Preserving the American Dream of Home Ownership Through Regulatory Reform

MHARR

Issues & Perspectives

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JULY 2018

"RESTORING THE RULE OF LAW TO MANUFACTURED HOUSING REGULATION"

The rule of law, and the supremacy of law over the arbitrary whims of individuals who happen to wield government power, was a profound concern for the founders who debated and developed the Constitution of the United States. For over two centuries, legal scholars have pointed to the primacy of the "rule of law" in the system of limited government and defined powers established by the Constitution, stating, for example: "The rule of law may be the most significant and influential accomplishment of Western constitutional thinking. The very meaning and structure of our Constitution embody this principle. Nowhere expressed yet evident throughout the Constitution, this bedrock concept is the first principle on which the American legal and political system was built."

For too long, though, the rule of law, as envisioned by the nation's founders, has been undermined, ignored, or bypassed by the so-called "Fourth Branch" of government – the permanent, overgrown and largely unaccountable bureaucracy that has ballooned within the federal government, often in concert with overpaid and largely unaccountable government contractors. While this is a major socio-political issue with ramifications that extend far beyond the scope of this column, federally-regulated manufactured housing faces challenges of its own regarding the rule of law, and with a new Administration – with a new regulatory philosophy -- now in place, there is no time like the present to clearly address this issue within the unique context of manufactured housing regulation.

In the manufactured housing arena, the most fundamental expression of the primacy of the rule of law is the Manufactured Housing Improvement Act of 2000. Indeed, the 2000 reform law is a direct outgrowth of – and a direct congressional response to and remedy for – administrative abuses that had piled-up within the federal manufactured housing program over the first quarter-century of its existence. These included, but by no means were limited to: (1) de facto rulemaking by "interpretation;" (2) circumventing, evading, or ignoring notice and comment requirements; (3) abuses of the "Interpretive Bulletin" process; (4) closed-door standards development activity; (5) non-consensus standards development; (6) contracting abuses resulting in a non-competitive, de facto "sole-source" program monitoring contract, the same monitoring contractor for the (now) entire 40-year-plus history of the program, and the delegation of governmental power to an unaccountable private entity; and (7) activity to subvert the operation and objectivity of the former Manufactured Housing Advisory Council, and a host of other actions that undermined the basic fairness, reasonableness and, ultimately, legitimacy of the federal manufactured housing program.

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Taking cognizance of these (and other) serious program failings, Congress incorporated multiple protections in the 2000 reform law designed to restore and enhance the program's compliance with – and adherence to – the rule of law, as reflected in the basic due process norms and substantive protections included in the original 1974 manufactured housing act. In large measure, then, the 2000 reform law is: (1) a reflection of Congress' concern over program abuses which had – and continue to -- unnecessarily limit the use and availability of affordable manufactured housing for millions of Americans and the growth of the industry; as well as (2) a compendium of targeted remedies designed to halt, cure and reverse those abuses.

As a result, the 2000 reform law, among many other things: (1) established a balanced Manufactured Housing Consensus Committee (MHCC) and consensus process to develop and update consensus standards and program enforcement regulations; (2) reiterated and strengthened notice and comment requirements for all standards, regulations and "Interpretive Bulletins;" and (3) made the consensus process and notice and comment, "mandatory" absent a statutorily-defined "emergency." Moreover, to make sure that no-one misunderstood the extremely broad scope of the review and approval authority of the MHCC and the other due process protections incorporated in the 2000 reform law, Congress included what is commonly known as a "catchall" provision in the section of the law that establishes the MHCC and defines the scope of its powers. The specific – and specifically targeted -- purpose of that provision, was to ensure that HUD regulators would not fall back on their established practice of bypassing notice and comment rulemaking (and consensus committee review and approval under the new 2000 law) by the simple expedient of calling new (or modified) de facto standards and/or regulations by some other name, whether it be an "interpretation," "guidance," a "policy statement," or some other moniker not mentioned as requiring rulemaking in either the original 1974 law or the federal Administrative Procedure Act (APA). That "catchall" provision is section 604(b)(6) of the 2000 reform law.

