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By E-Gov website: <http://www.regulations.gov> and by FAX 202-493-2251

Dear Docket Clerk

RE: FHWA Docket No. FHWA—2010—0027

These comments are submitted by the National Housing Law Project (NHLP) and the National Low Income Housing Coalition (NLIHC). NHLP is a nonprofit national housing law and advocacy center, working with attorneys, paralegals and tenant leaders nationwide to advance housing justice for low-income people. NHLP provides legal assistance, advocacy advice and housing expertise to legal services and other attorneys, low-income housing tenant and advocacy groups, and other intermediaries, as well as policymakers. NLIHC is a membership organization whose members include residents of public and assisted housing and their organizations, state and local housing coalitions, nonprofit housing providers, homeless service providers, fair housing organizations, housing researchers, public housing agencies, private developers and property owners, local and state government agencies, faith-based organizations, and concerned citizens.

Our comments are focused on the interface between Department of Housing and Urban Development (HUD) and Department of Transportation (DOT) policies and practices, with an emphasis on the implications for the Community Development Block Grant (CDBG) program and Section 3.

These comments emphasize the following points

- The Livability Principles should be augmented to be more consistent with those of the Interagency Partnership for Sustainable Communities, particularly those that reflect HUD's obligations to assist low- and moderate-income families and individuals in meeting their housing needs.
- Notice and implementation of the SEP—14 should reflect more coordination between DOT and HUD, especially in the implementation phase.
- A key focus of SEP—14 should be in ensuring that the goals of Section 3 and the primary objective of the CDBG program are achieved.

The DOT Notice seeks comments on a proposal to offer a Special Experimental Project No. 14 (SEP—14) to states. The proposed SEP—14 would on a case by case basis permit DOT to approve a state's work plan for Federal Highway Administration (FHWA) funds that uses CDBG funding as a local non-Federal match thereby triggering HUD's Section 3-style geographic preferences in hiring and contracting. This SEP—14 proposal seeks to implement the federal government's efforts to coordinate DOT, HUD and Environmental Protection Agency (EPA) policies to create sustainable and livable communities. We are generally supportive of the proposed SEP—14 experiment.

To determine if the Notice achieves its objectives, it is important to recognize the livability principals, the primary objectives of the CDBG program and the purpose of the Section 3 obligation. DOT, HUD and EPA entered into an interagency partnership for sustainable communities. In that process, they identified the following six livability principles:

- Provide more transportation choices.
- Promote equitable, affordable housing by expanding location housing choices for people of all ages, incomes, races and ethnicities, in order to increase mobility and lower the combined cost of transportation and housing.
- Enhance economic competitiveness through reliable and timely access to jobs, educational opportunities, services, and basic needs.
- Support existing communities and increase community revitalization.
- Coordinate polices and leverage investment.
- Value communities and neighborhoods by investing in healthy, safe and walkable communities.

CDBG Primary Objective

The primary objective of each CDBG grantee is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income.¹ Consistent with this primary objective, not less than 70% of the funds must be used for activities that benefit low- and moderate-income families. 42 U.S.C. § 5301(c). CDBG grant recipients must certify that the projected uses of CDBG funds will give, to the maximum extent feasible, priority to specific activities which will carry out at least one of the national objectives of the program. These national objectives are benefit to low-and moderate-income families, aid in the prevention or elimination of slums or blight, or addressing needs having a particular urgency because existing conditions pose a serious and immediate threat to the health or welfare of the community. *Id.*; 24 C.F.R. § 570.200. The regulations provide a variety of tests to determine whether an activity meets one of the national objectives. Activities that meet one of the four tests listed below are considered to benefit low- and moderate-income families “unless there is substantial evidence to the contrary.” In assessing any such evidence, the full range of direct effects of the assisted activity will be considered. 24 C.F.R. § 570.208(a).

