Given the functional relationship between the HRA and the City, the two complaints were consolidated for the purposes of investigation.

During the course of the investigation, HUD staff discovered that the City had not submitted annual reports (HUD Form 60002) documenting Section 3 activities as required by 24 CFR 135.90⁵ for the last several years. In light of Saint Paul's failure to submit the annual reports as required, HUD chose to incorporate the investigation of Mr. Newell's complaints into a general review of the City's compliance with the contracting provisions of Section 3.⁶

¹Section 3 applies to the following HUD assistance received by the City...community development assistance that is used for the following projects (i) housing rehabilitation (ii)housing construction and (iii) other public construction. The requirements apply to recipients of community development assistance for a Section 3 covered project(s) for which the amount of the assistance exceeds \$200,000. The requirements apply to contractors and sub contractors performing work on Section 3 covered project(s) for which the amount of the assistance exceeds \$200,000; and the contract or sub contract exceeds \$100,000.

² See <http://www.hud.gov/offices/cpd/about/budget/budget06>

³ See <http://www.hud.gov/offices/cpd/about/budget/budget07>

⁴ See <http://www.hud.gov/offices/cpd/about/budget/budget08>

⁵ Each recipient that receives directly from HUD financial assistance that is subject to the requirements of this part shall submit to the Assistant Secretary an annual report in such form and with and with such information as the Assistant Secretary may request, for the purposes of determining the effectiveness of Section 3.

⁶ See 24 CFR 135.74 (f).

During the week of May 19, 2009, HUD conducted a limited review of the City's compliance with Section 3, focusing on contracting opportunities and obligations. Data and documents were examined in advance of the on-site review. Key staff were interviewed and selected construction project files were reviewed on-site.

In addition, materials produced pursuant to a federal lawsuit⁷ filed by Mr. Newell against the City were also reviewed. In his lawsuit, Mr. Newell alleged the City failed to comply with Section 3 in numerous ways including (1) failure to award a sufficient percentage of contracts to Section 3 business concerns; (2) failure to exercise oversight over contractors hired with Section 3 funds to assure that the contractors provide training, employment, and contracting opportunities to Section 3 persons and business concerns; (3) failure to meet Section 3's reporting requirements; (4) failure to seek out and identify Section 3 business concerns about contracting opportunities; and, (5) failure to file form HUD-60002. These are essentially the same allegations contained in Mr. Newell's HUD complaint. The lawsuit was ultimately dismissed on summary judgment because the court determined that Section 3 does not provide a right of private action.

The Department's review revealed a number of deficiencies related to the City's compliance with Section 3. Specifically, the City is not in compliance with the statutory and regulatory requirements of Section 3. There is no written or unwritten Section 3 plan maintained. The City cannot document compliance with the greatest extent feasible requirement of Section 3 by meeting the numerical goals set forth in the regulations. There are no procedures in place to: 1) notify Section 3 residents about training and employment opportunities generated by Section 3 covered assistance and/or Section 3 business concerns about contracting opportunities; 2) notify potential contractors about the Section 3 requirements and ensure their compliance and their subcontractors' compliance with Section 3 requirements; 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; 5) document the actions taken to comply with the Section 3 requirements, the results of the actions and impediments, if any; and 6) refrain from entering into agreements with contractors that have violated the requirements of Section 3⁸. Further, the City has not submitted the HUD form 60002 annually as evidence of its efforts to comply with Section 3, as stipulated at 24 CFR § 135.90. On August 25, 2009, HUD issued a Letter of Finding of Noncompliance (LOF)

⁷ Nails Construction Company et al v. The City of Saint Paul, 2007 WL 423187 (D.Minn.)

⁸ See 24 CFR 135.32

against the City⁹ for failing to ensure compliance with the requirements of Section 3 in its own operations and those of its covered contractors attached as Appendix A.

The City agrees to enter into this Voluntary Compliance Agreement in order to address the issues raised in HUD's August 25, 2009, Letter of Findings and to comply with its responsibilities under Section 3 of the Housing and Urban Development Act of 1968. This Voluntary Compliance Agreement will and hereby does fully and finally resolve Mr. Newell's pending Section 3 administrative complaints against the City and the St. Paul HRA without any further action. This Voluntary Compliance Agreement does not release the City from any claims, damages, penalties, issues, assessments, disputes or demands arising under the False Claims Act, 31 U. S. C. sections 3729 to 3733, or any other statutory, administrative, regulatory or common law claims. Additionally, this Voluntary Compliance Agreement and any payments made in connection with this Voluntary Compliance Agreement cannot be used to offset or reduce any claims, damages, penalties, assessments, or demands arising under the False Claims Act or any other statutory, administrative, regulatory or common law claims.

Definitions

The following definitions will be used in the interpretation and implementation of the terms of this Agreement.

Applicant means any entity which makes an application for Section 3 covered assistance, and includes but is not limited to any State, units of local government, public housing agency, Indian housing authority, Indian tribe or other public body, public or private nonprofit organization, private agency or institution, mortgage developer, limited dividend sponsor, builder, property manager, community housing development corporation, resident management corporation, resident council or cooperative association.

Business concern means a business entity formed in accordance with State laws and which is licensed to engage in the type of business activity for which it was formed.

Contractor means any entity which contracts to perform work generated by the expenditure of Section 3 covered assistance, or for work in connection with a Section 3 covered project.

Employment opportunities generated by Section 3 covered assistance means all employment opportunities generated by the expenditure of Section 3 covered public and Indian housing assistance (i.e., operating assistance, development assistance and modernization assistance, as described in § 135.3(a)(1)). With respect to Section 3 covered housing and community development assistance, this term means all employment opportunities arising in connection with Section 3 covered projects (as

⁹ The original compliance review reviewed the City and the Housing and Redevelopment Authority. Since the City is the direct recipient of Section 3 covered assistance, it bears the ultimate responsibility for ensuring Section 3 compliance in their own operations/departments and those of their contractors/subcontractors. (see 24 CFR § 135.32)

described in § 135.3(a)(2)), including management and administrative jobs connected with the Section 3 covered project. Management and administrative jobs include architectural, engineering or related professional services required to prepare plans, drawings, specifications, or work write-ups; and jobs directly related to administrative support of these activities, e.g., construction manager, relocation specialist, payroll clerk, etc.

