Manufactured Housing Association for Regulatory Reform

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October 11, 2018

VIA FEDERAL EXPRESS AND ELECTRONIC SUBMISSION

Hon. Ben Carson
Secretary
U.S. Department of Housing and Urban Development
Room 10000
451 Seventh Street, S.W.
Washington, D.C. 20410-0001

Re: Advance Notice of Proposed Rulemaking
Affirmatively Furthering Fair Housing: Streamlining and Enhancements, Docket No. FR-6123-A-01; RIN 2529-AA97

Dear Secretary Carson:

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 association 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 (42 U.S.C. 5401, et seq.) (1974 Act) as amended by the Manufactured Housing Improvement Act of 2000 (2000 reform law). MHARR was founded in 1985. Its members include independent manufactured housing producers from all regions of the United States.[1]

I. INTRODUCTION

On August 16, 2018, HUD published an Advance Notice of Proposed Rulemaking (ANPR) in the Federal Register,[2] seeking public comments regarding potential amendments to HUD's Affirmatively Furthering Fair Housing (AFFH) regulations, adopted through a final rule published by the Department on July 16, 2015.[3] The stated purpose of the AFFH final rule was "to provide

[1] MHARR's member manufacturers are all "small businesses" as defined by the U.S. Small Business Administration (SBA) and are "small entities" for purposes of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.).

[2] See, 83 Federal Register, No. 159, August 16, 2018, at p. 40713, et seq.

[3] See, 80 Federal Register, No. 136, July 16, 2015, at p. 42357, et seq.

HUD program participants[4] with a revised planning approach to assist ... in meeting their legal obligation to affirmatively further the purposes and policies of the Fair Housing Act."[5]Since the publication of that final rule, however, "HUD has concluded that the current regulations are ineffective in addressing the lack of adequate housing supply, which has [had] particularly adverse impact[s] on protected classes under the Fair Housing Act."[6] As a result, "HUD has determined that a new approach toward AFFH is required"[7] and is seeking public input through the instant ANPR on conceptual and specific revisions to the AFFH regulatory structure.

In particular, HUD, through its August 16, 2018 ANPR, seeks comments on amendments to the current AFFH regulations that will "encourage actions that increase housing choice, including ... greater housing supply."[8] And it is in this specific area, that the nation's independent producers of HUD-regulated manufactured housing seek policy and regulatory changes that will positively promote the availability of inherently-affordable, non-subsidized manufactured housing in all areas of the United States – and in all local jurisdictions – as a private-sector means to increase both housing supply and housing choice.[9]

II. COMMENTS

HUD-regulated manufactured housing is the nation's most affordable source of non-subsidized homeownership, with a cost that, "even for recent movers, is much lower than other alternatives, including renting."[10]Recent 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 new homes sold for under $125,000.00. Census Bureau data, in addition, shows that the average sales price of a new manufactured home (in 2016) was $70,600.00, while the average price of a new site-built home (excluding land) was $286,814.00.[11]Not surprisingly, therefore, manufactured housing is a key homeownership resource for lower and moderate-income Americans, with the Consumer Financial Protection Bureau (CFPB) finding that the median net worth of families living in manufactured homes was $26,000.00, approximately one-quarter of the median net worth of families residing in site-built homes.[12]

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[4] I.e., local governments, public housing agencies, states and "Insular Areas." See, 83 Federal Register, No. 159, supra, at p. 40714, col. 1.

[5] Id. at p. 40713, col.3.

[6] Id.

[7] Id. at p. 40713, col. 1.

[8] Id. at p. 40714, col. 3.

[9] Promoting the availability of inherently affordable, non-subsidized manufactured housing is not only a sensible free-market mechanism to increase housing choice and supply, but is also already a specific objective of federal law. Section 602 of the Manufactured Housing Improvement Act of 2000 thus provides that one of the primary purposes of that law, is "to facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans." (42 U.S.C. 5401(b)(2)).

[10] 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.

[11] See, Attachment A, hereto, U.S. Census Bureau, Cost and Size Comparisons: New Manufactured Homes and New Single-Family Site-Built Homes (2007-2016).

[12] See, U.S. Consumer Financial Protection Bureau, "Manufactured Housing Consumer Finance in the United States" (September 2014), at p. 17.

