

April 19, 2023

VIA ELECTRONIC SUBMISSION

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, S.W.
Room 10276
Washington, D.C. 20410-0500

Re: Affirmatively Furthering Fair Housing -- Docket No. FR-6250-P-01

Dear Sir or Madam:

The following comments are submitted on behalf of the Manufactured Housing Association for Regulatory Reform (MHARR). MHARR is a Washington, D.C.-based national trade organization representing the views and interests of producers of manufactured housing regulated by the U.S. Department of Housing and Urban Development (HUD) pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended by the Manufactured Housing Improvement Act of 2000 (2000 reform law) (42 U.S.C. 5401, et seq.). MHARR was founded in 1985. Its members include independent producers of manufactured housing from all regions of the United States.

I. INTRODUCTION

On February 9, 2023, HUD published a proposed rule in the Federal Register to “implement the obligation to affirmatively further the purposes and policies of the Fair Housing Act...”¹ As described by HUD, “the Fair Housing Act not only prohibits discrimination, but also directs HUD to ensure that the agency and its program participants will proactively take meaningful actions to ... promote fair housing choice, eliminate disparities in housing-related opportunities and foster inclusive communities...”²(Emphasis added). While, as HUD acknowledges, “the [Fair Housing] Act itself does not define the precise scope of the affirmatively furthering fair housing obligation for [either] HUD or HUD’s program participants,” that metric necessarily includes, “at a minimum, an obligation to assess negatively those aspects of a proposed

¹ See, 88 Federal Register, No. 27 (February 9, 2023), “Affirmatively Furthering Fair Housing” at pp. 8516, et seq.

² Id. at p. 8516, col. 1.

course of action that would further limit the supply of genuinely open housing and to assess those aspects of a proposed course of action that would increase that supply.”³(Emphasis added).

MHARR, on behalf of its member manufacturers, which produce modern, affordable, energy-efficient manufactured housing comprehensively regulated by HUD itself,⁴ has submitted comments concerning previous proposed amendments to the original 2015 Affirmatively Furthering Fair Housing (AFFH) rule.⁵ Those comments are hereby incorporated by reference herein, as if restated in full.⁶

In those comments, MHARR urged HUD to act, under both AFFH and other federal legal authorities specific to HUD Code manufactured housing,⁷ to prevent states and localities from using zoning and other related land use mandates to discriminatorily exclude inherently affordable manufactured housing (which provide and further “genuinely open housing”) and the lower and moderate-income Americans who rely on such homes as a major source of housing and homeownership. In part, MHARR stated:

“MHARR, representing smaller, independent producers of HUD-regulated manufactured housing, responded to the 2018 [AFFH] [Advance Notice of Proposed Rulemaking] with specific comments relating to the need to eliminate discriminatory state and local zoning and placement mandates that effectively exclude or unreasonably restrict the placement and utilization of HUD-regulated manufactured housing in violation of applicable law. Such discriminatory mandates ... needlessly limit (or totally exclude) the supply of safe, decent and inherently affordable HUD-regulated manufactured housing from communities throughout the United States and simultaneously deprive millions of American families either access to any type of affordable homeownership whatsoever, or the simple ability to locate a HUD Code manufactured home and live in any community (or any area

³ *Id.* at p. 8522, col. 3.

⁴ Manufactured housing is subject to comprehensive federal regulation by HUD pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended by the Manufactured Housing Improvement Act of 2000 (42 U.S.C. 5401, *et seq.*)

⁵ *See*, 80 Federal Register, No. 136 (July 16, 2015), “Affirmatively Furthering Fair Housing,” at pp. 42272, *et seq.*

⁶ *See*, MHARR October 12, 2018 Comments on HUD Advance Notice of Proposed Rulemaking on Affirmatively Furthering Fair Housing; Streamlining and Enhancements (Docket No. FR-6123-A-01) (Attachment 1 hereto) and MHARR March 16, 2020 Comments on HUD Notice of Proposed Rulemaking on Affirmatively Furthering Fair Housing (Docket No. FR-6123-P-02) (Attachment 2 hereto)