Housing and community development assistance means any financial assistance provided or otherwise made available through a HUD housing or community development program through any grant, loan, loan guarantee, cooperative agreement, or contract, and includes community development funds in the form of community development block grants, and loans guaranteed under section 108 of the Housing and Community Development Act of 1974, as amended. Housing and community development assistance does not include financial assistance provided through a contract of insurance or guaranty.

Low-income person. See the definition of "Section 3 resident" in this section.

Metropolitan area means a metropolitan statistical area (MSA), as established by the Office of Management and Budget.

Neighborhood area means for HUD community development programs, the definition, if provided, in the regulations for the applicable community development program, or the definition for this term in 24 CFR 570.204(c)(1).

New hires mean full-time employees for permanent, temporary or seasonal employment opportunities.

Other HUD programs means HUD programs, other than HUD public and Indian housing programs, that provide housing and community development assistance for "Section 3 covered projects," as defined in this section.

Public housing resident has the meaning given this term in 24 CFR § 963.

Recipient means any entity which receives Section 3 covered assistance, directly from HUD or from another recipient and includes, but is not limited to, any State, unit of local government, PHA, IHA, Indian tribe, or other public body, public or private nonprofit organization, private agency or institution, mortgagor, developer, limited dividend sponsor, builder, property manager, community housing development organization, resident management corporation, resident council, or cooperative association. Recipient also includes any successor, assignee or transferee of any such entity, but does not include any ultimate beneficiary under the HUD program to which Section 3 applies and does not include contractors.

Section 3 means Section 3 of the Housing and Urban Development Act of 1968, as amended (12 U.S.C. 1701u).

Section 3 business concern means a business concern, as defined in this section (1) That is 51 percent or more owned by Section 3 residents; or (2) Whose permanent, full-time employees include persons, at least 30 percent of whom are currently Section 3 residents, or within three years of the date of first employment with the business concern were Section 3 residents; or (3) That provides evidence of a commitment to subcontract in excess of 25 percent of the dollar award of all subcontracts to be awarded to business concerns that meet the qualifications set forth in paragraphs (1) or (2) in this definition of "Section 3 business concern."

Section 3 clause means the contract provisions set forth in 24 CFR § 135.38¹⁰.

Section 3 covered assistance means assistance provided under any HUD housing or community development program that is expended for work arising in connection with: (i) Housing rehabilitation (including reduction and abatement of lead-based paint hazards, but excluding routine maintenance, repair and replacement); (ii) Housing construction; or (iii) Other public construction project (which includes other buildings or improvements, regardless of ownership).

Section 3 covered contract means a contract or subcontract (including a professional service contract) awarded by a recipient or contractor for work generated by the expenditure of Section 3 covered assistance, or for work arising in connection with a Section 3 covered project. "Section 3 covered contracts" also do not include contracts for the purchase of supplies and materials. However, whenever a contract for materials includes the installation of the materials, the contract constitutes a Section 3 covered contract. For example, a contract for the purchase and installation of a furnace would be a Section 3 covered contract because the contract is for work (i.e., the installation of the furnace) and thus is covered by Section 3.

Section 3 covered project means the construction, reconstruction, conversion or rehabilitation of housing (including reduction and abatement of lead-based paint hazards), other public construction which includes buildings or improvements (regardless of ownership) assisted with housing or community development assistance.

Section 3 joint venture means an association of business concerns, one of which qualifies as a Section 3 business concern, formed by written joint venture agreement to engage in and carry out a specific business venture for which purpose the business concerns combine their efforts, resources, and skills for joint profit, but not necessarily on a continuing or permanent basis for conducting business generally, and for which the Section 3 business concern: (i) Is responsible for a

¹⁰ See Appendix 2

clearly defined portion of the work to be performed and holds management responsibilities in the joint venture; and (ii) Performs at least 25 percent of the work and is contractually entitled to compensation proportionate to its work.

Section 3 resident means (1) A public housing resident; or (2) An individual who resides in the metropolitan area or nonmetropolitan county in which the Section 3 covered assistance is expended, and who is: (i) *A low-income person*, as this term is defined in Section 3(b)(2) of the 1937 Act (42 U.S.C. 1437a(b)(2)). Section 3(b)(2) of the 1937 Act defines this term to mean families (including single persons) whose incomes do not exceed 80 percent of the median income for the area, as determined by the Secretary, with adjustments for smaller and larger families, except that the Secretary may establish income ceilings higher or lower than 80 percent of the median for the area on the basis of the Secretary's findings that such variations are necessary because of prevailing levels of construction costs or unusually high or low-income families; or (ii) *A very low-income person*, as this term is defined in Section 3(b)(2) of the 1937 Act (42 U.S.C. 1437a(b)(2)). Section 3(b)(2) of the 1937 Act (42 U.S.C. 1437a(b)(2)) defines this term to mean families (including single persons) whose incomes do not exceed 50 percent of the median family income for the area, as determined by the Secretary with adjustments for smaller and larger families, except that the Secretary may establish income ceilings higher or lower than 50 percent of the median for the area on the basis of the Secretary's findings that such variations are necessary because of unusually high or low family incomes. (3) A person seeking the training and employment preference provided by Section 3 bears the responsibility of providing evidence (if requested) that the person is eligible for the preference.

Service area means the geographical area in which the persons benefitting from the Section 3 covered project reside. The service area shall not extend beyond the unit of general local government in which the Section 3 covered assistance is expended.