The same databases, however, indicate that HUD-regulated manufactured homes, despite their unparalleled, inherent affordability for Americans at every rung of the economic ladder, constituted just nine percent of all new housing starts in 2016,[13] and account for only six percent of all occupied housing in the United States,[14] at a time when the number of Americans with "worst-case" housing needs, as defined by HUD (i.e., renters with very low incomes who do not receive government assistance and pay more than one-half of their income for rent or live in severely inadequate conditions, or both),[15] rose to 8.3 million households in 2015, just slightly below the record number of 8.5 million households in 2011 and up from 7.7 million households in 2013.[16] Thus, despite its inherent affordability for a large potential universe of American homebuyers, HUD-regulated manufactured housing constitutes a comparatively small segment of the overall housing market, remaining constant at 9% of all new housing starts since 2012, after falling from a recent high of 12% in 2008.[17]

In substantial part, this disparity between manufactured home affordability – and thus availability to a large population of Americans -- and relatively low (and declining) proportional utilization rates, is attributable to a combination of federal policies that have: (1) severely restricted the manufactured housing consumer financing market by discriminatorily excluding 80% or more of that market from participation in the securitization and secondary market platforms provided by the Government Sponsored Enterprises (GSEs) and from significant participation in financing programs maintained by the Federal Housing Administration (FHA);[18] and (2) just as significantly, have allowed a proliferation of local zoning and placement restrictions, which have resulted in the discriminatory exclusion of HUD-regulated manufactured homes in many jurisdictions around the United States.

Indeed, exclusionary zoning measures and related land-use restrictions have prevented the construction of most new manufactured home communities in the United States for decades, have produced a significant net loss of community spaces for HUD Code manufactured homes, and have likewise prevented the expansion of existing communities to accommodate new homes and new homeowners.[19] At the same time, the adoption of new discriminatory zoning and land-use

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[13] HUD-regulated manufactured homes have constituted nine percent of new home starts since 2012. See, Attachment A, supra, U.S. Census Bureau, Cost and Size Comparisons: New Manufactured Homes and New Single-Family Site-Built Homes (2007-2016).

[14] See, U.S. Consumer Financial Protection Bureau, supra at p.10.

[15] See, U.S. Department of Housing and Urban Development, "Worst Case Housing Needs – 2017 Report to Congress" (August 2017) at p.ix-x.

[16] Id. at p. x.

[17] See, Attachment A.

[18] Despite being directed by Congress – through the "Duty to Serve Underserved Markets" (DTS) provision of the Housing and Economic Recovery Act of 2008 (HERA) – to facilitate a secondary market for manufactured home consumer loans, including the 80% or more of the manufactured housing market served by personal property "chattel" loans, the GSEs, some ten years after the adoption of DTS, still do not participate in the securitization of manufactured housing chattel loans on a market significant basis and have no current plans to do so through at least 2020. Further, the FHA Title I manufactured housing personal property loan insurance program which, in the 1990s, was a significant source of financing support for manufactured home chattel loans, has since dwindled to negligible levels.

[19] See, e.g., ManufacturedHomes.com, "Discriminatory Zoning Prohibits Manufactured Home Placement in Communities Across America" (September 7, 2016): "According to Frank Wolfe, co-owner of the 5th largest manufactured [home] community owners in the United States, new manufactured home park construction is

restrictions have forced the closure, sale, or abandonment of many existing manufactured housing communities in many additional jurisdictions.[20]The result has been a significant decline in the number of places and locations where inherently affordable manufactured homes can be placed, causing extreme hardship for existing manufactured home owners, the exclusion of large numbers of Americans from the manufactured housing market (and homeownership altogether), and the imposition of significant de facto limits on the growth of the manufactured housing industry in the United States.[21]

HUD, to its credit, under the leadership of Secretary Carson, has recognized the direct correlation between restrictive local zoning and land-use measures and the unavailability of affordable housing and homeownership in many jurisdictions around the country. Speaking on January 31, 2018 before the Policy Advisory Board of the Harvard University Joint Center for Housing Studies, Secretary Carson stated that HUD would seek to: "identify and incentivize the tearing down of local regulations that serve as impediments to developing affordable housing stock," including "[o]ut-of-date building codes, time consuming approval processes, [and] restrictive or exclusionary zoning ordinances," among other things. (Emphasis added). Shortly thereafter, HUD's Office of Policy Development and Research (PD&R) expressly acknowledged the connection between such "restrictive or exclusionary" zoning mandates, the discriminatory exclusion of HUD-regulated manufactured housing, and the unavailability of affordable, non-subsidized housing in many areas, stating: "Zoning that excludes manufactured housing also contributes to affordability challenges, because manufactured housing potentially offers a more affordable alternative to traditionally-built housing without compromising building quality and safety."[22]

Given this direct link between zoning and land-use restrictions that discriminatorily exclude manufactured homes from large swaths of the United States or otherwise limit the placement of manufactured homes in certain areas, and the lack of affordable housing for large numbers of Americans, a revised AFFH rule and AFFH regulations should specifically: (1) identify the discriminatory exclusion of HUD Code manufactured homes and/or manufactured home communities (or the discriminatory limitation of manufactured home placements in compatible residential areas) as an obstacle to fair housing that program participants must address as part of their AFFH efforts;[23]and (2) "encourage actions that increase housing choice," by promoting changes to local zoning and land-use ordinances 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 HUD Code manufactured housing communities in such compatible residential

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effectively banned in almost every major city in the U.S. [and] 'there are less than ten [manufactured] home parks built per year in the entire nation combined.'"