- Area Benefit Activities are available to all residents in a particular area, where at least 51% are low and moderate income. An activity that serves an area that is not primarily residential in character shall **not** qualify under this criterion (e.g. central business districts).
- Limited Clientele Activities are services and facilities, at least 51% of whose beneficiaries must be low and moderate income.
- Housing Activities include providing or improving permanent residential structures which will be occupied by low- and moderate-income households; at least 51% of the units in multifamily properties, and each single-family unit must be so occupied (in general).

¹ Low and moderate income is 80% and 50% of AMI respectively. 24 C.F.R. § 570.3

- Job Creation or Retention Activities, for which at least 51% of the full-time-equivalent jobs are held by or are available to low- and moderate-income persons. 24 C.F.R. § 570.208(a)(4).

Purpose and Goals of Section 3 Obligation

The purpose of the Section 3 obligation is to ensure that economic opportunities—training, employment and contracting opportunities—generated by certain HUD financial assistance shall to the *greatest extent feasible* be directed to low- and very low-income persons, particularly those who are recipients of federal housing assistance. A recipient of funds subject to Section 3 may demonstrate compliance with the *greatest extent feasible* provisions in the following manner.

- 30% of all new hires (both direct hires and hires by contractors) are low- or very low-income individuals. In evaluating whether this goal has been met, HUD has compared the number of hours worked by all new hires with the number of hours worked by low- or very low-income individuals.
- 10% of all contracts for building trades are awarded to Section 3 businesses, and
- 3% of all other contracts.

Section 3 applies to all HUD funds provided to public housing agencies and to any recipient of other HUD funds—such as CDBG—if the recipient receives at least \$200,000 and the contract is for at least \$100,000. Section 3 applies to the entire project or activity, regardless of whether the project or activity is fully or partially funded with Section 3 covered assistance. 24 C.F.R. § 135.5(b). For non-public housing activities, the jobs and contracting opportunities are given to low- and moderate-income individuals living in the metro area in which the project is located, and priority should be given to those low- and moderate- income individuals living in the service area of the project or the project’s neighborhood.

Relationship between CDBG Objectives, Section 3 Purposes, and Livability Principles

The primary objective of the CDBG program and the purpose of Section 3 are focused on direct benefit to low- and moderate-income individuals and families. The Interagency Partnership’s livability principles highlight “affordable housing” but fail to define the term “affordable housing” and fail to mention assistance to low- and moderate-income families. In contrast, the housing-specific principle is presented in a context which emphasizes mobility and benefiting “people of all incomes.” Two other key interagency livability principles are to support existing communities, and to improve access to employment centers, educational opportunities, services and other basic needs. These principals are laudable but are so general that they could be used to support objectives that are inconsistent with the objectives of the CDBG program and Section 3. Nevertheless, in broadly witnessed teleconferences and webinars, HUD officials have stated that deep affordability is at the core of HUD’s mission, and that HUD wants to ensure that people are not pushed out of their neighborhoods due to high housing prices as a result of HUD/DOT activities. *See e.g.*, Shelley Poticha, HUD webcast, March 9, 2010. The Notice recognizes that certain HUD funds may be used as a local match for FHWA grant-in-aid. 75 Fed. Reg. 15,767, 15768. CDBG funds may be used for “[p]ayment of the non-Federal share required in connection with a Federal grant-in-aid program undertaken as part of CDBG activities, provided, that such payment shall be limited to activities otherwise eligible and in compliance with applicable requirements under this subpart.” 24 C.F.R. § 570.201(g); *see also* 42 U.S.C. § 5305(a)(9). This means that the CDBG activities will have to be an integral part of the larger project that includes the FHWA-funded activities *and* meet the one of the national objectives of the CDBG program.

The Notice provides that states seeking a SEP—14 must address at least four points in their work plans. These points include how the states will:

- Evaluate the effects of HUD’s Section 3 requirements on competitive bidding. (It is suggested that States may compare current bids with prior bids on similar projects.)
- Quantify and report on the expected economic benefits under a single contract.
- Identify the amount of HUD and FHWA funding. (DOT proposes that in order to be qualify for SEP –14 approval, states use a minimum amount of HUD funding—10% of the amount of the Title 23 eligible work or 5% of a project of \$100 million or more of federal funding.)
- Address the degree to which the project enhances livability and sustainability. (Factors relevant to livability are listed and include user mobility, improving transportation choices, accessibility for economically disadvantaged populations, and other sub-populations, coordinating planning processes at the local level, and factors related to sustainability which includes environmental examples.)