Subcontractor means any entity (other than a person who is an employee of the contractor) which has a contract with a contractor to undertake a portion of the contractor's obligation for the performance of work generated by the expenditure of Section 3 covered assistance, or arising in connection with a Section 3 covered project.

Very low-income person see the definition of "Section 3 resident" in this section.

Terms of Agreement

This Voluntary Compliance Agreement ("Agreement" or "VCA") shall govern for a period of four (4) years from the effective date of the Agreement.

Effective Date

This Agreement shall become effective on the date that it is executed by the Assistant Secretary for Fair Housing and Equal Opportunity or his designee.

General Provisions

- a) This Agreement applies to the following HUD assistance received by the City...community development assistance that is used for the following projects (i) housing rehabilitation (ii) housing construction and (iii) other public construction. The requirements apply to recipients of community development assistance for a Section 3 covered project(s) for which the amount of the assistance exceeds \$200,000. The requirements apply to contractors and sub contractors performing work on Section 3 covered project(s) for which the amount of the assistance exceeds \$200,000; and the contract or sub contract exceeds \$100,000. Community development assistance includes, but is not limited to Community Development Block Grant funds (CDBG), HOME funds, Emergency Shelter Grant (ESG) funds, Neighborhood Stabilization Program (NSP) funds, and Housing for Persons with AIDS (HOPWA) funds.
- b) This Agreement does not increase or diminish the ability of any person or class of persons to exercise their rights under Section 3. Individuals or classes of persons who may have rights under the aforementioned statute or regulation are not parties or third party beneficiaries of this Agreement. Nothing in this Agreement shall be construed as creating any right in a third party to enforce any provision of this Agreement or to assert any claim against the City or HUD.
- c) This Agreement is a public document. A copy of this Agreement shall be made available to any person for his/her review in accordance with HUD's and the City's obligations under the Freedom of Information Act or any other law.
- d) To the extent that any prior or contemporaneous HUD guidance (written or oral) in the form of letters, opinions or similar guidance regarding the City's obligations, responsibilities, or responsibilities under Section 3 of the Housing and Urban Development Act of 1968, as amended, conflicts with this Agreement, this Agreement is the controlling document from the effective date of the Agreement.
- e) The City shall refrain from retaliating against any person who has: 1) exercised or will exercise his/her legal rights under Section 3; 2) participated in or will participate in any manner with a Section 3 compliance review; or 3)

participated in any manner in protecting the rights of Section 3 residents or businesses.

- f) HUD will monitor the City's implementation of and compliance with the terms of this Agreement. HUD may conduct on-site monitoring reviews of the City's compliance with the provisions of this Agreement. The City will grant HUD access to its premises, records and personnel for the reviews.
- g) This Agreement is a compromise of disputes, and nothing herein shall be deemed or construed to be an admission or concession of any liability whatever on the part of the City.

Specific Provisions

In addition to all regulatory requirements, the City shall:

- a) Within sixty (60) days of the effective date of this Agreement:
 - i. Hire or appoint appropriate personnel to oversee compliance with the provisions of the Agreement and forward that person's name(s) as well as a copy of the position description(s) to HUD.
 - ii. Develop a system to ensure that all covered contracts include the Section 3 clause found at 24 CFR § 135.38.
 - iii. Obligate a total of \$650,000 to be placed into a Section 3 Implementation Fund for years one (1) and two (2) of this Agreement to fund the various Section 3 initiatives herein detailed. *See* sections (b) and (c), below.

The penalties paid by developers, contractors, subcontractors and sub-recipients under the "Penalties" section, (d)(v)(1)(b) of this section, below, for failure to achieve the Section 3 numerical contracting and employment goals, will be placed into this Fund for each year that the Agreement is in effect. In addition, for years three (3) and four (4) of this Agreement, City staff will annually submit a request to the City Council for funding of the Section 3 Implementation Fund, to fund the various Section 3 initiatives herein detailed, in an amount equal to the difference between \$175,000 and the penalties collected under section (d)(v)(1)(b) of this Section, below. In the event that in years three (3) and four (4) of this Agreement, the City does not allocate sufficient funds to bring the total deposit to the Section 3 Implementation Fund to \$175,000, the Agreement will be suspended to allow HUD to conduct a Section 3 compliance review to determine, in particular but not limited to, whether the City is meeting the "safe harbor" numerical requirements. In the event that the compliance review determines that the

City is meeting the "safe harbor" numerical requirements and is otherwise complying with Section 3, the Agreement will terminate; however, the City will continue to make semi-annual reports to HUD until the Agreement has expired. However, in the event that the compliance review determines that the City is not meeting the "safe harbor" numerical requirements, and/or the City is not complying with Section 3 to the greatest extent feasible, and/or is not otherwise complying with Section 3, HUD will find the City in noncompliance and the procedures and remedies contained in the section of this Agreement entitled "Effect of Noncompliance with this Agreement" will apply. Provided, however, HUD will give the City a reasonable opportunity to meet the "safe harbor" numerical requirements before implementing the procedures and remedies contained in the section of this Agreement entitled "Effect of Noncompliance with this Agreement."

- b) Within sixty (60) days of the effective date of this Agreement, the City will develop and forward to HUD for review and approval, a written Section 3 Plan covering Section 3 contracting, employment and training opportunities which will:
- i. Establish policies, procedures and practices to ensure that projects fully or partially funded with Section 3 covered financial assistance comply with regulatory requirements 24 CFR § 135.
 - ii. Establish a mechanism to ensure to the maximum extent feasible that a minimum of 10% of the total dollar amount of all Section 3 covered contracts for building trades work arising in connection with housing rehabilitation, housing construction, and other public construction be awarded to Section 3 business concerns.
 - iii. Establish a mechanism to ensure to the maximum extent feasible that at least 3% of the total dollar amount of all other Section 3 covered contracts be awarded to Section 3 business concerns.
 - iv. Require contractors to develop a Section 3 plan detailing how they will comply with the requirements of Section 3. The plan should include but not be limited to specific information about the contractor's current workforce, plans for hiring additional employees, anticipated subcontracting needs, and strategies for targeting Section 3 residents and business concerns for new economic opportunities.
 - v. Establish a process by which the City will certify Section 3 residents and business concerns.

