Manufactured Housing Institute

October 18, 2019

U.S. Department of Housing and Urban Development
Office of the General Counsel, Rules Docket Clerk
Room 10276
451 7th Street SW
Washington, DC 20410-0001

Re: Docket No. FR-6111-P-02
RIN 2529-AA98
HUD's Implementation of the Fair Housing Act's Disparate Impact Standard

Dear Secretary Carson,

The Manufactured Housing Institute (MHI) is pleased to provide comments in response to the U.S. Department of Housing and Urban Development's (HUD) proposed rule to amend the Department's interpretation of the Fair Housing Act's disparate impact standards.

MHI is the only national trade association that represents every segment of the factory-built housing industry. Our Members include home builders, suppliers, retail sellers, lenders, installers, community owners, community operators, and others who serve the industry, as well as 49 affiliated state organizations.

MHI appreciates HUD's interest in providing guidance and alignment with respect to the Supreme Court's 2015 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,*[1] which deals with disparate impact. However, MHI is concerned that, as drafted, the rule could undermine HUD's stated goal in its September 5, 2019 housing finance report of combatting regulatory barriers to affordable housing, including manufactured housing, and similarly could undermine the objectives of the Administration's *Council on Eliminating Regulatory Barriers to Affordable Housing* which was established in June.

Benefits of Manufactured Housing to Consumers and the Economy

Manufactured housing is the largest form of unsubsidized affordable housing in the U.S. and the only type of housing built to a federal construction and safety standard. It is also the only type of housing that Congress recognizes as playing a vital role in meeting America's housing needs as a significant source for affordable homeownership accessible to all Americans. Today, twenty-two million people live in manufactured housing and the industry employs tens of thousands of Americans nationwide.

In 2018, our industry produced nearly 100,000 homes, accounting for approximately 10 percent of new single-family home starts. These homes are produced by 34 U.S. corporations in 130 plants located

[1] *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. ___ (2015).

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across the country. MHI's members are responsible for close to 85 percent of the manufactured homes produced each year.

Manufactured housing is one solution that is helping to solve the shortage of affordable housing in this country and making the dream of homeownership an affordable and attainable reality for millions. The affordability of manufactured homes enables individuals to obtain housing that is often much less expensive than renting or purchasing a site-built home, with the average cost of a new manufactured home without land being $71,900. Indeed, the recently released Housing Finance Reform Plan report by HUD states that "manufactured housing plays a vital role in meeting the nation's affordable housing needs."

Administration Focus on Eliminating Regulatory Barriers and HUD's Preemption Powers

On June 25, 2019, the President issued an Executive Order entitled "Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing." As the Chair of the Council, Secretary Carson is leading the Council's effort, which is composed of members from eight Federal agencies, tasked to engage State, local, and tribal leaders across the nation to discuss and alleviate issues surrounding affordable housing.

Two of the stated goals of the Council are to "work across agencies, States, local governments, tribal governments, and private-sector stakeholders to identify policies that artificially increase the cost of developing affordable housing" and "take action within existing Federal programs to align and support local, and tribal state efforts to reduce regulatory and administrative burdens that discourage housing development." By making it more difficult to challenge regulatory barriers to affordable housing, the proposed rule would have the opposite result.

On September 5, 2019, the U.S. Department of the Treasury and HUD issued Housing Finance Reform Plans. Both plans recognize the critical need for more affordable housing and identify regulatory barriers as an impediment to affordable housing. Treasury's report states that the "GSEs should also continue to support affordable housing for low- and moderate-income, rural, and other similar borrowers."[2]

HUD's report included a focus on manufactured housing, with a separate section entitled "Eliminating Regulatory Barriers to Affordable Housing Including Manufactured Housing." That section stated that "policies that exclude or dis-incentivize the utilization of manufactured homes can exacerbate housing affordability challenges because manufactured housing potentially offers a more affordable alternative to traditional site-built housing without compromising building safety and quality."

For years MHI has been advocating that HUD's existing preemption authority allows broader authority over zoning and land use planning that negatively impacts the availability of affordable housing. This preemption argument goes together with what MHI believes to be HUD's authority regarding disparate impact.

[2] See U.S. Department of the Treasury Housing Reform Plan Pursuant to the Presidential Memorandum Issued March 27, 2019, September 2019, at 3.

The Impact of Restrictive Local Zoning and Land Planning Ordinances on Manufactured Housing

Zoning and land planning ordinances have a profound impact on housing patterns. In particular, restrictive local ordinances – which can include significant limitations or prohibitions against manufactured housing – can act as barriers to affordable housing.