[20] See, MHProNews.com, "'Unconstitutional Taking,' 'Gentrification on Trial' in Recent Oak Hill Manufactured Home Community Ruling" (July 8, 2018).

[21] The domestic manufactured housing industry produced a modern low of just over 49,000 homes in 2009 and since that time has experienced only a slow recovery, reaching a production level of 93,000 homes in 2018.

[22] See, U.S. Department of Housing and Urban Development, Office of Policy Development and Research, "Evidence Matters: Regulatory Barriers and Affordable Housing," (Spring 2018) at p. 5.

[23] See, 83 Federal Register, No. 159, supra at p. 40715, col. 1.

areas. This can and should include conditioning the receipt of grant (or other) funds on the elimination of discriminatory restrictions on the placement of HUD Code manufactured homes.[24]

Moreover, to effectuate and ensure compliance with such measures, HUD should: (1) specifically and expressly acknowledge that the revised federal preemption language of the Manufactured Housing Improvement Act of 2000,[25] which provides HUD the authority to preempt state and 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 (2) take action to enforce that preemption against jurisdictions that do not voluntarily allow for the zoning approval or placement of HUD-regulated manufactured homes in compatible residential areas.

The rationale and basis for such a position is straightforward and firmly rooted in both the express language of the 2000 reform law and contemporaneous congressional statements regarding the purpose(s) and intent of that law's preemption provision, as amended.

As originally enacted, the preemption section of the National Manufactured Housing Construction and Safety Standards Act of 1974 referred to the preemption of state and local construction and safety "standards" that were not identical to the federal manufactured housing construction and safety standards promulgated by HUD, stating: "Whenever a federal manufactured home construction and safety standard ... is in effect, no State or political subdivision ... shall have any authority ... to establish ... any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the federal ... standard." (Emphasis added).

The most often litigated issue under this standard-to-standard preemption was whether a state or local standard addressed the "same aspect" of manufactured home "performance" as a federal standard. For example, in Liberty Homes, Inc. v. Department of Industry, Labor and Human Relations, the Wisconsin Court of Appeals, in a decision upheld by the Wisconsin Supreme Court, ruled that a state ambient-air formaldehyde standard for manufactured homes was preempted by the then-newly adopted federal "product" standard for formaldehyde emissions, as both standards addressed the "same aspect" of manufactured home performance, albeit in different ways. Even within the confines of standard-to-standard preemption, though, HUD rarely exercised its preemptive authority, based on an extremely narrow interpretation of the key phrase "same aspect of performance," as admitted in HUD legal memoranda obtained by MHARR under the Freedom of Information Act.

Subsequently, in 1997, HUD published two preemption-related policy documents in the Federal Register – a January 23, 1997 "Notice of Staff Guidance" and a May 5, 1997 "Statement

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[24] Id. at p. 40714, col. 3. HUD should also support proposed legislation – H.R. 3793 – introduced by Rep. Norma Torres, which would, among other things, require the Secretary of HUD to "issue guidelines for jurisdictions relating to the appropriate inclusion of residential manufactured homes in a Consolidated Plan of the jurisdiction."

[25] See, 42 U.S.C. 5403(d).

of Policy" (collectively, "HUD 1997 rulings"). Taken together, these documents, formulated prior to the preemption amendments of the 2000 reform law, establish three central tenets of what has been -- and still remains -- HUD policy regarding federal preemption and discriminatory exclusion: (1) that federal manufactured housing law imposes no duty on HUD to "enforce" federal preemption; (2) that the exclusion of manufactured housing "fall[s] outside the scope of preemption" under the Act, unless that exclusion is based "solely on a construction and safety code different than that prescribed" by HUD under federal law; and (3) that "federal preemption cannot be based on a general purpose of the [manufactured housing] Act."

Congress, though, was well aware of this microscopic HUD approach to federal preemption when it enacted the Manufactured Housing Improvement Act of 2000. As a result, it made two key changes to the federal preemption provision of the original 1974 law, which legislatively overrule HUD's entire pre-2000 approach to preemption, including its interpretation of the original preemption provision and the HUD 1997 pronouncements that rest on those interpretations.

The first and most obvious change in the 2000 reform law – targeted at the heart of HUD's historically narrow application of federal preemption -- is the directive to HUD to "broadly and liberally" construe the scope of federal preemption.[26] Such an express statutory directive from Congress stands as a direct rebuke -- and congressional rejection of – HUD's historical position on the scope of preemption under the Act.

For purposes of discriminatory exclusion, however, the even more important change is the one that added state and local "requirements" -- of any kind -- to the category of state or local actions that can be preempted under the Act as amended. Because every word in a statute must be given its ordinary and customary meaning, the 2000 reform law thus extended the standard-to-standard preemption of the original 1974 law to the preemption of any state or local "requirements or standards" that could negatively impact "federal superintendence of the manufactured housing industry" as defined by Congress, including the national policy purposes of the law. (Emphasis added).