⁷ Among other things, the Manufactured Housing Improvement Act of 2000 amended the federal preemption provision of the original 1974 law to allow HUD to preempt any state or local “requirement” which interferes with the federal superintendence of the manufactured housing industry. *See*, Attachment 1, hereto at pp. 5-7. *See also*, November 13, 2003 congressional communication to HUD Secretary Mel Martinez (Attachment B to MHARR’s October 12, 2018 AFFH Comments) stating: “[T]he 2000 Act expressly provides, for the first time, [that] ‘federal preemption’ ... should be ‘broadly and liberally construed’ to ensure that local ‘requirements’ do not affect ‘federal superintendence of the manufactured housing industry.’ Combined with the expansion of the findings and purposes of the Act to include for the first time the ‘availability of affordable manufactured homes,’ the 2000 Act changes have transformed the Act from solely being a consumer protection law to also being an affordable housing law. More specifically, these combined changes have given HUD the legal authority to preempt local requirements or restrictions which discriminate against the siting of manufactured homes (compared to other single-family housing) simply because they are HUD Code homes.” (Emphasis added).

of any community) that they wish, thereby undermining legitimate housing choice. *** [S]uch discrimination is unconscionable, wholly unjustified and without basis, and should be eliminated by HUD using both the AFFH framework ... and the statutory tools that it already possesses.”⁸

(Emphasis in original).

For these reasons and for the additional reasons set forth below, MHARR urges HUD, in its final amended and updated AFFH rule, to: (1) direct and require all covered HUD program participants to allow for the placement of HUD Code manufactured homes within single-family zoning districts in their respective jurisdictions; and (2) to include provisions for the use and placement of manufactured homes within the Equity Plans that would be required by proposed section 24 C.F.R. 5.154. In addition, and as detailed by MHARR in other submissions to HUD, the Department should facilitate the broader availability and utilization of HUD Code manufactured housing – consistent with the foregoing policies – by updating and revitalizing the Federal Housing Administration’s Title I manufactured housing chattel (personal property) financing program and related Government National Mortgage Association involvement in that program.

II. COMMENTS

In the preamble to its proposed AFFH rule, HUD documents the existing and growing need for equitable access to affordable housing and homeownership. It also addresses the root causes of that need, as well as the uneven and unequal availability of affordable housing in communities across the United States. The AFFH Notice of Proposed Rulemaking (NPR) thus states, in part:

“The most recent HUD report on Worst Case Needs for Affordable Housing [issued July 2021] found there were over 7.77 million unassisted very low- income renter households facing either severe rent burden ... or severely inadequate housing conditions or both. This does not include persons facing homelessness, nor does it include lower income [but not very low-income] cost-burdened households.”⁹

The NPR broadly attributes this lack of affordable housing opportunity (both rental and homeownership) to a lack of affordable housing availability, per se, that is driven, in substantial part by local government policies that while (arguably) facially neutral, nonetheless result in patterns of discrimination which AFFH seeks to remedy. Consequently, while noting that “the widespread lack of quality affordable housing shuts out families with children and members of other protected class groups,” the NPR further states:

“Current patterns of residential segregation are largely reflective of this nation’s legacy of racially discriminatory housing, ableism and other policies. *** This proposed rule requires [HUD] program participants to redress these injustices.

⁸ See, Attachment 2, hereto at p. 2.

⁹ See, 88 Federal Register, supra at pp. 8524-8525. Research by Freddie Mac also documents a severe and growing housing shortage (3.8 million units in 2020), as well as a corresponding shortage of affordable “starter” homes. See, Freddie Mac, Perspectives/Research: “The Significant Shortage of Starter Homes” (April 15, 2021).

Program participants will be required to promote fair housing choice ... by addressing the variety of barriers that inhibit such access. *** In particular, this rule requires an analysis of barriers to affordable housing, representing a key opportunity for program participants to identify the policies and practices, such as land use and zoning ordinances that impede the development and maintenance of affordable housing commensurate with need."¹⁰

(Emphasis added).