- vi. Maintain a separate list of certified Section 3 business concerns.
 - vii. Provide a list of Section 3 businesses to all sub-recipients, developers and successful bidders in an effort to facilitate the award of contracts and subcontracts to Section 3 business concerns.
 - viii. Provide annual Section 3 training events for area contractors, sub-contractors, grantees, sub-recipients and residents.
- c) The City agrees to provide its services to Section 3 residents and Section 3 business concerns. The City agrees to submit to HUD for review and approval a plan to enhance the capability and technical capacity of Section 3 residents and business concerns. The Plan will fund activities such as:
- i. Developing a program which will evaluate the strengths and weaknesses of potential and/or new Section 3 business owners and will provide specific services that will develop and improve their potential for success.
 - ii. Providing training in business consultation, start-up, technical assistance for business expansion and retention, outreach and advertising services.
 - iii. Providing training in the City's project development process.
 - iv. Providing training on insurance and bonding requirements.
 - v. Helping establish relationships between the business and banking community.
 - vi. Providing construction job preparation training both in the classroom and in the field.
 - vii. Providing information on tax credits available to contractors for employing Section 3 residents.
 - viii. Funding and making available a scholarship fund to be used by Section 3 residents to be used as financial assistance for the payment of items such as, union initiation fees, dues, tools, equipment and work clothing.
 - ix. Funding and making available a no-interest revolving loan fund for Section 3 business concerns, including start-up Section 3 business concerns.

- d) Within 180 days of the effective date of this Agreement, the City will revise its existing contract and procurement policies, practices and procedures as follows:
- i. Provide notice on the City's web site and the Contract Analysis Services bulletin board, and electronic notice, or written notice where the Section 3 business concern prefers written notice, to all City-certified Section 3 business concerns of upcoming contracting opportunities. This notice shall be in sufficient time to allow the Section 3 business concerns to respond to the bid invitations or request for proposals.
 - ii. For publicly-owned Section 3 covered projects constructed by the City, arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways to facilitate the participation of Section 3 business concerns.
 - iii. For privately-owned Section 3 covered projects not constructed by the City, require the developer to arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways to facilitate the participation of Section 3 business concerns.
 - iv. For publicly-owned Section 3 covered projects constructed by the City, where appropriate, break out contract work items into economically feasible units to facilitate participation by Section 3 business concerns.
 - v. For privately-owned Section 3 covered projects not constructed by the City, require the developer, where appropriate, to break out contract work items into economically feasible units to facilitate participation by Section 3 business concerns.
- (1) Where a contractor, subcontractor, developer or sub-recipient has not reached the goal that at least 10% of the total dollar amount of all Section 3 covered subcontracts for building trades work arising in connection with housing rehabilitation, housing construction, or other public construction to Section 3 business concerns and at least 3% of the total dollar amount of all other Section 3 covered contracts are provided to Section 3 business concerns, the City, contractor, developer and/or sub-recipient shall be required to make additional efforts. Those additional actions may include but shall not be limited to:
- (a) Within 120 days the City will devise and implement Section 3 Procurement Preferences consistent with the Appendix III to 24 CFR 135, Examples of Procurement that Provides for Preference for Section 3 Business Concerns and require the contractor, subcontractor,

developer and sub-recipient to comply with the same. The Preferences will be devised so as to maximize the utilization of Section 3 sub-contractors without economically disadvantaging general contractors or developers.

(b) Require the contractor, sub-contractor, developer or sub-recipient to provide other economic opportunities to Section 3 residents and businesses pursuant to 24 CFR 135.40 as follows. Where at least 10% of the total dollar amount of all Section 3 covered contracts for building trades work arising in connection with housing rehabilitation, housing construction, and public construction or at least 3% of the total dollar amount of all other Section 3 covered contracts are not provided to Section 3 business concerns and/or do not result in the employment of Section 3 residents, the contractor, sub-contractor, developer or sub-recipient will be required to contribute the difference between 10% of the covered contract amount (3% for non-construction related contracts) and the amount provided to Section 3 business concerns and/or in the employment of Section 3 residents into the City's Section 3 Implementation Fund. The City will enforce this requirement.

e) Employment and Training: Within one hundred eighty (180) days of the effective date of this Agreement, the City shall:

i. Complete a review of the City's current full time new¹¹ hiring practices with respect to a Section 3 covered project to determine their compliance with Section 3.

ii. If current hiring practices do not comply with Section 3, then, subject to the City's obligations under the City's Affirmative Action Program, Civil Service Rules and current labor contracts and other applicable laws, regulations and contracts, within 180 days of the effective date of this Agreement:

(a) Revise full-time new hiring practices to conform and comply with Section 3 requirements.

(b) Include Section 3 residents as a preference group in the selection criteria for all full-time and part-time job vacancies.

¹¹ New hire means full-time employees for permanent, temporary or seasonal employment opportunities. See 24 CFR § 135.5.