That this amendment to the preemption language of the law was intended by Congress to extend federal preemption to the invalidation of discriminatory local exclusion or restrictive placement measures against HUD-regulated manufactured housing, was made clear by key congressional proponents of the 2000 reform law in November 13, 2003 correspondence to HUD.[27] That correspondence states, in relevant part:

> "We are writing to express our deep disappointment in HUD's July [2003] rejection of the Manufactured Housing Consensus Committee recommendation, which addresses the problem of discrimination in the siting of manufactured homes. ***

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[26] See, 42 U.S.C. 5403(d) as amended by the Manufactured Housing Improvement Act of 2000: "Federal preemption under this subsection shall be broadly and liberally construed to ensure that disparate state or local requirements or standards do not affect the uniformity and comprehensiveness of the standards promulgated under this section nor the federal superintendence of the manufactured housing industry as established by this title."

[27] See, Attachment B, hereto.

> "[W]e believe that HUD should have taken this opportunity to use its expanded legal preemption authority under the 2000 Act to develop a Policy Statement or regulation to make it clear that localities may not engage in discriminatory practices that unfairly inhibit or prohibit development and placement of manufactured housing.
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> "[T]he 2000 Act expressly provides, for the first time, for federal preemption [to] 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 [facilitating] the 'availability of affordable manufactured homes' ... these ... changes 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.

(Emphasis added).

Put simply, this statement confirms that the enhanced preemption of the 2000 reform law – both in letter and intent -- sweeps away HUD's previous objections to preempting the discriminatory exclusion or restriction of HUD Code homes via zoning or other "requirements," making it clear that, as amended, the preemption language of the 2000 reform law does reach and include discriminatory exclusion measures, and that the new preemption language was designed and intended to achieve that result.

Accordingly, MHARR urges HUD, in modifying its AFFH regulations, to: (1) apply a modified AFFH structure to, among other things, seek the elimination of local zoning or placement ordinances that discriminatorily exclude or limit the placement of HUD-regulated manufactured homes and/or manufactured housing communities in compatible areas; (2) seek to prevent the adoption of any additional ordinances or measures of that type and/or effect; and (3) failing voluntary local compliance with such criteria, take action to federally preempt such ordinances or measures.

Promoting and advancing the availability of affordable homeownership for Americans through the increased availability and utilization of inherently affordable manufactured housing, however, will require additional steps – and policy reforms – by HUD.

Among other things HUD should immediately halt an ongoing policy overreach by its Office of Manufactured Housing Programs (OMHP) that was conceived, developed and initiated prior to the arrival of the Trump Administration – i.e., HUD-mandated changes, modifications and alterations to existing state manufactured home installation programs under the purported authority of Section 605 of the Manufactured Housing Improvement Act of 2000 (42 U.S.C. 5404(c)(3)). Under that section, states are accorded primary authority to regulate the installation of manufactured homes within their borders based on the recognition that the states are best suited and in the best position to determine, assess and address relevant installation conditions. HUD,

though, has sought to impose unilateral installation mandates and demands on the states that in many cases are either not appropriate or conflict with relevant state experience, or both, leading a number of states to either exit – or consider exiting – the federal-state installation program, with significant negative consequences for both the industry and consumers.

Second, but just as importantly, HUD, as the federal housing agency for the nation, should take the lead in ensuring the development and adoption of federal policies that will assure the availability of consumer financing for manufactured home purchasers, and particularly the 80% of HUD Code homes that are financed through personal property or "chattel" loans – in market-significant numbers. This should include not only promoting market-significant support for such loans by the two Government Sponsored Enterprises– Fannie Mae and Freddie Mac – pursuant to the "Duty to Serve Underserved Markets" provision of the Housing and Economic Recovery Act of 2008 (HERA), but also via direct action within HUD to: (1) revive and expand support for manufactured home chattel loans under the Federal Housing Administration's Title I manufactured housing program – which at one time provided significant levels of support for the manufactured housing chattel market but, in more recent years has dwindled to negligible levels; and (2) by revisiting and modifying the Government National Mortgage Association's (GNMA) rigid "ten-ten" rule, which has severely limited the number of lenders able to participate in FHA manufactured housing programs.