As Secretary Carson noted on the day the President signed the Executive Order Establishing the White House Council on Eliminating Regulatory Barriers to Affordable Housing, "we can increase the supply of affordable homes by changing the cost side of the equation."

Moreover, zoning ordinances that are exclusionary or restrictive with respect to manufactured housing can clearly violate the Fair Housing Act, as HUD and the Department of Justice (DOJ) have publicly recognized. According to a November 10, 2016, Joint Statement of HUD and DOJ, titled State and Local Land Use Laws and Practices and the Application of the Fair Housing Act:

> Examples of land use practices that violate the Fair Housing Act under a discriminatory effects standard include minimum floor space or lot size requirements that increase the size and cost of housing if such an increase has the effect of excluding persons from a locality or neighborhood because of their membership in a protected class, without a legally sufficient justification.

MHI urges HUD to work with these agencies to amend the statement to include other types of discriminatory actions that restrict manufactured housing.

There are numerous examples of zoning ordinances that restrict the use of and discriminate against manufactured housing. In April of this year, Bryan, Texas, voted to eliminate the city's MU-1 mixed use residential zone, which is the only zone allowing manufactured homes on individual lots. Census data indicates that this zone has many persons that would qualify as protected under the Fair Housing Act. According to news reports, this change will affect roughly 2,600 parcels of land, 1,167 landowners, and will strip more than 750 manufactured homes of their market value. Appendix A of this letter offers additional examples of similar situations, with a representative range of types of exclusionary local zoning actions across a variety of jurisdictions. These examples reflect a growing trend whereby local jurisdictions adopt land planning ordinances and utilize code enforcement that excludes manufactured housing without considering whether such action intentionally discriminates, or results in disparate treatment, against a protected class of persons.

Proposed Rule Changes Test Under HUD's 2013 Disparate Impact Final Rule

HUD's 2013 Disparate Impact Final Rule established uniform standards for determining when a housing practice with a discriminatory effect violates the federal Fair Housing Act, setting out a three-step burden-shifting process between plaintiffs and defendants.

The proposed rule would eliminate this burden-shifting approach and replace it with a five-part test, which would require plaintiffs to:

(1) plead that a challenged practice is arbitrary, artificial and unnecessary to achieve a valid interest or legitimate objective;
(2) allege a "robust causal link" between the challenged policy or practice and the disparate impact;

(3) explain how the challenged policy or practice has a harmful effect on a protected class as a group – not just an individual;
(4) allege that a disparity caused by the policy or practice is significant; and
(5) allege that an injury is directly caused by the challenged policy or practice.

Only after meeting this five-part test could the legal process proceed. If met, defendants would need to offer a legitimate justification for the challenged policy or program. However, plaintiffs would be required to defend the five-part test at the Motion to Dismiss stage, which is early in the process and prior to full discovery, which is critical to fact finding and important to establishing or defending the plaintiff's case. In summary, the establishment of the five-part test and the requirement to defend the five-part test in a Motion to Dismiss shifts the burden substantially to the plaintiffs in pleading their case.

HUD's proposed rule states that it is being issued to update its existing regulation to conform with the decision by the U.S. Supreme Court in *Inclusive Communities Project*.[3] In that case, the Supreme Court upheld disparate impact as cognizable under the federal Fair Housing Act, ruling that that in a disparate impact claim, a plaintiff may establish liability, without proof of intentional discrimination, if an identified business practice has a disproportionate effect on certain groups of individuals and if the practice is not grounded in sound business considerations. Writing for the majority, Justice Kennedy stated that, "…antidiscrimination laws must be construed to encompass disparate impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." Justice Kennedy went on to note that:

> Recognition of disparate impact claims is consistent with the Fair Housing Act's central purpose. The Fair Housing Act, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy…**These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate impact liability.** (Emphasis added)

Impact of Proposed Rule on Local Zoning and Land Use Planning Decisions Regarding Manufactured Housing

While zoning and land use planning decisions historically have been the purview of local governments, disparate impact has been one of the primary legal tools available to challenge restrictive ordinances that have the effect of impermissibly discriminating against individuals of a protected class. More specifically, disparate impact has been used to challenge local zoning and land use planning policies that exclude manufactured housing or create unreasonable barriers designed to prevent such use.

The lengths to which communities go to exclude manufactured housing go beyond just the zoning code and, more often than not, have a discriminatory disparate impact on persons protected under the Fair Housing Act. It is without question they have a negative impact on the availability of affordable housing.