Section 604(b)(6), as MHARR has written and observed many times before, is straightforward and unequivocal. It provides that: "Any statement of policies, practices, or procedures relating to construction and safety standards, regulations, inspections, monitoring, or other enforcement activities that constitutes a statement of general or particular applicability to implement, interpret, or prescribe law or policy by the Secretary is subject to subsection (a) or this subsection. Any change adopted in violation of subsection (a) or this subsection is void." (Emphasis added). The "subsection (a)" that is referred to, is the part of the 2000 reform law (i.e., section 604(a)) which requires MHCC consideration and approval of new or modified standards and their publication by HUD for notice and comment, among other things. Effectively then, section 604(b)(6) requires the same procedural safeguards mandated by the 2000 reform law for standards and regulations, to be applied with equal force to "any" change to HUD's policies, practices, or procedures relating to either the standards, the regulations, monitoring, inspections or virtually any other aspect of standards-setting and enforcement in an extremely broad, inclusive and comprehensive way.

Through this language, Congress sought to ensure the rule of law, rather than administrative fiat, in connection with manufactured housing regulation, in order to preserve the core purposes of the 1974 law as amended – i.e., to ensure the availability and affordability of manufactured housing for all Americans, and to avoid arbitrary, capricious, excessive and/or

unnecessary regulation that would undermine or interfere with those objectives. Or at least, that was the idea.

It did not take long, though, for HUD to start backtracking on section 604(b)(6), with a campaign designed: (1) to first limit its application and scope; (2) to subsequently read it out of the 2000 reform law entirely; and (3) having accomplished that, revert to the type of "sub-regulatory" actions and practices that section 604(b)(6) was designed to stop in the first place.

The first salvo in the war over section 604(b)(6) came in February 2004, in the form of a letter from the MHCC to HUD, asking the Department to confirm the broad scope and applicability of the MHCC's review authority under section 604. The MHCC stated, in part: "It is the Committee's opinion that the terms 'procedural and enforcement regulations' cited in subsections 604(b)(1) and (2) and 'procedural or enforcement regulations' cited in subsection 604(b)(3) refer to 'any … regulations, inspections, monitoring or other enforcement activities that constitutes a statement of general or particular applicability to implement, interpret, or prescribe law or policy be the Secretary,' as stipulated in section 604(b)(6), and, as such, must be submitted to the Committee…." (Emphasis added). HUD responded, however, in May 2004, with a five-page tome which drastically curtailed the role and authority of the MHCC. HUD's opinion letter concluded that section 604(b)(6) – directly contrary to its clear and unequivocal language -- rather than constituting a broad "catchall" provision, designed to bring most program activities within the scope of the MHCC's consensus review and recommendation role, was actually designed to limit the scope of section 604 to an extremely narrow category of HUD "statements on the construction and safety standards and [their] enforcement," thereby excluding all of the sub-regulatory "interpretations" and other pseudo-regulatory statements and activity that section 604(b)(6), by its plain language, was actually designed and intended to embrace.

Matters, though, only got worse from there. In February 2010, HUD published an "interpretive rule" – without opportunity for notice and comment -- which further slashed the scope and applicability of section 604(b)(6), to the point that it *was* effectively read out of the law, concluding that section 604(b)(6) applies only to HUD statements and actions that would constitute a "rule" within the meaning of the APA in any event. This position, however – as MHARR noted at the time and many times since -- stands the law on its head and violates a basic rule of statutory construction which prohibits interpretations that would nullify either all – or any part – of an enactment of Congress. Put differently, since the APA already requires notice and comment for APA "rules," construing section 604(b)(6) to require notice and comment only for APA rules is redundant and renders section 604(b)(6) – and Congress' action in adopting that section – meaningless, in violation of settled law concerning statutory interpretation.

The damage had been done, though, and the 2010 interpretive rule, in particular, opened the floodgates for a wave – or, more accurately, flood -- of new sub-regulatory and pseudo-regulatory program actions (i.e., at least 14 "guidance" memoranda between 2014 and 2016 alone, not counting "monitoring"-related "guidance") that imposed new and/or expanded mandates on regulated parties including, most significantly, wholesale changes to the Subpart I-related "monitoring" function, based on a new/modified "focus" that shifted from the detection of specific alleged standards violations, to a broader concentration on "quality control," at a time when industry production was rapidly declining. This had the effect of maintaining and even increasing

contractor work hours and compensation (as previously detailed by MHARR) while resulting in needlessly higher regulatory compliance costs for manufacturers and, ultimately, consumers – not a single part of which was ever considered by the statutory consensus committee or subject to notice and comment rulemaking.