III. CONCLUSION

For 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 manufactured homes and manufactured homeowners in otherwise compatible residential areas, subject to the federal preemption of non-compliant local 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. Brian Montgomery
Hon. Mick Mulvaney
HUD Office of the General Counsel, Rules Docket Clerk
HUD Code Industry Manufacturers, Retailers, Communities and Finance Companies

ATTACHMENT A

Cost & Size Comparisons:
New Manufactured Homes and New Single-Family Site-Built Homes
(2007 - 2016)

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
New Manufactured Homes										
All										
Avg. Sales Price	$ 65,400	$ 64,700	$ 63,100	$ 62,800	$ 60,500	$ 62,200	$ 64,000	$ 65,300	$ 68,000	$ 70,600
Avg. Square Feet	1,600	1,565	1,530	1,520	1,465	1,480	1,470	1,438	1,430	1,446
Avg. Cost per Sq. Ft.	$ 40.88	$ 41.34	$ 41.24	$ 41.32	$ 41.30	$ 42.02	$ 43.54	$ 45.41	$ 47.55	$ 48.82
Single										
Avg. Sales Price	$ 37,300	$ 38,000	$ 39,600	$ 39,500	$ 40,600	$ 41,100	$ 42,200	$ 45,000	$ 45,600	$ 46,700
Avg. Square Feet	1,100	1,100	1,120	1,110	1,115	1,100	1,100	1,115	1,092	1,075
Avg. Cost per Sq. Ft.	$ 33.91	$ 34.55	$ 35.35	$ 35.59	$ 36.41	$ 37.36	$ 38.36	$ 40.36	$ 41.76	$ 43.44
Double										
Avg. Sales Price	$ 74,200	$ 75,800	$ 74,500	$ 74,500	$ 73,900	$ 75,700	$ 78,600	$ 82,000	$ 86,700	$ 89,500
Avg. Square Feet	1,775	1,765	1,735	1,730	1,705	1,725	1,720	1,710	1,713	1,746
Avg. Cost per Sq. Ft.	$ 41.80	$ 42.95	$ 42.94	$ 43.06	$ 43.34	$ 43.88	$ 45.70	$ 47.95	$ 50.61	$ 51.26
Housing Starts vs. MH Shipments *(Thousands of units)*										
New Single Family										
Housing Starts	1,046	622	445	471	431	535	618	648	715	782
Percent of Total	92%	88%	90%	90%	89%	91%	91%	91%	91%	91%
Manufactured Home Shipments										
Shipped	96	82	50	50	52	55	60	64	71	81
Percent of Total	8%	12%	10%	10%	11%	9%	9%	9%	9%	9%
Total	1,142	704	495	521	483	590	678	678	786	863
New Single-Family										
Site-Built Homes Sold (Home and Land Sold as Package)										
Avg. Sales Price	$ 313,600	$ 292,600	$ 270,900	$ 272,900	$ 267,900	$ 292,200	$ 324,500	$ 345,800	$ 360,600	$ 372,500
Derived Average Land Price	$ 84,268	$ 74,209	$ 67,718	$ 66,340	$ 59,950	$ 69,115	$ 75,071	$ 84,628	$ 84,316	$ 85,686
Price of Structure										
Avg. Square Feet	2,479	2,473	2,422	2,457	2,494	2,585	2,662	2,690	2,745	2,676
Avg. Price per Sq Ft. (excl. land)	$ 92.51	$ 88.31	$ 83.89	$ 84.07	$ 83.38	$ 86.30	$ 93.70	$ 97.10	$ 100.65	$ 107.18
Manufactured Home Shipments										
Total	95,752	81,907	49,717	50,046	51,618	54,881	60,228	64,331	70,544	81,136
Single-Section	30,737	30,384	18,568	20,373	25,291	25,629	28,239	30,218	32,210	38,944
Multi-Section	65,015	51,523	31,149	29,673	26,237	29,252	31,989	34,113	38,334	42,192
New Manufactured Homes Placed *(for Residential Use)*										
Located in Communities	26%	26%	22%	25%	26%	29%	30%	33%	34%	34%
Located on Private Property	74%	74%	78%	75%	74%	71%	70%	67%	66%	66%
Titled as Personal Property	64%	62%	67%	73%	75%	77%	78%	80%	80%	77%
Titled as Real Estate	28%	28%	28%	21%	17%	15%	14%	13%	14%	17%

Source: These data are produced by the U.S. Commerce Department's Census Bureau from a survey sponsored by the U.S. Department of Housing and Urban Development.

Released by the U.S. Census Bureau on August 15, 2017

ATTACHMENT B

Congress of the United States

Washington, DC 20515

November 13, 2003

Honorable Mel Martinez
Secretary
Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410

Dear Secretary Martinez:

We are writing to express our deep disappointment in HUD's July 17 rejection of the Manufactured Housing Consensus Committee recommendation, which addresses the problem of discrimination in the siting of manufactured homes. We ask HUD to use its expanded authority under the "Manufactured Housing Improvement Act of 2000" to address this growing problem, which is undermining homeownership opportunities for low-income and minority Americans.

The Millennial Housing Commission concluded that "During the 1990s, manufactured housing placements accounted for one quarter of all housing starts and, from 1997 to 1999, 72 percent of new units affordable to low income homebuyers." Unfortunately, discrimination against the siting of manufactured homes continues to undermine its full potential to meet the needs of low-income homebuyers. A September 2002 Ford Foundation study on manufactured housing notes that "zoning and code rules continue to be a major barrier," and that "the vast majority of local governments continue to discriminate against manufactured housing, thereby limiting its potential to meet the need for affordable housing."