Discriminatory land use and zoning ordinances have particularly been used by localities as a weapon to exclude affordable manufactured housing and the mostly lower and moderate-income American families that on these high-quality HUD-regulated homes. HUD Code Manufactured housing is – and historically has been – the nation’s leading source of inherently affordable homeownership, with a cost that “even for recent movers, is much lower than other alternatives, including renting.”¹¹Recent data from the U.S. Census Bureau shows that approximately 22 million Americans live in manufactured homes and that manufactured homes account for 71% of all homes sold for less than \$125,000. Census Bureau data, in addition, shows that the average sales price of a new HUD Code manufactured home (in 2021) was \$108,100, while the average price of a new site-built home (excluding land) was \$365,900.¹²Not surprisingly, then, HUD Code manufactured housing is a key homeownership resource for lower and moderate-income families, with the Consumer Financial Protection Bureau (CFPB) finding that the median net worth of families living in manufactured homes (in 2021) was \$26,000, approximately one-quarter of the median net worth of families residing in site-built homes.¹³The same CFPB study, moreover, found that minority Americans (including “Hispanic-white, Black and African American and American Indian and Alaska Native[s]) are “overrepresented” among purchasers of the most affordable (i.e., chattel-financed) manufactured homes as compared with site-built homes.¹⁴

The same database, however, indicates that HUD-regulated manufactured homes, despite their unparalleled, inherent affordability for Americans at every rung of the economic ladder, constituted just 9% of all new housing starts in 2021,¹⁵ and account for only 6% of all occupied housing in the United States.¹⁶In substantial, part, this disparity between manufactured home affordability – and thus its nominal availability to a large population of Americans – and its relatively low proportional utilization rate, is attributable to a combination of: (1) widespread local exclusion based on discriminatory land use and zoning laws; and (2) the parallel failure of HUD to utilize legal tools made available by Congress when it enacted the Manufactured Housing

¹⁰ Id. at p.8551, col. 1

¹¹ See, U.S. Department of Housing and Urban Development, “Is Manufactured Housing a Good Alternative for Low-Income Families? Evidence from the American Housing Survey (December 2004) at p. 6.

¹² See, U.S. Census Bureau, “Cost and Size Comparisons: New Manufactured Homes and New Single-Family Site-Built Homes (2014-2021).

¹³ See, U.S. Consumer Financial Protection Bureau, “Manufactured Housing Consumer Finance in the United States,” (September 2014) (CFPB 2014) at p. 17.

¹⁴ See, U.S. Consumer Financial Protection Bureau, “Manufactured Housing Finance: New Insights from the Home Mortgage Disclosure Act Data,” (May 2021) (CFPB 2021) at p. 31.

¹⁵ Id.

¹⁶ See, CFPB 1 at p. 10.

Improvement Act of 2000, to federally preempt such exclusionary edicts which summarily undermine federal policy to promote affordable housing and homeownership and equal/equitable access to such housing by all Americans in all communities, regardless of race or other minority status as outlined in the NPR. This failure, moreover, has been perpetuated by HUD for nearly a quarter-century, despite Congress clear statement in 2003, that the enhanced preemption language of the 2000 Reform Law was designed and intended to give “HUD the legal authority to preempt local requirements or restrictions which discriminate against the siting of manufactured homes (compared to other single-family housing) simply because they are HUD Code homes.”

Given the direct link between zoning and land use restrictions that discriminatorily exclude HUD Code manufactured homes from large areas of the United States (or otherwise limit the placement of manufactured homes in certain areas that are otherwise zoned for single-family housing) and the lack of affordable housing for large numbers of Americans including, but not limited to minority groups as specified in the NPR, the final AFFH rule and AFFH regulations should specifically: (1) identify the discriminatory exclusion of HUD Code manufactured homes and/or manufactured housing communities (or the discriminatory limitation of manufactured home placements in compatible residential areas) as an obstacle to fair housing and fair housing opportunity that program participants must address as part of their AFFH Equity Plans; and (2) encourage actions that increase housing choice within communities by promoting changes to local zoning and land use ordinances (and related procedures and processes) that would permit the siting of HUD Code manufactured homes in all compatible residential areas, as well as the development of new and/or expanded manufactured housing communities in such compatible residential areas. This can and should include conditioning the receipt of federal grants or other federal funds on the elimination of discriminatory restrictions (and/or exclusion) of HUD Code manufactured homes.