The list of factors should be expanded to include evaluating the economic impact, including the number of low- and moderate-income individuals who were expected to be trained and employed (by job title or trade) as a result of the FHWA project, the amount of the anticipated Section 3 contracting opportunities, and the number of low- and moderate-income resident who actually obtained a job or training , the hours of employment and/or training provided and the names of the Section 3 businesses and the dollar amount of the contracts for those Section 3 business that received a contract because of the FHWA project.

Concerns

One of the goals of the Interagency Partnership for Sustainable Communities included coordinated policies. We welcome the possibility that FHWA funds may be used to create job training and opportunities for local low- and moderate-income workers and Section 3 businesses. However, DOT could do more in this Notice to explain how the policies of DOT and HUD will be coordinated.

Encouraging the use of CDBG funds as a local match for FHWA projects will have a tendency to tip the balance in local planning toward highway and other transportation-oriented infrastructure projects. Care will have to be taken at the federal level in oversight and at the local level to ensure that the national objectives of the CDBG program are fully met and that housing activities or other activities that lower income families would want and need are not ignored or minimized.

We assume that the SEP—14 experiment that the amount of HUD funding in a project be either 10% of the Title 23 eligible work or 5% of a project with more than \$100 million in federal money is a threshold for the consideration of a SEP—14 application. If it is also being proposed that the 10%/5% thresholds not only trigger SEP—14 consideration but also be the threshold for Section 3 compliance, we would strenuously object. The Section 3 thresholds are \$200,000 and \$100,000 and they should not be increased. Moreover, the eligibility criteria for SEP—14 experiments should be decreased. We do not understand why the eligibility criterion was established so high. Ten or five percent of a large project could be a huge amount of money—certainly beyond the reach of most CDBG recipients. On the other hand, the SEP—14 experiment could be used for a smaller more modest projects related for example to a transit oriented development. Smaller projects should not be excluded from participating in the SEP—14, especially because Section 3 will apply to these efforts if CDBG funding is used.

Recommendations

Augment Livability Principles and Revise the SEP—14 Notice to be Consistent with such Augmentation

Consistency with CDBG

DOT and HUD should amend or otherwise augment the livability principles to be more consistent with HUD goals of assisting low- and moderate-income families and supporting rental housing.

In the spirit of the Interagency Partnership for Sustainable Communities entered into among DOT, HUD, and EPA, the four “livability factors” in the FHWA notice are disappointingly transportation-centric, heavily oriented to the Interagency Partnership’s first principle and only lightly touching on the third and fifth principles. Most discouraging is the complete failure to incorporate the second principle’s promotion of equitable and affordable housing for all, the fourth principle’s support for existing communities, and the sixth principle’s valuing of communities and neighborhoods.

Although the Interagency Partnership’s principles are expressed in quite general terms, HUD officials have been promoting them with far greater verbal specificity. For example, they emphasize that “affordable” means deep affordability of homes for extremely low- and very low-income households and that rents plus utilities not exceed 30% of household income. They also explicitly assert, with regard to the fourth and sixth principles, that long-time residents of existing communities and neighborhoods must not experience either direct displacement (by acquisition or demolition) or indirect displacement (by gentrification).

Therefore, we recommend that in order to participate in SEP—14, considerable weight must be given to the Interagency Partnership’s second principle by assessing the contribution of the project and its activities to promoting affordable homes by preserving and/or creating homes that are affordable to households with incomes below CDBG’s 80% area median income (AMI) threshold. More importantly in the spirit of the principle’s “all incomes and races”, the housing should be targeted to households with the greatest need for affordable homes and transportation – those with “extremely low” income (below 30% AMI) and “very low” income (those with income between 30% and 50% AMI), with great attention to “affirmatively furthering fair housing choice” to racial and ethnic minorities.