You have made homeownership a top Administration priority, emphasizing opportunities for low-income Americans. You have also made reducing local barriers to affordable homeownership a top priority, announcing on June 10th a Department-wide effort to break down such barriers, in order to create "an environment to increase minority homeownership."

The very first recommendation of the the Manufactured Housing Consensus Committee addressed the problem of discrimination against the siting of manufactured homes, through a prohibition against localities enforcing discriminatory covenants made by private landowners. We believe HUD's summary rejection of this proposal is inconsistent with HUD's stated priority of removing barriers to affordable low-income homeownership opportunities.

We understand that HUD may have concerns about its legal authority to implement this particular proposal. But, we believe HUD should have taken this opportunity to use its expanded legal preemption authority under the 2000 Act to develop a Policy Statement or regulation to make it clear that localities may not engage in discriminatory practices that unfairly inhibit or prohibit development and placement of manufactured housing. We understand that some in the industry have asked HUD to take such action and we urge HUD to be responsive to this request.

We are also troubled by the legal analysis HUD used in its July 17th rejection of the Consensus Committee recommendation. HUD's analysis relies on rulings in court cases that predated the 2000 Act amendments, which render such rulings obsolete. Moreover, HUD's legal analysis states that the 2000 Act amendments "did not modify the basic substance of the statutory preemption provision." Such a statement ignores the plain language of the 2000 Act changes.

Prior to the 2000 Act changes, the statute merely prohibited states and localities from establishing any standard regarding construction or safety "applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard." The 2000 Act broadened this provision to add that: "*Federal preemption* under this subsection *shall be broadly and liberally construed* to ensure that disparate State or local *requirements* or standards do not affect the uniformity and comprehensiveness of the standards promulgated under this section nor the *Federal superintendence* of the manufactured housing industry as established by this title." [italics added].

The 2000 Act amendments also expanded the findings and purposes of the Act. Prior to 2000, the statutory findings declared it necessary to establish construction and safety standards merely "to reduce injuries, deaths, insurance costs and property damage," and "to improve the quality and durability of manufactured homes." The 2000 Act amendments introduce the new findings that "manufactured housing plays a vital role in meeting the housing needs of the nation," and that "manufactured homes provide a significant resource for affordable homeownership." New purposes were also introduced by the 2000 Act, which include protecting the "affordability of manufactured homes," and "facilitating the availability of affordable manufactured homes and to increase homeownership for all Americans."

Thus, the 2000 Act expressly provides, for the first time, for "Federal preemption," and states that this 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. We ask that HUD use this authority to develop a Policy Statement or regulation to address this issue, and we offer to work with you to ensure that it comports with Congressional intent.

Sincerely,

BARNEY FRANK

BENNIE G. THOMPSON

BARON P. HILL

MAXINE WATERS

KEN LUCAS

JULIA CARSON

ATTACHMENT C

Preserving the American Dream of Home Ownership Through Regulatory Reform

MHARR

Issues & Perspectives

By Mark Weiss

MAY 2017

"Industry, States and Consumers Must Resist HUD Installation Power Grab"

As MHARR continues to expose the outlines, extent and sheer audacity of HUD's ongoing power grab under Administrator Pamela Danner to dictate installation standards and enforcement procedures in all fifty states – including states with complying, HUD-approved, state law installation programs – the Association has received a wave of concerned inquiries from industry members and other direct stakeholders asking for more information on how and why this has come about, and what can be done to halt this effort to emasculate the federal-state partnership underlying the HUD manufactured housing program, as well as the primacy of state installation regulation as designed and mandated by the Manufactured Housing Improvement Act of 2000.

In order to fully comprehend the significance of this installation power grab -- orchestrated by HUD regulators and revenue-driven program contractors -- two points must be understood. The first, is that regulators, by nature, regulate. It is up to the "regulated," therefore, to ensure that such regulation is in compliance with applicable law. Unfortunately, though, with half of the industry accustomed to going-along-to-get-along, such is not the case with manufactured housing. Indeed, there is no limit on the mandates that federal regulators (and their unaccountable contractors) will seek and demand, unless and until the industry pushes-back. This has been the case with production regulation and the role of MHARR, which was formed 30-plus years ago, with the specific mission of fighting against unfair, excessive and unreasonable regulation. Unfortunately, the post-production sector has no comparable organization or institutional force to resist HUD, leaving a vacuum that the Department and its contractors are now only too happy to fill.