- iii. Annually, review staffing and hiring needs of the City in connection with Section 3 covered projects including management and administrative jobs connected to Section 3 covered projects. Document any and all aspects of the hiring and employment policies that present barriers to complying with Section 3. Document all actions taken to overcome the barriers (120 days and on-going).
- f) Annually:
- i. Document the number of employees, newly-hired by the City or its covered contractors in connection with Section 3 covered projects, during the previous twelve month period; determine the number and percentage of Section 3 hires. Document all actions taken to ensure at least 30% of the newly-hired employees are Section 3 residents.
 - ii. At the end of 12 months after the effective date of this Agreement, if at least 30% of the new-hires were not Section 3 residents, determine and document whether the Section 3 Plan for recruiting and hiring was followed. If the Plan was followed, then, subject to the City's obligations under the City's Affirmative Action Program, Civil Service Rules, current labor contracts and other applicable laws, and regulations, review and revise the Plan to incorporate the following action: For publicly owned Section 3 covered projects constructed by the City enter into "first source" hiring agreements with organizations representing Section 3 residents; and for privately-owned Section 3 covered projects not constructed by the City, require the developer, covered contractors and subcontractors, and subrecipients to enter into "first source" hiring agreements with organizations representing Section 3 residents.
- g) If at the end of 24 months after the effective date of this Agreement, at least 30% of the newly-hired were not Section 3 residents, determine and document whether the Section 3 Plan for training, recruiting and hiring was followed, changes/revisions are needed and strategies for addressing the barriers in the future are created.

Reporting, Monitoring and Recordkeeping

The City shall keep any and all records necessary to substantiate information regarding the reports described below for a period of four (4) years from the effective date of this Agreement unless indicated otherwise; and specifically, the City shall:

- a) Ensure that form HUD 60002¹² is submitted in an accurate and timely fashion as directed by HUD in accordance with 24 CFR § 135.90. This report shall be filed annually and as required by law.
- b) Submit semi-annual reports to HUD detailing all activity undertaken pursuant to this Agreement. The report will contain such specific information and be in such format as will be agreed upon by HUD and the City in advance of the City's first submission.
- c) Every six months after the effective date of this Agreement, HUD will review the progress the City, its contractors and subcontractors have made in meeting the minimum numerical goals for employment and contracting.¹³ Thirty days in advance of each semi-annual meeting, the City will provide HUD with its semi-annual report. The report will identify any of the actions listed in the Agreement which the City believes have proved ineffective or impractical and will propose alternative proposals which would achieve the same ends.
- d) If after 12 months after the effective date of this Agreement, the numerical or "safe harbor" goals have not been met, the City and HUD will review this Agreement to determine what modifications will be made as needed. The agreed upon modifications shall take effect upon the execution of an amendment to this Agreement signed by both Parties.
- e) If the City meets its "safe harbor" goals, reporting requirements, grantee requirements, and other Section 3 regulatory requirements under this Agreement for two consecutive years, the City will be deemed to have satisfied the terms of this Agreement. However, the City will continue to make Section 3 progress reports to HUD on a semi-annual basis until the effective date of the Agreement has passed.

Duration

The duration of this Agreement shall be four (4) years from the effective date of this Agreement and this Agreement may be amended during such period of time if HUD:

¹² Use Appendix 3

¹³ Each recipient and contractor and subcontractor (unless the contract or subcontract awards do not meet the threshold specified in § 135.3(a)(3)) may demonstrate compliance with the requirements of this part by committing to award to Section 3 business concerns:

(1) At least 10 percent of the total dollar amount of all Section 3 covered contracts for building trades work for maintenance, repair, modernization or development of public or Indian housing, or for building trades work arising in connection with housing rehabilitation, housing construction and other public construction; and (2) At least three (3) percent of the total dollar amount of all other Section 3 covered contracts.

- a) Determines that this Agreement must be revised, or expanded based on HUD's monitoring review of the City's performance under the Agreement or as a result of HUD's findings made following a subsequent compliance review of the City; and
- b) Notifies the City of this prior to the expiration date of the Agreement.

Effect of Noncompliance with this Agreement

- a) Any act(s) or omission(s) by the City or its representatives, including its employees, which violate the terms of this Agreement may serve as grounds for HUD to impose debarment, suspension or limited denial of participation sanctions pursuant to 2 CFR 2424. HUD will provide the City with notice and a reasonable opportunity to cure any violations of the terms of this Agreement before employing the procedures and remedies contained in this section of the Agreement.
- b) Any act(s) or omission(s) that violate(s) the terms of this Agreement may serve as grounds for HUD to seek specific performance and/or enforce any or all of the provisions of this Agreement in federal court.
- c) A continuing failure or refusal by the City to comply with the regulations in this part may result in the application of sanctions specified in the contract through which HUD assistance is provided, or the application of sanctions specified in the regulations governing the HUD program under which HUD financial assistance is provided.
- d) If, after 24 months following the effective date of this Agreement, HUD determines, as a result of the semi-annual reviews, that the City is unwilling or not able to carry out its HUD funded programs in compliance with the statutory and regulatory requirements of Section 3 and this Agreement, HUD may, at its option, require the City to engage the services of a consultant or contractor to perform said duties if HUD, in its sole discretion, determines that said services would be effective and practical. Such services, if required, shall be at the City's expense. The City will notify HUD of which consultant or contractor the City is considering and be provided an opportunity to comment on the selection(s). The City shall determine which consultant to use and the terms and conditions of the consultant's contract.
- e) If after the expiration of the Agreement, the City has met all of the terms of this Agreement, but has still failed to meet the "safe harbor" numerical requirements, HUD will, at its discretion, evaluate the City's compliance with Section 3 in accordance with 24 CFR Section 135.30(d)(2).

Signatures

These signatures attest to the approval and acceptance of this Voluntary Compliance Agreement:

On behalf of the City of Saint Paul, Minnesota:

Christopher B. Coleman
Mayor

Date

Approved as to form

Assistant City Attorney

Date

On behalf of the U. S. Department of Housing and Urban Development

Barbara M. Knox, Director,
Region V, Fair Housing and Equal Opportunity Division

Date

Appendix 1 will be a copy of the August 2009 letter to the City.