The HUD program, accordingly, has spent much of the past decade operating outside of the rule of law, in direct violation of the clear language of its own authorizing statute, exercising authority it was never granted by Congress, in ways that were never authorized by Congress, while giving short-shrift to the statutory MHCC, all to the detriment of the industry – and particularly its smaller businesses – and the millions of Americans in need of affordable, non-subsidized home ownership.

Just as importantly, through nearly every step of this decade-plus subversion of the 2000 reform law, "deep state" regulators at HUD have been aided and abetted by "institutional" program contractors – i.e., de facto sole-source contractors, such as the program monitoring contractor – which constitute a "deep state" of their very own, wielding unlawfully-delegated and largely unaccountable governmental power, together with a built-in incentive to continually expand both the scope and cost of regulation, thereby increasing their own power and influence and, not surprisingly, their contract revenues. This needless regulatory expansion, in itself, has excluded hundreds-of-thousands of Americans from the benefits of manufactured home ownership, based on studies conducted by the National Association of Home Builders (NAHB), and has unnecessarily slowed and stunted the industry's recovery from its modern production low in 2009, disproportionately harming smaller industry businesses. Nor does the industry itself escape part of the blame for this activity, as far too many of its largest corporate conglomerates – and their representatives -- have provided protection and "cover" for the HUD status quo and program "leaders" who have gone to extraordinary lengths to undermine the most important elements of the 2000 reform law.

The change in presidential administrations, however, has opened the door to potential remedies for this fundamentally lawless regulatory activity. In particular, the Trump Administration's "top-to-bottom" review of HUD's manufactured housing regulations and "regulatory activities," under Executive Orders 13771 ("Reducing Regulation and Controlling Regulatory Costs") and 13777 ("Enforcing the Regulatory Reform Agenda") provides a viable basis for action to repeal both the 2010 HUD interpretive rule and the slew of "field guidance" and other sub-regulatory mandates issued by HUD based on the Department's unlawful construction of section 604(b)(6). And indeed, MHARR in its February 20, 2018 regulatory review comments to HUD, specifically urged the program to return to the rule of law, through the withdrawal of the 2010 interpretive rule and all of the program's sub-regulatory mandates issued without MHCC consideration and notice and comment rulemaking.

This effort, moreover, received a major boost when the U.S. Department of Justice notified federal agencies, through memoranda issued on November 16, 2017 and January 25, 2018, that it would no longer enforce administrative "guidance" documents issued without notice and comment rulemaking. In part, the Justice Department stated: "Guidance documents cannot create biding requirements that do not already exist by statute or regulation. Accordingly, … the [Justice] Department may not use its enforcement authority to effectively convert agency guidance

documents into binding rules. Likewise, Department litigators may not use noncompliance with guidance documents as a basis for proving violations of applicable law...."

Based on these memoranda, MHARR filed a separate request with HUD on April 25, 2018, reiterating its call for the withdrawal of the 2010 interpretive rule and all HUD manufactured housing "guidance" documents imposed without notice and comment rulemaking (and/or proper MHCC review), stating: "[A]s is demonstrated by the November 16, 2017 and January 25, 2018 memoranda, the Justice Department would quite properly refuse to enforce any such guidance documents issued without rulemaking and prior MHCC consensus review ... in any type of enforcement proceeding sought be HUD, in any event. Accordingly, rather than leaving those unenforceable 'guidance' documents on the public record ... those 'guidance' documents ... should be declared null and void in accordance with section 604(b)(6) and formally withdrawn."

As MHARR has observed, the time has come for HUD to restore the rule of law to the manufactured housing program and to finally obey the 2000 reform law as written. The pending EO 13771/13777 regulatory review process provides the perfect opportunity for HUD to finally and formally renounce its past lawlessness and withdraw both the 2010 interpretive rule and the invalid sub-regulatory "guidance" documents issued pursuant to that "rule." The legitimacy of the federal program – and the rule of law – demand no less.

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