The various ways in which cities and counties have used zoning and land use planning to restrict the placement of manufactured homes are set forth in Exhibit A. MHI and its member state associations

[3] See "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard," Federal Register, August 19, 2019, Vol. 84, No. 160, p. 42857.

have investigated all of these cases and believe that many of the methods being employed are having a discriminatory disparate impact on persons protected under the Fair Housing Act. At the very least, the potential impact under the Fair Housing Act is not being considered as a factor in the decision-making process. In several of the instances listed, Federal lawsuits have been filed alleging discrimination based upon both intentional discrimination and disparate impact theories.

Each of the instances listed whereby localities have discriminated against manufactured housing and those persons who reside in them have had a negative adverse impact on the availability of affordable housing. To that end, it is important to consider that the current disparate impact rule serves a vital role in educating communities, including public officials, about the unintended consequences of local zoning and land use planning decisions, some of which limit or prohibit the availability of affordable housing. Any proposed changes that would limit the type or number of disparate impact cases that may be brought denies the public and policymakers of the important educational aspects of this current rule.

As we understand it, the Supreme Court, in its *Inclusive Communities Project*[4] decision, did not intend to make it more difficult to bring such claims. However, as noted, the proposed rule would significantly increase the legal burden on plaintiffs by requiring them to meet a five-part test in order to establish a prima facie case of unlawful discrimination. In our opinion, this change would establish a legal standard that is so strict as to effectively nullify disparate impact as a legal tool to both challenge discriminatory local zoning and land use planning actions that constitute housing discrimination and create barriers to affordable housing.

Accordingly, MHI urges the Department to revise or eliminate the new application of standards for establishing disparate impact with respect to discriminatory local zoning and land use planning decisions, in order to preserve the ability of plaintiffs to pursue legitimate disparate impact cases against discriminatory actions that impede affordable housing, including manufactured housing.

Concerns about a "Single Event" Standard

Of particular concern is language in the proposed rule that appears to constrain the use of disparate impact in the case of a "single event." While we appreciate the general intent of this approach, we believe it is unduly restrictive in the context of discriminatory local zoning actions. Specifically, the rule includes the following statement:

> Plaintiffs must identify the particular policy or practice that causes the disparate impact. Plaintiffs will likely not meet the standard, and HUD will not bring a disparate impact claim, alleging that a single event—such as a local government's zoning decision or a developer's decision to construct a new building in one location instead of another—is the cause of a disparate impact, unless the plaintiff can show that the single decision is the equivalent of a policy or practice. In unusual cases, a plaintiff may still be able to succeed at identifying a one-time decision, if the plaintiff can establish that the one-time decision is in fact a policy or practice.

We understand how the rule might wish to provide constraints on use of a single action to demonstrate disparate impact in circumstances in which a private entity is serving a large number of customers. However, a single zoning decision can have wide applicability or impact.

[4] See "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard," Federal Register, August 19, 2019, Vol. 84, No. 160, p. 42857.

Contrary to the proposed rule, a single change to a zoning standard or single application of a zoning standard, does in fact set a community's policy or practice with respect to zoning policy as well as its policy towards affordable housing. It does not take multiple changes to a community's zoning code to affect a community's policy or practice. A single change can, and often does, result in a change to a community's policy or practice. That single changes establishes a new pattern. Thus, the statement that HUD will not bring a disparate impact claim based on a single event is deeply troubling.

The language above from the proposed rule appears to create a burden of meeting some much more stringent bar than the standard set forth in *Inclusive Communities Project* – i.e., a "policy" or "practice." We are particularly concerned that in the context of local zoning decisions, this could create an unreasonably high burden, and therefore sanction discriminatory zoning actions.

MHI would suggest that this standard be amended, in the distinct area of zoning actions, to clarify that this burden is met in the case of a single zoning action when the action has broad applicability or impact. The number of actions is not the point – the impact is.

Conclusion

Manufactured homes remain the most affordable homeownership option available in the U.S. today. MHI reiterates its appreciation for the efforts of this Administration, including the Department of Housing and Urban Development, to prioritize the importance of manufactured housing as a critical affordable housing option and to work to reduce barriers to its use. MHI also appreciates the sincere desire of HUD to bring more legal clarity to the standards used in alleging and defending disparate impact cases. In this spirit, we ask that HUD consider changes to the proposed rule to ensure that legitimate challenges to discriminatory local zoning can be brought using the standard of disparate impact. We appreciate consideration of these comments.