Second, and given point one above, MHARR knows – and has tried to educate program stakeholders (and particularly the industry's post-production sector) – that it is the ultimate goal, desire and objective of the federal program and its revenue-driven contractors to federalize and control installation. Thus: (1) with revenue-driven program contractors constantly seeking to expand "make-work" opportunities and revenue sources; (2) with HUD Code manufacturers building their best homes ever, as far as the in-plant production process is concerned; and (3) with a pro-regulation, contractor-friendly program administrator in place at HUD, the "new frontier" for HUD regulatory expansion has shifted to the post-production arena, and specifically to opportunities within the realm of installation regulation.

Beyond these observations -- and for those who may still not grasp the full and profound significance of this effort to completely federalize installation regulation -- two additional points stand out. The first is that a de facto federal takeover of installation regulation, in violation of the 2000 reform law, will hurt all segments and sectors of the industry (as well as consumers and states

with approved installation programs), but retailers and especially communities will suffer the most direct impacts and the most costly harm. The second is that such abusive behavior can only be stopped if all program stakeholders – and particularly industry members -- mobilize and take action (for the ultimate benefit of consumers) to halt and reverse an utterly baseless assault on the states and the very foundations of the HUD program as a federal-state partnership.

While this issue of installation regulation can seem complex – and is widely misunderstood both within and outside of industry circles -- it actually is not (particularly for those who participated directly in the development and enactment of the 2000 reform law). The evolution of the installation regulation provision now contained in the 2000 reform law, as explained in the March 2016 edition of the MHARR Viewpoint – entitled "As Predicted by MHARR, HUD Delivers Worst of Both Worlds on Installation" (published in The Journal of Manufactured Housing), bears reiteration:

> "Once again, predictions made years ago by MHARR regarding HUD's failure to correctly interpret and implement the Manufactured Housing Improvement Act of 2000 – and the profoundly negative consequences of those failures -- are being proven true and accurate. *** The latest example of MHARR early-warnings going unheeded, but now being validated, concerns installation regulation and the HUD program's mangled, distorted approach to the installation mandates of the 2000 reform law, which will inevitably harm both the industry and consumers, saddling both with excessive and unnecessary regulatory compliance costs.
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> Coupled with dispute resolution, the installation provisions of the 2000 reform law were adopted to close significant gaps in the original National Manufactured Housing Construction and Safety Standards Act of 1974, as construed by HUD. Although the industry – and manufacturers in particular – have always supported sound consumer protection and the safe and proper installation of manufactured homes (which had been at the root of the overwhelming majority of consumer complaints prior to the 2000 law), HUD determined, early-on that it would not address the installation of manufactured homes under the 1974 law, because that law did not include specific authorization for such standards.
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> Recognizing, however, that proper installation is crucial: (1) to the proper performance of a manufactured home; (2) to the value of that home to its owner and consumer finance providers; and (3) to public and government acceptance of manufactured homes as legitimate "housing," rather than "trailers," the industry and consumers went back to work for nearly 12 years, together with other stakeholders, to develop the installation provisions that were ultimately included in the 2000 reform law.
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> The result was a statutory structure, based on the 1994 recommendations of the National Commission on Manufactured Housing, which authorized any state that wished to do so (i.e., a "complying" state), to establish (or continue) a state-law installation program and state-law installation standards, so long as those requirements provided protection that met or exceeded baseline federal standards to be developed by the Manufactured Housing Consensus Committee (MHCC) and adopted by HUD. HUD, by contrast, was authorized

to regulate installation in non-complying (i.e., "default") states that failed to adopt a state-law installation program within five years of enactment of the 2000 law.

This structure ... advanced by MHARR ... was consistent with the nearly-universal view of program stakeholders that varying soils and other installation-related conditions in different geographical areas made states the best and most appropriate party to regulate the siting of manufactured homes. The 2000 reform law, consequently, allows states to take the lead role in the regulation of installation, with HUD assuming that duty only in default states that fail to adopt and implement a conforming state-law program.

What the 2000 reform law specifically does not do, however -- again recognizing, as it does, the unique competence and ability of the states and state authorities to determine proper installation systems and techniques within their own borders – is authorize or direct HUD to substitute its judgment for that of state authorities regarding the specific details and elements of any given state installation standard. Put differently, the 2000 law allows HUD to determine whether a state-law installation program and state-law installation standards as an integrated "whole" provide consumers with a level of protection equal-to-or-greater-than the HUD standards, but does not provide back-door authority for HUD to micro-manage state-law programs and/or standards or over-ride state judgments regarding the need for -- or content of -- any specific installation requirement.

Refusing to accept this fundamental aspect of the 2000 reform law, however, HUD, from the start, sought to undermine the law's clear division of federal-state responsibility and its preference for state regulation of installation (including an express reservation of state installation authority added to the preemption section of the law), by separating installation from the Part 3280 Federal Manufactured Housing Construction and Safety Standards, thus giving rise to the "re-codification" of installation. While MHARR vigorously opposed this re-codification and the MHCC rejected it as well, HUD ultimately got its way through the tacit acceptance of [others within the industry].