Also important to adhering to the spirit of the second Interagency Principle is that there is “maintenance of effort” with respect to a jurisdiction’s use of CDBG for housing activities. That is, in order to preclude further drain of CDBG resources from addressing the need for affordable housing, SEP—14 applicants must adhere to the CDBG statute which states that “[i]t is the intent of Congress that [CDBG] not be utilized to reduce substantially the amount of local financial support for community development activities below the level of such support prior to the availability of such assistance.” 42 U.S.C. § 5301(c).

With regard to the fourth and sixth principles, we recommend that in order to participate in SEP—14, applicants clearly describe in their work plan how they will truly support existing neighborhoods and communities by explicitly indicating the means by which direct and indirect displacement will be prevented.

Prior to the approval of any SEP—14 proposal, DOT must work directly with CPD staff to ensure that the proposed use of CDBG is designed to meet one of CDBG’s national objectives. In particular, because there is likely to be uses of CDBG in conjunction with DOT “Enhancement Projects,” it is imperative that there be

rigorous adherence to CDBG’s “area benefit” test. That is, simply using CDBG for a streetscape project in a service area in which 51% of the households are low and moderate income is not sufficient. As the statute states, any area benefit activity must be “clearly designed to meet identified needs of persons of low and moderate income.” 42 U.S.C. § 5305(c)(2)(A). The regulations refine the statute, declaring that “the full range of direct effects” of the assisted activity will be considered when judging whether low- and moderate-income people truly benefit. 24 C.F.R. § 570.208(a). Too many existing communities of lower income people have experienced scarce CDBG funds used for streetscapes that they did not request and which principally foster gentrification and displacement.

Given the larger set of resources available to DOT, we recommend that Enhancement Projects only be considered by SEP—14 if there is strong proof that a community’s existing lower-income residents understand that CDBG can be used to support affordable housing and still decide to use their CDBG resources in the form akin to an Enhancement Project that genuinely provides them with new or augmented, affordable transportation choices.

We recommend that DOT notify applicants that a preference will be provided to SEP—14 applications that use the CDBG match to support affordable housing activities that will benefit lower income people.

Consistency with Section 3

Section 3 is a statutory requirement that training, employment and economic opportunities should benefit low- and moderate-income individuals. Training is a key component to the success of Section 3. A percentage of the FHWA funds should be set aside to provide the necessary training so that the objectives of Section 3 can be fully realized. We urge a set aside of a minimum ½ of 1% of the FHWA funds for training for any state that seeks to participate in the SEP—14. Alternatively, we urge DOT to recommend such a set aside to its grantees and those interested in participating in the SEP—14 experiment.

In the awarding of the exception for the SEP—14 experiment, DOT should consider or request information from HUD regarding a CDBG recipient’s past compliance with Section 3. If prior compliance was not stellar or the amount of prior funds subject to Section 3 substantially less than what is proposed in the SEP—14 application, the state work plan and the CDBG Action Plan should be thoroughly reviewed by the HUD Section 3 office as well as Community Planning and Development. If necessary, HUD should provide the CDBG recipient with technical assistance.

Improvements to Section 3

Historically, compliance with Section 3 has been very weak. HUD must continue to improve enforcement of Section 3. HUD ought to provide Section 3 training to those states seeking and that obtain the SEP—14 approvals, to the local CDBG recipient that is providing the funds triggering the Section 3 obligations, and to the local PHA and Section 8 owners who have contacts with the recipients of HUD assistance. HUD should provide the states seeking SEP—14 approvals guidance regarding best practices such as

- The benefits of a Section 3 coordinator.
- The importance of a comprehensive Section 3 plan, which requires that contractors establish quantifiable goals for hiring and contracting and provide at the time of bid acceptance a copy of the payroll listing the contractor’s full time employees.