U.S. DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT
Midwest Regional Office, Region V
Ralph H. Metcalfe Federal Building
77 West Jackson Boulevard – Room 2101
Chicago, Illinois 60604-3507

Office of Fair Housing and Equal Opportunity

August 25, 2009

Honorable Chris Coleman
Mayor of Saint Paul
390 City Hall
15 West Fourth Street
Saint Paul, MN 55102

Dear Mayor Coleman:

SUBJECT: Section 3 Monitoring and Limited Compliance Review
City of Saint Paul and the Housing and Redevelopment Authority (HRA)
Determination of Non-Compliance

The U.S. Department of Housing and Urban Development (HUD), Office of Fair Housing and Equal Opportunity, has completed a limited on-site compliance review of the city of Saint Paul and the Saint Paul Housing and Redevelopment Authority (HRA)¹ pursuant to Section 3 of the Housing and Urban Development Act of 1968². The purpose of the review was to determine whether, and to what extent, the city of Saint Paul and the HRA were administering HUD-funded programs in compliance with the requirements of Section 3 as specified in 24 CFR § 135. The review was limited to Section 3 contracting requirements and therefore the findings contained herein do not address the city's compliance with the Section 3 training and employment requirements.

The purpose of Section 3 is to ensure that employment and other economic opportunities generated by HUD financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed to low and very low-income persons. Section 3 applies to training, employment, contracting and other economic opportunities arising in connection with the expenditure of community development assistance. Most HUD programs require the grantee to sign a certification stating that it will comply with the requirements of Section 3.

Background:

The city of Saint Paul is a Community Development Block Grant (CDBG) entitlement

¹ The Saint Paul Housing and Redevelopment Authority is a legally distinct public entity which undertakes housing, commercial and business development activities on behalf of the City of Saint Paul. The Saint Paul City Council serves as the HRA Board of Commissioners.

² 12 USC 1701a.

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community and a HOME program participating jurisdiction. As such it is a recipient of HUD financial assistance. Certain projects carried out by the city utilizing HUD funds constitute "Section 3 covered assistance" as defined in 24 CFR 135.3.³ Between 2006 and 2008, the city received HUD funds in the following amounts:

2006 ⁴	CDBG \$8,211,748	HOME \$2,291,390
2007 ⁵	CDBG \$8,225,675	HOME \$2,277,962
2008 ⁶	CDBG \$7,941,344	HOME \$2,202,555

On June 23, 2008, Fredrick Newell filed a complaint alleging that the Saint Paul HRA failed or refused to comply with the requirements of Section 3. On June 24, 2008, Mr. Newell filed a second complaint alleging that the city of Saint Paul failed or refused to comply with the requirements of Section 3. Given the functional relationship between the HRA and the city of Saint Paul, the two complaints were consolidated for the purposes of investigation.

During the course of the investigation, HUD staff discovered that the city of Saint Paul had not submitted annual reports (HUD Form 60002) of Section 3 activity as required by 24 CFR 135.90⁷ for the last several years. In light of Saint Paul's failure to submit the annual reports as required, HUD determined to incorporate the investigation of Mr. Newell's complaints into a general review of the city of Saint Paul's compliance with the contracting provisions of Section 3.⁸

During the week of May 19, 2009, the following staff conducted a limited review of the city's compliance with Section 3, focusing on contracting opportunities and obligations: Jaime Pedraza, Erika Finkler and Lerdine Darden of the HUD Minneapolis Field Office, and Rafiq Munir of HUD's Section 3 Headquarters office. Data and documents were examined in advance of the on-site review. Key staff were interviewed and selected construction project files were reviewed on-site. Peter McCall, Assistant City Attorney, was present during the entrance and exit meetings and at all staff interviews.

In addition, materials produced pursuant to a federal lawsuit⁹ filed by Mr. Newell against the city of Saint Paul were also reviewed. In his lawsuit, Mr. Newell alleged the city failed to comply with Section 3 in numerous ways including (1) failure to award a sufficient percentage of contracts to Section 3 business concerns; (2) failure to exercise

³Section 3 applies to the following HUD assistance...community development assistance that is used for the following projects (i) housing rehabilitation (ii)housing construction and (iii) other public construction.

⁴ See <http://www.hud.gov/offices/cpd/about/budget/budget06>

⁵ See <http://www.hud.gov/offices/cpd/about/budget/budget07>

⁶ See <http://www.hud.gov/offices/cpd/about/budget/budget08>

⁷ Each recipient which receives directly from HUD financial assistance that is subject to the requirements of this part shall submit to the Assistant Secretary an annual report in such form and with and with such information as the Assistant Secretary may request, for the purposes of determining the effectiveness of Section 3.

⁸ See 24 CFR 135.74 (f).

⁹ *Nails Construction Company et al v. The City of Saint Paul* 2007 WL 423187 (D.Minn.)

oversight over contractors hired with Section 3 funds to assure that the contractors provide training, employment, and contracting opportunities to Section 3 persons and business concerns; (3) failure to meet Section 3's reporting requirements; (4) failure to seek out and identify Section 3 business concerns about contracting opportunities; and, (5) failure to file form HUD-60002. These are essentially the same allegations contained in Mr. Newell's HUD complaint. The lawsuit was ultimately dismissed on summary judgment because the court determined that Section 3 does not provide a right of private action.

Interviews:

HUD staff conducted interviews to determine the extent of knowledge city staff had of Section 3. From these interviews it was apparent that the staff had no working knowledge of Section 3 and was generally unaware of the city's programmatic obligations thereto. It appeared that city staff were confusing Section 3 responsibilities with Saint Paul's efforts to increase participation by minority and women-owned businesses in city contracts. Project managers and grants administrators in the city's Department of Planning and Economic Development (PED) testified that potential contractors are not notified of their Section 3 obligations nor do bid solicitations or contracts reference or incorporate the required "Section 3 clause."¹⁰ Further, they stated that an explanation of Section 3 requirements is not included in pre-bid or pre-construction conferences. Although such conferences are routine and project managers review various contract compliance issues during the conferences, they acknowledged that Section 3 is not one of the matters regularly discussed. Mr. McCall stated that his office works with PED staff to develop contracts using CDBG and HOME funds but that he has never advised that the Section 3 clause be incorporated into said contracts.