As early as 2004, therefore, then-MHARR President and CEO Danny Ghorbani warned that HUD appeared intent on controlling installation and dictating installation criteria everywhere, including complying states with approved state-law programs. In an MHARR Viewpoint article entitled "Federal Installation Trap?" he wrote: "[F]rom both its approach to the substance of the model federal standard, and from the information that MHARR has been able to obtain, it appears that HUD has not abandoned its ambition to totally federalize installation regulation, under its control."

Now, more than a decade later ... this prediction is coming true, as HUD (both directly and via a non-accountable installation contractor) seeks to use the State Plan approval and re-certification process to over-ride and replace – or compel state officials to revise, modify and replace – state-adopted installation standards in complying states. This HUD activity ... has the potential [of] ... dire consequences for consumers and the industry, but also for the co-equal federal-state partnership that Congress envisioned for the HUD program.

(Emphasis added).

Indeed, MHARR's warnings regarding the potential federalization of installation regulation in all 50 states by a Department intent on resisting and circumventing the reforms of the 2000 law were detailed even further in a visionary December 2004 MHARR Viewpoint article (again, authored by Danny Ghorbani) entitled, "Federal Installation Trap – Initial Findings:"

"As has been noted on many prior occasions, the Manufactured Housing Improvement Act of 2000 was designed to give the individual states the 'first option' to regulate the installation of manufactured homes. Congress structured the Act this way based on the common sense notion that local soil, weather and siting conditions will inevitably vary, and that state governments are in a better position to evaluate and respond to such conditions as contrasted with federal authorities. More importantly, though, Congress also chose this structure – placing the federal authorities in charge of production and state authorities in charge of [post-production] issues – in order to promote and strengthen the federal-state partnership that was established by the original 1974 manufactured housing Act. *** As a result, the 2000 Act gave the states up to five years ... to adopt installation standards and programs under state law. If, and only if, a state did not adopt a program by that deadline, did Congress empower HUD to impose a default federal installation standard and federal installation program developed through the statutory consensus process.

While Congress wanted the states to be pre-eminent in the area of installation regulation, this has not stopped HUD from taking various steps that could be interpreted as moving toward a much broader federal involvement in installation or even, in a worse-case scenario, the substitution of federal regulation for state-based regulation. These steps, moreover, must be viewed in the context of HUD's historical approach to the manufactured housing program.... Given this history ... there is valid reason to be skeptical of the program's actions regarding these regulations.

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[One such] concern is the program's approach to the MHCC-developed model installation standard. Under the 2000 Act, the consensus federal standard is designed to be enforced in states that do not adopt state-law installation standards and enforcement programs. It is, by its nature, designed to be a minimum default standard and program for adoption in states that do not have a qualifying standard and program by the deadline established by the Act. This is why MHARR and others are concerned that the present proposed [HUD] rule is titled the "Model Manufactured Housing Installation Standard" rather than the "Model Manufactured Housing Installation Standard to be Enforced in Default States." While the difference in terminology might seem academic, it is essential that HUD be compelled to recognize the default nature of the federal rule. *** Otherwise, the [federal] program could attempt to impose the federal standard and program on all states. This, in turn, could result in the imposition of prescriptive federal criteria on installation, in a 'one-size-fits-all' approach that could also include ... Subpart I-type monitoring and enforcement for 'non-conformances.' It is thus essential that the industry work to ensure that state-preeminence and state discretion in [installation] regulation are preserved and maintained."

(Emphasis added).

This prophetic warning and its call for concerted and aggressive industry action is even more consequential now that HUD is actually taking concrete steps designed to achieve a de facto 50-state takeover of installation regulation. With the proverbial "chickens coming home to roost," and MHARR's long-ago concerns and predictions being validated, the question becomes, "what can the industry and other program stakeholders do to halt this effort and restore the federal-state power balance regarding installation that was intended by Congress under the 2000 reform law?"

The first step – as always -- will be to admit that there is a serious problem emerging regarding installation, and that HUD's attempted takeover of installation is not routine, "business as usual," where part of the industry can go along to get along, as is so often the case. Indeed, given MHARR's early and repeated warnings on this topic, the apparent lack of concern and engagement on this issue by industry members (particularly retailers and communities), some industry state associations and others – over the course of years – and even more so now, is startling. This absence of aggressive engagement also helps to explain, at least in part, a distressing lack of understanding and information – at the industry grassroots level – about just what HUD is up to, and how it could severely impact the industry's post-production sector.

It is thus incumbent upon – and should be a priority for – all industry members, including state associations, as well as consumers, state governments and other manufactured housing program stakeholders, to fight-back against HUD's installation power-grab (including engagement with members of Congress), to halt and reverse HUD's effort to usurp the proper and legitimate role of the states, and to ensure that the crucial role of installation regulation and enforcement is preserved for responsive and accountable state government agencies, rather than being transferred to unaccountable, revenue-driven contractors.

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