- Local reporting of the employment goals and achievements and the same for Section 3 businesses.
- Interaction and coordination with the local Department of Labor– Workforce Investment Agencies (WIA) and one stop and local employment training centers.

Coordination at the National Level.

A state work plan should describe the benefit to the state and/or the affected local jurisdiction of the application of the HUD economic opportunity requirements. Those benefits presumably would include increased local employment and training for low- and moderate-income individuals as well as support for local Section 3 businesses. The state work plan should describe the economic opportunity goals and expected outcomes. The four points identified in the Notice request that states in their work plans provide information that is extremely limited. The four points fail to address the practical effects of the economic opportunity requirement. More should be asked including information about the number of anticipated training and employment opportunities created for low- and moderate-income individuals and the dollars that will be set aside so as to meet the contracting obligations with Section 3 businesses. In addition, the state should describe the overall potential economic impact of retaining these economic opportunities in the local community.

At the time that a state submits a work plan to the appropriate FHWA division office for SEP—14 approval, HUD, particularly the CDBG and Section 3 offices, should be informed. The notice should provide that both the state and DOT should notify HUD of the pending work plan and application for SEP—14. The notice to the HUD offices should briefly explain the proposed amount of the CDBG matching funds and a description of how those matching funds will further and comply with the goals of the CDBG program and how the goals for Section 3 will be met for the entire project or activity.

The SEP—14 decision making process should include, early on, a HUD CPD staff person very knowledgeable in CDBG requirements as well as a Fair Housing and Equal Opportunity person steeped in Section 3.

When HUD is informed, it should review the CDBG Action Plan and the Section 3 plan for the entity providing the CDBG funds for the non-Federal local match.

Getting the Word out About this SEP—14 Process

Notice should be provided jointly to CDBG and DOT fund recipients about this SEP—14 experiment. In addition, other interested parties should be informed such as local Workforce Investment Agencies and PHAs and owners of HUD assisted Housing in the area of a SEP—14 experiments. In addition, to the extent that they exist, disadvantaged, minority and women business organizations should be told of the SEP—14 experiment. If a SEP—14 application is accepted, PHAs and owners of HUD assisted housing should be requested to notify HUD assisted tenants of the Section 3 preferences regarding employment and other economic opportunities.

Type of Data that the FHWA Should Receive from States in Evaluating the SEP—14 Experiment.

The evaluation of the SEP--14experiment must include a review of whether the purposes of Section 3 and CDBG program were met.

The notice should be revised to require that states and local CDBG recipients that participate in the SEP—14 experiment submit data regarding compliance with Section 3. FHWA grantees should be notified that the Section 3 data must be reported and that there will be consequences for failure to make such reports.

Significantly, for Section 3 compliance, the key issue should be outcomes—such as the number of low- and moderate-income individuals trained, and/or provided with jobs—listed by job classification or training category—and the number who are recipients of HUD rental assistance. Determining the total dollars contracted with Section 3 businesses should be reported. For large projects, especially those of \$100 million or more, these reports of outcomes should be reported quarterly to the federal agencies—DOT and HUD—and to the relevant state and local agencies, and to the affected community. To the extent that such reporting and compliance data is considered to be the responsibility of HUD, the date for the collection of the data from the state and local agencies should be coordinated with the DOT reporting cycles so that the report on the effectiveness of SEP—14 can be fully and timely evaluated. Such coordination is consistent with one of the Livability Principles—No. 5. Coordinate policies.

HUD will have to be substantially more aggressive than it has been in the past to ensure that the goals of Section 3 are met with this experiment. HUD should conduct monitoring and compliance reviews of a number of SEP—14 experiments and provide technical assistance, if necessary.

In cases where CDBG is a part of the local match for a substantial amount of DOT dollars, HUD will have to be substantially more specific as to what is required than it is now so as to effectuate the purposes of Section 3.

If you have any questions regarding this letter please contact, Catherine Bishop, at cbishop@nhlp.org or at 510-2512-9400 extension 3105.

Cc

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