HUD requires CDBG entitlement communities to submit an annual report to determine the effectiveness of Section 3. The annual report is to be electronically submitted on Form 60002 with or at the same time the entitlement community submits its Consolidated Annual Performance and Evaluation Report (CAPER). City staff stated that they were unaware of this requirement and that, to their knowledge, the city has never submitted a Section 3 report to HUD.

Ronald Ross, PED Grants Administrator, stated that the city does submit the required Contract and Subcontract Activity Report to HUD annually.¹¹ This report is submitted pursuant to Executive Order 2516 which requires that all federal agencies develop Minority Business Development Plans. Form 2516 is designed to provide HUD with sufficient information to evaluate a grantee's performance towards meeting its Minority Business Enterprise (MBE) goals. While Form 2516 does include a field for reporting on Section 3 contract activity, filing Form 2516 does not obviate the recipient's obligation

¹⁰ 24 CFR 135.32 Each recipient has the responsibility to comply with Section 3 in its own operations, and ensure compliance in the operations of its contractors and sub-contractors. This responsibility includes...notifying potential contractors for Section 3 covered projects of the requirements of this part, and incorporating the Section 3 clause ... in all solicitations and contracts.

¹¹ HUD Form 2516 Contract and Subcontract Activity

to file Form 60002.

Form 2516 was not designed to fully capture a recipient's Section 3 contracting activities. However, even if it were, the city's method of data collection would have rendered its efforts in this regard as insufficient. This is demonstrated by a review of the Forms 2516 submitted by the city for 2005, 2006 and 2007. In project reports for each of the three years, there are numerous instances where a contractor is identified as Section 3 business in one report but not in another. When asked about this discrepancy, Mr. Ross stated that when filling out Form 2516 he relies exclusively upon information provided to him by the city's various sub-recipients. He said that upon receipt of said information he enters it onto a Form 2516 which he then transmits to HUD annually. Consequently in those instances where a sub-recipient working on a project asserts that a given contractor is a Section 3 business and another sub-recipient working on a different project does not so certify, the city simply forwards the contradictory information to HUD. Further, as Mr. Ross acknowledged, the city does not have a procedure in place for certifying Section 3 businesses. Therefore there is no mechanism by which the city could have independently evaluated a sub-recipient's assertion concerning a business's Section 3 status.

File review:

Based on information gathered before the on-site review, five community development projects were selected for review¹². The projects were selected because, per the recipient, they met the Section 3 funding threshold¹³. HUD staff reviewed the contract files maintained by the PED and the Human Rights and Equal Economic Opportunity Department. The reviewers were examining the files for documentation of compliance with Section 3. None of the contracts examined contained the required "Section 3 clause."¹⁴ Further, neither the project bid solicitations nor the official minutes of pre-bid and pre-construction conferences contained any reference to Section 3

The HOME Repayment Loan Agreements for the Winnipeg Apartments, Booth Brown Manor and for the Delancey/Selby Stone Apartments did contain a paragraph on Section 3, but it incorrectly stated that participation in the city's Vendor Outreach Program and Affirmative Action Program are required elements of Section 3 compliance. Nor did these documents include or reference the required Section 3 clause but rather recommended that sub-grantees utilize businesses located in, or owned by people living within, the seven county metropolitan area.

The Request for Qualifications for the Delancey/Selby Stone Apartments renovation

¹² The projects selected were Booth Brown Manor, Commerce Apartments, Delancey/Selby Stone Apartments, City House and Rice-Winnipeg Apartments.

¹³ 24 CFR 135.3(a)(3)(ii)(B) The requirements of this part apply to contractors and subcontractors performing work on Section 3 covered project(s) for which the amount of the assistance exceeds \$200,000; and the contract or subcontract exceeds \$100,000.

¹⁴ 24 CFR 135.38. All Section 3 covered contracts are required to contain a specific clause that details a contractor's Section 3 responsibilities.

project did state that Section 3 requirements apply. However, the Acknowledgment of Receipt of Compliance Documents for this project did not identify any subsequent compliance with Section 3.

Testimony or Other Evidence:

HUD staff reviewed materials developed pursuant to Mr. Newell's federal civil suit against the city of Saint Paul. This material is generally consistent with the information developed during the on-site compliance review. Robert Hammer, Director of Finance and Administrative Services for the city of Saint Paul, provided a sworn affidavit filed with the United States District Court in which he stated that the city of Saint Paul had never instituted, nor had in place at the time, a Section 3 certification and tracking program. Further, Mr. Hammer affirmed that the city had never submitted a Form 60002 to HUD nor was he familiar with a requirement to do so.¹⁵

Findings and Conclusions:

The city of Saint Paul (including the Saint Paul HRA) is not in compliance with the requirements of the Section 3. It cannot document compliance with the "greatest extent feasible" requirement of Section 3 by demonstrating that its contracting activities meet the numerical goals as set forth in the regulation.¹⁶ Nor has it implemented any of the specific activities defined by the regulation as recipient responsibilities. There are no procedures in place to: 1) notify Section 3 residents about training and employment opportunities generated by Section 3 covered assistance and Section 3 business opportunities;¹⁷ 2) notify potential contractors and their subcontractors about the Section 3 requirements and ensure their compliance and their subcontractors' compliance with Section 3 requirements;¹⁸ 3) incorporate the Section 3 clause¹⁹ in all solicitations and contracts;²⁰ 4) facilitate the training and employment of Section 3 residents and the award of contracts to Section 3 business concerns;²¹ or 5) document the actions taken to comply with the Section 3 requirements, the results of the actions and impediments, if any.²² Furthermore, the recipient has not submitted the Form 60002 annually as required by the regulations.