Sincerely,

Lesli Gooch, Ph.D.
Executive Vice President for Government Affairs & Chief Lobbyist

APPENDIX A – Examples of Zoning Adverse to Manufactured Housing

Outright Bans

Bryan, TX – In April 2019, the City of Bryan, TX, voted to eliminate the city's MU-1 mixed-use residential district zone, which is the only zoning district in the city that allows manufactured homes on individual lots. According to news reports, the zoning change would affect roughly 2,600 parcels of land and 1,167 landowners, rendering 750 manufactured homes as nonconforming uses (and essentially stripping them of all value). Additional bans have occurred in Haughton, LA, Stillwater, NY and Huntsville, TX.

Zoning Barriers

Coxsackie, NY – In 2005, UMH Properties ("UMH") purchased 180 acres of land (and then an additional 70 acres), the majority of which is located in the Village of Coxsackie, NY ("Village"). At the time, the Village zoning laws allowed for the development of the 330 manufactured home community UMH proposed on the property. Despite the zoning law at the time of purchase, for the next fourteen years the Village set up various land planning roadblocks under the auspices of its zoning code to reject UMH's project. In October 2018, UMH brought a disparate impact case against the Village for its rejection of affordable housing.

Segregated Zoning

Panama City, FL – Panama City, FL, recently banned manufactured homes as a "Permitted Use" in all residential zones, segregating manufactured homes into one special overlay zone.

St Tammany Parish, LA, and Aransas Pass, TX – Both cities placed zoning for land-lease communities in locations far away from essential services and as buffers to commercial zones.

City of Sandersville, GA – The city of Sandersville, GA, recently banned manufactured homes as a "Permitted Use" in several residential zones, segregating them into one special overlay zone in one area of the city.

Lot Size

Harrison County, KY – In 2018, this rural Kentucky county passed legislation requiring ten acres of land for placement of a manufactured home on private property.

Chandler, GA – Chandler, GA, requires five acres for placement of a manufactured home on private property.

Shelby County, IL – Shelby County, IL, requires a minimum of one acre for the placement of a manufactured home on private property.

Carroll County, GA – Carroll County, GA, requires a minimum of five acres for the placement of a manufactured home on private property.

Value

McCrory, AR – In 2017, the city of McCrory, AR, settled a lawsuit banning the placement of a manufactured home in its limits because the home was valued under an arbitrary and capricious amount ($7,500) as dictated by city ordinance. Newark, AR, has a similar ordinance and is also facing litigation.

Age

Many local jurisdictions prohibit placement or movement of a home based upon its age:

- **Jasper County, SC** – twenty years
- **Mohave County, AZ** – seven years

Conditional Use

Pearl, MS, and Lodi, OH – Many cities, including Pearl, MS, and Lodi, OH, have taken administrative action (without a hearing or a vote) to treat the removal of a single home from a manufactured home community as a change in use, thus disqualifying the particular foundation for a replacement home.

Clayton County, GA – In parks and communities in Clayton County, GA, if a pad is empty and has not been utilized in six months, it is not permitted to place another home on the pad, either new or used.

Density/Setback

Harker Heights, TX – In Harker Heights, TX, building Code requires a twelve-foot-five-inch setback between homes, which was changed to 35 feet for manufactured homes.

Disparate Treatment

Georgetown, SC – Ignoring its own Comprehensive Plan, the city of Georgetown, SC, council rejected a petition from residents of the minority populated West End to allow residents to replace older existing manufactured homes with newer used models.

Flood Zone Manufactured Home (MH) Exemption

Florida and Mississippi – In an effort to achieve higher Community Rating System (CRS) numbers, thus lowering the premium for flood insurance, cities and counties on the Gulf Coast began removing the FEMA/MH height exemption. Under the former rule, manufactured homes located in Flood Zone A (100-year floodplain) must be elevated 36 feet on reinforced concrete piers. The change being made would require new manufactured homes to be elevated at the bottom of the frame to the Base Flood Elevation (BFE). In some cases, the new elevation could be six to eight feet higher.

Other

Green County, WI – In Green County, WI, the County Administrator determined that a HUD Code home must have a basement in order to be considered a dwelling under local law.

O'Fallon, IL – O'Fallon, IL, refused to recognize manufactured homes as dwellings.

Alvin, TX – Cities like Alvin, TX, have required incredibly expensive renovations for manufactured home communities, including concrete road construction, streetlights, and other pretextual requirements that are intentionally cost-prohibitive, forcing many communities to close. These requirements are targeted specifically at manufactured home communities and never similarly imposed on the cities' historical downtowns, site-built neighborhoods, or even aging site-built homes.