Based on these principles, the following modifications should be made to the AFFH regulations set forth in the NPR and included in any final rule on this matter.

1. Amend, section 5.152, “Definitions,” as follows:
 - A. In the definition of “Affirmatively Furthering Fair Housing,” add: “the duty to affirmatively further fair housing extends to all of a program participant’s activities, services and programs relating to housing, including HUD-regulated manufactured housing, and community development.”
 - B. In the definition of “Affordable Housing Opportunities,” add: “affordable housing opportunities means: (1) Housing, including HUD-regulated manufactured housing...”
 - C. In the definition of “Fair Housing Choice,” add: “Fair housing choice encompasses: (1) Actual choice, which means the existence of realistic housing options (e.g., those that are affordable and attainable), including HUD-regulated manufactured housing and other homeownership options....”
 - D. In the definition of Fair Housing Goal Categories,” add: “Fair housing goal categories means the following categories for which program participants must establish fair housing goals to overcome identified fair housing issues ... (5) Laws, ordinances, policies, practices and procedures, including those

pertaining to zoning and placement, that impede the provision of affordable housing, including HUD-regulated manufactured housing, in well-resourced areas of opportunity....”

- E. In the definition of “Homeownership Opportunity,” add: “Homeownership opportunity means that one has the actual choice to own, buy and finance a home, including a HUD-regulated manufactured home, without discrimination based on a protected characteristic.”
 - F. In the definition of “Siting Decision,” add: “Siting decision means decisions made by State or local entities, including cities, counties, or general units of local government regarding where and where not in a jurisdiction to locate, build, finance, rehabilitate, develop, or permit the development of affordable housing, including HUD-regulated manufactured housing and manufactured housing communities.”
- 2. Incorporate and amend, as and where appropriate, the foregoing modifications within relevant subsection of section 5.154, “Equity Plan.”
 - 3. Amend section 5.156, “Affirmatively Furthering Fair Housing through Equity Plan Incorporation into Subsequent Planning Documents,” as follows: -- in subsection (b), add: “Strategies and meaningful actions include, but are not limited to, elimination of local laws or ordinances, including zoning and/or land use requirements, that that are barriers to equitable access to homeownership or other affordable housing opportunities, including access to HUD-regulated manufactured homes, manufactured homeownership, rental manufactured housing and/or manufactured housing communities....”

Moreover, to effectuate and ensure compliance with such measures, HUD must: (1) specifically and expressly acknowledge that the revised preemption language of the Manufactured Housing Improvement Act of 2000,¹⁷ which provides HUD the authority to federally preempt state or local “requirements” which interfere with its superintendence of the manufactured housing industry and the accomplishment of the legislative purposes of the 2000 Reform Law (including Congress’ directive to “facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans”) includes the preemption of local zoning and/or land use ordinances which discriminatorily exclude or discriminatorily restrict or limit the placement of HUD Code manufactured homes and the ability of manufactured homeowners to live in the communities or areas of their choice; and (2) take action to enforce preemption against jurisdictions that do not voluntarily allow for the zoning approval or placement of HUD-regulated manufactured homes in compatible residential areas.¹⁸

¹⁷ See, 42 U.S.C. 5403(d).

¹⁸ HUD should simultaneously retract its January 23, 1997 “Notice of Staff Guidance” and its May 5, 1997 “Statement of Policy” regarding federal preemption under the National Manufactured Housing Construction and Safety Standards Act of 1974, insofar as those statements pre-date the 2000 Reform Law and do not reflect the substantive amendments made to 42 U.S.C.5403(d) at that time.

III. CONCLUSION

For all of the foregoing reasons, MHARR calls on HUD, as part of the revision of its AFFH regulations, to specifically address the discriminatory exclusion and/or restriction of HUD Code manufactured home placements by local jurisdictions and to prohibit such discriminatory strictures on HUD Code manufactured homes and manufactured homeowners in otherwise compatible residential areas, subject to the federal preemption of non-compliant local (and/or state) mandates pursuant to the federal preemption provision of the Manufactured Housing Improvement Act of 2000 (42 U.S.C. 5403(d)).

Sincerely,

Mark Weiss
President and CEO

cc: Hon. Marcia Fudge
Hon. Julia Gordon