¹⁵ Second Affidavit of Robert Hammer dated October 3, 2006.

¹⁶ See 24 CFR § 135.30

¹⁷ See 24 CFR § 135.32(a)

¹⁸ See 24 CFR § 135.32(b)

¹⁹ See 24 CFR § 135.38

²⁰ See 24 CFR § 135.32(b)

²¹ See 24 CFR § 135.32(c)

²² See 24 CFR § 135.32(e)

The city asserts that notwithstanding its inability to document compliance with the "greatest extent feasible" requirement, to implement any of its defined program responsibilities, or to file Form 60002 annually, it administers its community development programs in compliance with Section 3 requirements. The city offers in support of this assertion the fact that HUD's Office of Community Planning and Development (CPD) reviews its community development activities annually to determine compliance with applicable laws and regulations and that the city routinely receives high rating from CPD. However, Section 3 compliance is not an element of a CPD annual review. Although HUD may periodically conduct Section 3 compliance reviews of selected recipients, it relies primarily on a recipient's self-certification in this regard. Absent reason to believe to the contrary, HUD accepts a recipient's self-certification as sufficient evidence that the recipient is carrying out its community development activities in compliance with Section 3. The Section 3 self-certification of compliance is included in every application for new or continued HUD funding.

Given this finding of noncompliance, the Assistant Secretary for Fair Housing and Equal Opportunity will take informal steps to bring this matter to a voluntary and just resolution in accordance with 24 CFR 135.76(f)(2).²³ Where attempts to informally resolve this issue fail, the Assistant Secretary will impose a resolution. Any resolution imposed by the Assistant Secretary will be in accordance with the regulations governing the particular HUD program(s) in question and may result in the imposition of program sanctions if appropriate. Please be advised that you have the right to appeal this decision with fifteen (15) days of the receipt of this notification by requesting a reconsideration of this action. Any request for reconsideration should specify the reasons why this decision should be reconsidered. Your request should be mailed directly to the Assistant Secretary for Fair Housing and Equal Opportunity at:

U.S. Department of Housing and Urban Development
Office of Fair Housing and Equal Opportunity
451 Seventh Street, SW
Suite 5100 Washington, D.C. 20410

If an appeal is not submitted during the indicated time above, you will be contacted by a staff person to begin the voluntary resolution process. If you have any questions

²³ Generally findings of noncompliance identified by way of a compliance review are resolved pursuant to 24 CFR 135.74 (c). However, since the compliance review resulted from an individual complaint, the Assistant Secretary has determined to resolve the matter in the manner detailed above.

regarding any aspect of this review, please contact Ms. Jaime Pedraza at 612-370-3000 ext 2130. Thank you for your cooperation.

Sincerely,



Barbara M. Knox, Director
Office Fair Housing & Equal Opportunity
Region V

cc: Cecile Bedor, PED
Robert Hammer, Administrative Team Leader
Fredrick Newell
Dexter Sidney, Field Office Director
Michele Smith, CPD Director
Jaime D. Pedraza, FHEO Director

Appendix 2

§ 135.38 Section 3 Clause.

All Section 3 covered contracts shall include the following clause (referred to as the Section 3 clause):

- a) The work to be performed under this contract is subject to the requirements of Section 3 of the Housing and Urban Development Act of 1968, as amended, 12 U.S.C. 1701u (Section 3). The purpose of Section 3 is to ensure that employment and other economic opportunities generated by HUD assistance or HUD-assisted projects covered by Section 3, shall, to the greatest extent feasible, be directed to low- and very low-income persons, particularly persons who are recipients of HUD assistance for housing.
- b) The parties to this contract agree to comply with HUD's regulations in 24 CFR part 135, which implement Section 3. As evidenced by their execution of this contract, the parties to this contract certify that they are under no contractual or other impediment that would prevent them from complying with the part 135 regulations.
- c) The contractor agrees to send to each labor organization or representative of workers with which the contractor has a collective bargaining agreement or other understanding, if any, a notice advising the labor organization or workers' representative of the contractor's commitments under this Section 3 clause, and will post copies of the notice in conspicuous places at the work site where both employees and applicants for training and employment positions can see the notice. The notice shall describe the Section 3 preference, shall set forth minimum number and job titles subject to hire, availability of apprenticeship and training positions, the qualifications for each; and the name and location of the person(s) taking applications for each of the positions; and the anticipated date the work shall begin.

- d) The contractor agrees to include this Section 3 clause in every subcontract subject to compliance with regulations in 24 CFR part 135, and agrees to take appropriate action, as provided in an applicable provision of the subcontract or in this Section 3 clause, upon a finding that the subcontractor is in violation of the regulations in 24 CFR part 135. The contractor will not subcontract with any subcontractor where the contractor has notice or knowledge that the subcontractor has been found in violation of the regulations in 24 CFR part 135.
- e) The contractor will certify that any vacant employment positions, including training positions, that are filled (1) after the contractor is selected but before the contract is executed, and (2) with persons other than those to whom the regulations of 24 CFR part 135 require employment opportunities to be directed, were not filled to circumvent the contractor's obligations under 24 CFR part 135.
- f) Noncompliance with HUD's regulations in 24 CFR part 135 may result in sanctions, termination of this contract for default, and debarment or suspension from future HUD assisted contracts.
- g) With respect to work performed in connection with Section 3 covered Indian housing assistance, section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e) also applies to the work to be performed under this contract. Section 7(b) requires that to the greatest extent feasible (i) preference and opportunities for training and employment shall be given to Indians, and (ii) preference in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned Economic Enterprises. Parties to this contract that are subject to the provisions of Section 3 and section 7(b) agree to comply with Section 3 to the maximum extent feasible, but not in derogation of compliance with section 7(b).

